SEPARATE OPINION OF JUDGE MORELLI

[Translation]

1. I wish to give the reasons why, in my view, the Court's 1962 Judgment on the preliminary objections was no bar to the rejection of the claim on the merits on the ground of its not being based on substantive rights pertaining to the Applicants.

It is my view that a judgment on preliminary objections, particularly a judgment which, like the judgment in question, dismisses the preliminary objections submitted by a party, is final and binding in the further proceedings. Its binding effect is however confined to the questions decided, and these can relate only to the admissibility of the claim or the jurisdiction of the Court.

On the other hand, the Court's reasoning in deciding a question submitted to it in the form of a preliminary objection is devoid of any binding effect. This limitation on the binding effect of the judgment applies to all the reasons for the decision, whatever their nature, whether of fact or of law, procedural or touching on the merits. Those touching on the merits of the case must be denied any binding effect for an additional reason; since, under Article 62, paragraph 3, of the Rules of Court, the filing of a preliminary objection suspends the proceedings on the merits, it is not possible for a question concerning the merits to be decided with final effect in a judgment on preliminary objections.

2. The 1962 Judgment requires interpretation to elucidate the exact scope of the decision on the question submitted to the Court in the third preliminary objection. In particular it is necessary to ascertain whether it was the Court's intention in dismissing that objection to hold the right to institute proceedings under Article 7 of the Mandate to be independent of any substantive right, in the sense that an applicant might avail himself of it without being required to assert the existence of a substantive right of his own. On this construction it would be sufficient for the applicant to rely on an obligation of the mandatory irrespective of whether the obligation were owed to the applicant or to some other person or persons. Thus the action would be a sort of *actio popularis*, and the jurisdiction exercised by the Court would be of the nature of a jurisdiction simply to declare the law objectively.

The decision by which the 1962 Judgment held, according to this interpretation, that the Members of the League of Nations had the right to seise the Court in respect of the Mandatory's obligations relating

to the inhabitants of the Territory, irrespective of whether the applicant possessed any substantive right, would be a decision concerning the characterization of the action, conceived of as legitimately brought by the Applicants in the present case. By such a decision the Court would have settled a purely procedural question relating, on the one hand, to the Applicants' right to institute proceedings and, on the other hand, to the Court's jurisdiction. The decision would not have touched on the merits of the case at all. The Court would have said nothing about the existence of any substantive rights pertaining to the Applicants. The Court would simply have found that the existence of such rights was irrelevant not only to its jurisdiction, but also to the duty with which it had been entrusted. According to this interpretation that duty was to establish the existence, not of rights vested in the Applicants, but rather of obligations incumbent on the Mandatory, regardless of whether they were owed to the Applicants or to some other person or persons.

Having regard to the purely procedural character of the question which, according to this interpretation, would have been decided by the 1962 Judgment, the way in which this question was disposed of would be final and binding. In the first place, therefore, it would not in the merits phase of the proceedings have been possible to dispute the Court's jurisdiction on the ground that the provisions of the Mandate relating to the inhabitants of the Territory did not confer any individual rights on the Applicants. In the second place, the Court would have been bound by the 1962 Judgment's characterization of the Applicants' action. In other words, in order to decide the merits, the Court would have had to establish the existence or non-existence, not of rights pertaining to the Applicants, but rather of obligations owed by the Mandatory, whether to the Applicants or to some other person or persons. The question of the present existence for any particular person or persons of rights under the Mandate would have been open to examination only in so far as the answer to this question might have an indirect influence on the question of the existence of obligations owed under the Mandate and thus of the subsistence of the Mandate itself.

3. The 1962 Judgment, particularly as regards the third preliminary objection, is far from easy to interpret. Any possibility of construing the decision on that preliminary objection on the lines of the above hypothesis must however be excluded. To read the decision in that way would be, not to interpret it with a view to ascertaining the Court's real intention, but rather to modify and systematize it with a view to fitting it into a particular logical construction.

