DISSENTING OPINION OF PRESIDENT WINIARSKI

[Translation]

The subject of the third objection can be analysed in two ways. It is possible to deny the existence of a dispute as such between the Applicants and the Respondent and to find that the claim is inadmissible on the basis of the Statute of the Court. It is also possible, supposing Article 7 of the Mandate instrument to be still in force as did the Court's Opinion of 11 July 1950, to show that that Article is not applicable to the case brought before the Court by the Applicants and that the Court therefore has no jurisdiction to hear the present case.

It has been observed that the question of admissibility is one which comes after that of jurisdiction; the consideration of a question of admissibility assumes a finding of jurisdiction. Certainly, there are cases where the observation would be justified; but there are others in which it is not necessary that there should have been a finding of competence before an Application can be held to be inadmissible. The Permanent Court of International Justice adopted a pragmatic position in this connection. In one case it said that the distinction between lack of jurisdiction and inadmissibility, while clear in municipal legal systems, has not the same significance in international law. In another case it expressed the same opinion: "Whether this submission should be classified as an 'objection' or as a *fin de non-recevoir*, it is certain that nothing, either in the Statute or Rules which govern the Court's activities, or in the general principles of law, prevents the Court from dealing with it at once, and before entering upon the merits of the case; for there can be no proceedings on the merits unless this submission is overruled." (*Polish Upper Silesia*, P.C.I.J., Series A, No. 6, p. 19.)

The second aspect involves both substantive and procedural law: it is a question of whether the Court has jurisdiction to hear a case in which the Applicants have no individual legal interest which is in issue for them, as appears from the facts placed on record by the Applicants themselves

For the purpose of the argument it will be assumed that after examination the meaning of Article 7 remains doubtful; in fact it is not, as will shortly be shown. The first question that arises in this hypothetical case is what was the practice of the League of Nations in this respect and what may be learned from it concerning the interpretation and application of the provision. In the League of Nations period fourteen Mandates were in force over twenty-five years. During that whole period only one case concerning Mandates came before the Permanent Court of International Justice, the

Mavrommatis case, and this fact alone is significant. It was the subject of three Judgments (Series A, Nos. 2, 5 and 11).

The Court directed its attention, *inter alia*, to the following main point: "violation of international obligations accepted by the Mandatory and damage to M. Mavrommatis' interests resulting therefrom" (Series A, No. 5, p. 28, II). There were several concessions involved; in one of the cases the Court asked "whether this fact alone constituted a violation of the international obligations contemplated in Article 11 of the Mandate" (*ibid.*, p. 38). It was able to find (Series A, No. 11, p. 18), in virtue of the jurisdiction "which it derives under Article 26 of the Mandate" (the corresponding article to Article 7 in the present case), that there had been a breach of Article 11 of the Mandate to the detriment of the Greek national. In another case (Series A, No. 5, p. 51) the Court gave judgment "that no loss to M. Mavrommatis, resulting from this circumstance, has been proved" and dismissed the Applicant's claim on this point. This was a classic case.

The authors of a number of dissenting opinions took the view that the dispute was not one between States, but was in fact a dispute between Great Britain and M. Mavrommatis.

The Court was at the outset of its activities and thought it necessary to reply to these arguments by stating, with finality, the unquestionable principle that (Series A, No. 2, p. 12): "Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant... By taking up the case of one of its subjects ... a State is, in reality, asserting its own rights."

But in addition to this difference of view there was another which was much more important. In his dissenting opinion Judge Bustamante wrote (Series A, No. 2, p. 81): "As the latter [the League of Nations] could not appear as a party to a dispute concerning the application or interpretation of the Mandate, having regard to the restrictive terms of Article 34 of the Court's Statute, it is the Members of the League who have been authorized, in their capacity as Members, to bring before the Court questions regarding the interpretation or application of the Mandate." And later (*ibid.*, pp. 81-82): "When [the Mandatory] takes action ... in respect of individuals and private companies ... there is no question of juridical relations between the Mandatory and the Members of the League from which she holds the Mandate, but of legal relations between third parties who have nothing to do with the Mandate itself."