There is in fact nothing in the Judgment to show that it was the Court's intention to admit the concept of *actio popularis* as a general proposition or to apply it to this case. There is nothing in the Judgment to the effect that to establish whether the claim is well-founded it is not necessary to ascertain whether it is based on rights pertaining to the Applicants.

On the contrary, the 1962 Judgment confines itself to declaring that the dispute brought before the Court is a dispute within the meaning of

Article 7 of the Mandate, without purporting to characterize the Applicants' action in any particular way.

Far from excluding the necessity of a right pertaining to the Applicants for the claim to be able to be regarded as well-founded, the 1962 Judgment explicitly refers to the legal right or interest of the Members of the League of Nations in the observance by the Mandatory of its obligations. With reference to Article 7 of the Mandate, the Court said:

> "The manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members." (*I.C.J. Reports 1962*, p. 343.)

This passage seems to indicate some confusion between, on the one hand, the right to institute proceedings, the only right of Members of the League of Nations under Article 7, paragraph 2, of the Mandate, the provision to which the Court is referring, and, on the other hand, substantive rights, which appear to be correctly designated by the reference to a legal right or interest in the observance of its obligation by the person owing the obligation.

However, whatever the criticism to which the Judgment may be open in connection with this confusion, it is quite clear that any possibility of taking the decision on the third objection to mean that it is not necessary to establish a substantive right pertaining to the Applicants is totally excluded by this very confusion. Once it is established that the Judgment did not draw any distinction between the right to institute proceedings and substantive rights, it becomes impossible to extract a diametrically opposite meaning from the Judgment, namely not only that the right to institute proceedings is quite separate from substantive rights, but also that it is so completely independent of any substantive right that the Court could uphold the claim as well-founded even if it were not based on a substantive right vested in the Applicants.

4. There are other reasons which also rule out any possibility of interpreting the 1962 Judgment in this way.

Article 7 of the Mandate deals with the case of a dispute arising between the Mandatory and another Member of the League of Nations, and the need for the existence of a dispute to enable the Court to be seised is recognized in the Judgment. It is precisely in order to establish that this condition, laid down as a *sine qua non* by Article 7 of the Mandate, is fulfilled in this case that the Judgment begins by seeking to demonstrate the existence of a dispute between the Parties (*I.C.J. Reports 1962*, p. 328); then, in connection with the third preliminary objection, the Judgment finds that the dispute in question is a dispute within the meaning of Article 7 of the Mandate.

However, if Article 7 of the Mandate had conferred on Members of the League of Nations the right to institute proceedings for the protection of substantive rights not pertaining to them, there could be no reason for Article 7 making the institution of such proceedings dependent on the existence of a dispute to which the State desiring to seise the Court must be a party. The requirement, clearly upheld by the 1962 Judgment, that there should be a dispute between the applicant and the Mandatory precludes the possibility of a right to institute proceedings under Article 7 of the Mandate being characterized as an *actio popularis*, or of its having been so characterized by the 1962 Judgment. The need for there to be a dispute between the applicant and the Mandatory requires by implication that there should be a conflict of interest between the parties, whatever the nature of those interests. Having regard, on the other hand, to the legal character which must be possessed by the dispute, as appears from the reference in Article 7 to the legal rules contained in the provisions of the Mandate, it follows that the applicant must be able to rely on a right given to him as a means of protecting his interest.

5. For it to be possible to seise the Court, Article 7 of the Mandate requires not only that there should be a dispute between the applicant and the Mandatory, but also that such a dispute should be one that cannot be settled by negotiation. This requirement also was recognized in the 1962 Judgment, the final section of which, concerning the fourth preliminary objection, is devoted to showing that this requirement is satisfied in this case.

By its reference to a dispute which "cannot be settled by negotiation" Article 7 clearly envisages a dispute which is inherently capable of being settled by negotiation between the parties, but one which negotiation has in fact failed to settle. This interpretation of Article 7 is clearly upheld by the Judgment. After finding that negotiations had really taken place, the Judgment draws the conclusion "that no reasonable probability exists that further negotiations would lead to a settlement" (*I.C.J. Reports 1962*, p. 345).