The opinion of Judge Oda appears to be on similar lines (*ibid.*, p. 86): "provision is made for indirect supervision by the Court; but the latter may only be exercised at the request of a Member of the League of Nations ... an application by such a Member must be

made exclusively with a view to the protection of general interests".

Neither Lord Finlay nor J. B. Moore, both in the minority for other reasons, were able to concur in these views. Lord Finlay, on the contrary, points out (*ibid.*, p. 42) that in the Palestine Mandate (which was more detailed than the Mandate for South West Africa), there were a whole series of provisions which could be violated by the Mandatory to the prejudice of another Member of the League of Nations (Articles 5-21): the operation of the judicial system, freedom of communication and transit, equality of treatment, even questions of antiquities and excavations, the possibility of discrimination against a country without reasonable grounds, etc. "Under all these heads", he wrote (p. 43), "there are endless possibilities of dispute between the Mandatory and other Members of the League of Nations, and it was highly necessary that a Tribunal should be provided for the settlement of such disputes." In the same way Judge Moore wrote (p. 61): "There must be a difference ... in the sense ... that the government which professes to have been aggrieved should have stated its claims", etc. The view taken by Judges Bustamante and Oda remained isolated. In 1950 two judges, Judge Sir Arnold McNair and Judge Read, expressed similar views, but here again the Court was unable to subscribe to them.

The Council, the League supervisory organ, had constantly to deal with important legal problems; in no case did it request an advisory opinion of the Court, in spite of suggestions by the Permanent Mandates Commission; never, if I am not mistaken, did it envisage the possibility of a Member of the League of Nations bringing before the Court a question relating to the general supervision of the administration of the Mandate, which was within the exclusive competence of the Council and, to a certain extent, of the Assembly. The two Hymans reports to the Council (of 5 August and 26 October 1920) and the Council's report to the Assembly of the League of Nations of 6 December 1920 on "Responsibilities of the League arising out of Article 22 (Mandates)" are unaware of any such problem.

The Applicants rely on the views of certain jurists in favour of a general supervision to which any Member of the League could subject any Mandatory by bringing it before the Permanent Court of International Justice.

And yet Mr. van Rees, one of the most active members, and Vice-Chairman of the Permanent Mandates Commission, says nothing in his book *Les Mandats internationaux*, Vol. I, *Le contrôle international de l'administration mandataire* (Paris, 1927) about this judicial supervision by the Permanent Court of International Justice claimed to be able to be brought into operation by any Member of the League. Even more significant, the official publication *The Mandates System—Origin—Principles—Application* which the League put out in 1945 with a preface by the Acting Secretary-General, Mr.

Sean Lester, is also silent on the subject of this alleged role of the Court, although it contains a passing reference to the jurisdictional clause; yet such a role, if provided for, could not have escaped the attention of the authors. If in League quarters such as the Council, Secretariat and Permanent Mandates Commission judicial supervision was contemplated even only as a possibility provided for in extreme cases by the international agreements, the fact that we find no mention of it in these two books is inexplicable. If in the time of the League, when the framers of the Covenant and the Mandates, and their associates, were still alive, judicial supervision such as the Applicants put forward found no authoritative proponent, it may be taken as evidence that matters were not seen in this light.

The characteristic feature of this alleged supervision was that it could be brought into operation by any Member of the League which considered that there existed between it and the mandatory administration "a disagreement on a point of law or fact, a conflict of legal views" on the way in which the Mandatory was exercising its Mandate. Reference has been made in this connection to an institution under the old Roman penal law known as "*actio popularis*" which, however, seems alien to the modern legal systems of 1919-1920 and to international law. Is it possible that such can have been the common intent of the framers of the Mandate instruments? There is no evidence for it, it has been asserted without any attempt to show that it was so; on the contrary, it would seem that the circumstances in which the Mandate was established exclude such an eventuality.

At the end of the First World War two new institutions were introduced into international law: the minorities treaties and the Mandates. The former were imposed on the "new States" and some other States by the Principal Allied and Associated Powers. These treaties, as a security for their proper observance, provided for the jurisdiction of the Court as compulsory for the States subject to such a régime; but the Principal Powers desired to share the responsibilities of this innovation and proceedings could be instituted by any Member represented on the Council of the League, that is to say in the beginning by the four Principal Powers and the four other non-permanent Members.

The Mandates were the work of the Principal Allied and Associated Powers, which shared among themselves (apart from the United States but with Belgium) the conquered territories, and agreed on the terms of the Mandates. This is clearly apparent from, *inter alia*, the report of Viscount Ishii to the Council on 26 February 1922 (L. o. N., *Official Journal*, No. 8, 1922, p. 850), which contains the following passage: "In general, therefore, the role of the Council may be limited merely to ratification of the proposals made by the

mandatory Powers"; which is what was done, with a few changes of which only one is here relevant.

These Powers were realistic; their resistance to the Mandate idea is known. It is difficult to believe that they should have, as Mandatories, accepted the heavy new burden of judicial accountability, with all its unforeseeable implications, towards any Member of the League which might take exception to their administration of the Mandate. This *actio popularis* would have been such a novelty in international relations, going far beyond the novelty of the Mandates system itself in its implications, that, if the drafters of these instruments had all agreed on the self-imposition of such a responsibility, they would not have failed to say so explicitly, as they did in the case of certain States subjected to the minorities régime.

It is not possible to infer such an obligation as implied, understood or resulting from tacit agreement, since it would have been an undertaking in favour of future and unknown third parties. The need for an explicit and clear provision was more than ever obvious. It is difficult to see in the second paragraph of Article 7 anything other than a simple jurisdictional clause of that period, for in order to form an opinion as to the character and scope of a legal instrument it is necessary to consider it from the point of view of the period when it was drawn up.

On 17 December 1920 Lord Balfour had submitted for approval by the Council, *inter alia*, the Mandate for South West Africa. The second paragraph of Article 7 of that text read as follows: "If any dispute whatever should arise between the Members of the League of Nations ... this dispute shall be submitted to the Permanent Court", etc. The Council modified the paragraph, putting it into its present form: "The Mandatory agrees that ... any dispute ... shall be submitted to the Permanent Court", etc. The explanation is to be found in the Ishii report referred to above (*ibid.*, p. 854). In proposing a modification of the jurisdictional clause of the Mandate instruments to be approved on 20 July 1922, the Rapporteur proposed a wording identical with that of the second paragraph of Article 7, which is now in question: "A similar alteration has been made by the Council in the draft C mandates. It was inspired by the consideration that Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court of International Justice."

If the Powers represented on the Council were so scrupulous of the right of Member States not to be bound without their express consent, it is difficult to believe that they would have introduced this alleged right of action without saying so expressly.

It is not possible to find any support for the Applicants' contention in what has been called the "Tanganyika clause"

Article 13 of the British Mandate for East Africa contains, in addition to the first paragraph which is identical to the jurisdictional clause in Article 7 of the Mandate for South West Africa, a further paragraph worded as follows:

> "States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said Court for decision."

It has been said that since this paragraph specifically empowers any Member of the League of Nations to submit to the Court any case of infractions of the rights of its nationals, the first paragraph, and hence Article 7 of the Mandate we are concerned with, authorizes proceedings with a view to general judicial supervision. This conclusion is unfounded: while that instrument, alone among the fourteen Mandate instruments, devoted a special paragraph to the case of infractions of the rights of nationals of a State Member, the first paragraph relates merely to cases of infractions of rights which are the State's own rights. What was said by the Court in 1924, which is quoted above, has cleared up these questions.

No one has been able to explain how this paragraph, which seems completely unnecessary, got into the Mandate for Tanganyika and that Mandate alone, but this is not of the slightest importance. The Permanent Mandates Commission turned to that question in 1925 but quickly decided not to pursue its discussion.