Now it would not be possible to find the dispute to be one inherently capable of being settled by negotiation between the Parties if it had first been accepted that the Applicants could seise the Court by means of a claim based on rights vested not in them but in other persons. It is quite obvious that the Applicants would have been in no sort of control of such rights, and this would have been a complete bar to the possibility of the dispute being settled by negotiation between the Applicants and the Mandatory. Thus, by finding the dispute to be one inherently capable of being settled by negotiation between the Parties, the 1962 Judgment necessarily held that the Applicants had a right of action only if they could rely on a substantive right of their own.

6. It must be added that it was not possible for the 1962 Judgment

to depart from the terms of the claim, and there is no indication that there was any such intention.

In paragraph 9 of the Applications the Applicants state that, in the dispute which they maintain to exist between them and South Africa, they have continuously sought to assert and protect their "legal interest in the proper exercise of the Mandate" by disputing and protesting the violation by South Africa of its duties as Mandatory. The Applicants add that during the negotiations which they assert to have taken place, they exhibited at all times their "legal interest in the proper exercise of the Mandate". They conclude by declaring that they instituted the proceedings for the very purpose of protecting their legal interest in the proper exercise of the Mandate.

It is thus the legal interest, or right, of the Applicants in the proper exercise of the Mandate which constitutes the *causa petendi* of the claim. It was thus on the claim as characterized by such a *causa petendi* that the Court had to give its decision. Nothing to the contrary is to be found in the 1962 Judgment.

7. An analysis of that part of the 1962 Judgment which relates to the third preliminary objection leads to the conclusion that the decision represented by the dismissal of that preliminary objection amounts solely to a finding that the dispute submitted to the Court, held by the Judgment to exist, was a dispute within the meaning of Article 7 of the Mandate. This decision does not in any way concern the characterization of the action provided for by that Article and utilized by the Applicants. In particular this decision does not give such action the quite unusual characterization according to which it could be utilized without the need for the applicant to rely on a substantive right of his own.

It follows that in the merits phase of the proceedings the Court was completely unfettered with regard to the question of whether it was necessary for the Applicants to have a substantive right in order that the claim might be upheld.

Such a question could only have been decided in the affirmative. In the first place, such a decision would have been in accordance with the normal characterization of an international action. Secondly, it would have been required, for the reasons set out above, by the actual terms of Article 7 of the Mandate, which stipulates that, for it to be possible to seise the Court, there must be a dispute between the applicant and the Mandatory which is inherently capable of being settled by negotiation between the parties. Thirdly, it was not open to the Court to depart from the wording of the Applications, by which it had been seised of a claim based on an alleged right of the Applicants in the proper exercise of the Mandate.

In connection with this last point it must be observed that the Court's jurisdiction in the present case is founded on Article 7 of the Mandate, which refers to any dispute "relating to the interpretation or the appli-

cation of the provisions of the Mandate". Now, in respect of a jurisdictional clause in a treaty which refers, like Article 7 of the Mandate, to disputes relating to the interpretation or the application of the provisions of the treaty, it is not sufficient, for a dispute to be held to be one as envisaged in that clause, for a party to rely in any way whatever on any provision whatever of the treaty; on the contrary, a party must assert an individual right under the provisions of the treaty (see the considerations developed in this connection in my separate opinion in *Northern Cameroons, I.C.J. Reports 1963*, pp. 145-146).

It follows that if, contrary to the actual terms of the Applications, it were found that in this case the claim had been submitted without reference to any right of the Applicants, the Court ought, rather than rejecting the claim on the merits, to have found that it lacked jurisdiction. This would have been possible even in the merits phase of the proceedings, since it is a question which, although relating to the jurisdiction of the Court, was not examined in the Judgment on the preliminary objections.

8. Since the claim could be upheld only if a substantive right pertaining to the Applicants were found to exist, it was necessary to consider whether the provisions of the Mandate relating to the inhabitants of the territory confer rights on Members of the League in their individual capacities.

This is a question which belongs entirely to the merits and one therefor which could not in any way be prejudged by the 1962 Judgment. Hence no express or implied finding purporting to decide such an issue which it might be sought to discern in that Judgment would have been in any way binding on the Court in its Judgment on the merits.

In my view this question could only be decided in the negative, and this, in its Judgment on the merits, the Court has done on the basis of very detailed, even superabundant reasoning which, as a whole, carries complete conviction.

In fact the provisions of the Mandate concerning the administration of the territory and the treatment of its inhabitants envisage interests which do not belong to the various States Members of the League of Nations in their individual capacities but are rather collective interests, that is to say interests belonging to all the States Members jointly.

These collective interests are not protected by the provisions in question by means of rights conferred on the different States concerned, so that each of those States could individually require the prescribed conduct; this would give rise to the possibility of conflicting demands on the part of two or more States all relying on the same provision of the Mandate. Such an eventuality must be ruled out by the very fact that the right is conferred not on the States Members in their individual capacities, but either on the League of Nations as a single person distinct

from its component States, or if the League of Nations is not accepted as having legal personality, then on the States Members as a group and not in their individual capacities. Under the second of these two concepts it would be a right the exercise of which is organized in a certain way, so that it may be exercised by its holders only collectively, that is to say through corporate organs.

It follows that no State Member derives any right in its individual capacity from the provisions of the Mandate concerning the administration of the territory. Consequently it is not open to any State Member, on the basis of those provisions, to make demands on the Mandatory which might possibly be in conflict with the view taken by the League organs.

9. Once it was established that the claim could not be based on rights pertaining to the Applicants, the Court was bound to reject it. The rejection is grounded on the Applicants' lack of standing.

Standing in this case means the possession by one person rather than another of the substantive right relied on in the proceedings. It is thus substantive and not procedural standing. Lack of such standing must necessarily entail rejection of the claim on the merits and not a finding of inadmissibility. For a finding that the Applicants are not the holders of rights corresponding to any obligations owed by the Mandatory under the provisions of the Mandate relating to the administration of the territory amounts to a declaration that the claim is for that reason not well-founded.

Lack of standing on the part of the Applicants is only one of the reasons on which the rejection of the claim could have been grounded. Having rejected the claim on the ground of lack of standing the Court had no need to go into other possible grounds.

One of the grounds on which the claim could also have been rejected is the non-existence of obligations owed by the Mandatory, possibly because of the lapse of the Mandate. Such a ground might even be considered as more radical in nature than the non-existence of rights pertaining to the Applicants; in other words, it might be considered that the question of the existence of obligations owed by the Mandatory is a preliminary question with respect to the question of whether such obligations, if found to exist, are owed to the Applicants or to some other person or persons. For it might be considered that it is only in respect of an actual existing obligation that it is possible to enquire into the identity of the holder of the rights corresponding to the obligation.

It must however be observed that as between the various questions all of which concern the merits, there is no strict order of logic; the order to be followed in any particular case in dealing with the various questions of merits is dictated rather by reasons of what might be called economy, which counsel the use of the simplest means of reaching

the decision. It was thus perfectly open to the Court, in this case, to begin by examining the question of standing in relation to any rights which might exist on the assumption that South Africa still owes certain obligations under the Mandate.

In adopting this order and finding that the Applicants have no standing, the Court has followed an as it were hypothetical line of reasoning. However, the decision to which it has led the Court, namely the rejection of the claim on the merits, is an absolute and not a hypothetical decision. The Court has found the claim to be not well-founded, even if it were possible to hold that obligations are owed by South Africa under the Mandate, because, in that event, the rights corresponding to any such obligations would not belong to the Applicants.

(Signed) Gaetano MORELLI.