In the practice of the League of Nations there were not two types of supervisory machinery, one judicial and the other administrative. The supervision of the Council (assisted by the Permanent Mandates Commission) was not administrative, either by virtue of the character of the organ which was not an administrative organ, or by its object. The Council was a political organ; it exercised supervision from the point of view of the conformity of the administration by the Mandatory with the terms of the Mandate, thus from the point of view of legality; it consequently had to decide questions of law and it did so by making available to itself suitably qualified assistance; but, the matters with which it was concerned being eminently of a political character, it acted with all the necessary flexibility; it never availed itself of its right to refer to the Permanent Court of International Justice for an opinion. On the other hand, any Member of the League of Nations which considered itself to have suffered injury as a result of the way in which the Mandatory had exercised its functions, had the right to refer the dispute in the ordinary way to the Court. There was only one case of this kind, the *Mavrommatis* case, the classic case.

So far as scholarly authority is concerned it will suffice to cite the opinion expressed by Professor Feinberg in his course at The Hague Academy of International Law. He gave a summary of the

position in this connection in 1937, thus shortly before the Second World War:

> "Like most of the writers who have, in their works, expressed a view on the question, I consider that the judicial settlement clause does not confer on Members of the League of Nations the right unilaterally to bring a Mandatory Power before the Court except in cases where they can allege the violation of some right of their own or some injury to the interests of their nationals. This interpretation would seem to me to be entirely correct and in conformity with the general scheme of the Mandates System. It is indeed difficult to imagine that, by the inclusion of the judicial settlement clause in the text of the Mandates, it was intended to give each Member of the League of Nations a power so extensive that it would enable it to set itself up as a censor of the Mandatory's administration. The aim pursued was certainly a more limited one; it was desired to secure compulsory reference to the Court of all conflicts which might arise as a result of the non-performance of obligations assumed by the Mandatory, under the Mandate, in relation to other Members of the League of Nations."

* * *

The Applicants rely upon the jurisdictional clause in Article 7 of the Mandate which, according to the Opinion of 1950, "is still in force" and according to which the Union of South Africa is under an obligation to recognize as compulsory the jurisdiction of the Court for "any dispute whatever" relative to the interpretation or the application of the provisions of the Mandate.

These words clearly do not mean any dispute whatsoever and still less any divergence of opinion whatsoever which a State might see fit to bring before the Court. It is a principle of international law that every conventional provision must be interpreted on the basis of general international law. The relevant words of Article 7 cannot be interpreted in such a way as to conflict with the general rule of procedure according to which the Applicant State must have the capacity to institute the proceedings, that is to say, a subjective right, a real and existing individual interest which is legally protected. "No interest, no action": this old tag expresses in a simplified, but, on the whole, correct form the rule of all municipal law, but also of international law. We have seen it in the *Mavrommatis* case. In the *Wimbledon* case the Permanent Court of International Justice met the objection raised by Germany by saying (Series A, No. 1, p. 20) that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags".

The Statute of the Court is expressly to the same effect, since Article 62 thereof requires that a request to intervene must be made by a State which is qualified to do so; such a State must show

that it has "an interest of a legal nature which may be affected by the decision in the case", and it is for the Court to decide whether that condition is satisfied. M. O. Hudson in the second edition of his work on the Court (1943, p. 420) says: "The precise character of the 'interest of a legal nature' to be established for intervention under Article 62 is uncertain; it would seem to require a special interest, in addition to a State's general interest in the development of international law." Elsewhere (p. 209) he states: "The 1920 Committee of Jurists ... wished to exclude 'political intervention'"; the same reasons must be thought to hold good for the exclusion of a political action.

In the discussion of the Rules of Court in 1922 (Series D, No. 2, p. 87) Judge Max Huber said that he "did not think that intervention under the terms of Article 62 should be admitted in cases where no actual concrete right was at stake". And Judge Anzilotti (p. 90) did not think that Article 62 referred to cases which were of interest from the point of view of international law; it was necessary to have "an actual legal interest in the dispute". A recent Dutch work has pointed out that public international law also requires that an applicant should have an interest in the claim which it advances. "Why, indeed, should the requirement apply solely to an intervening party and not to the applicant?" It is a principle of international law which that law shares with municipal legal systems.

The Applicants recognize this principle, since they have frequently repeated that they have "a legal interest"; but what interest? That of ensuring that the burdens of the Mandate should be faithfully performed by the Mandatory? Or perhaps that of defending the fundamental interests of the organized international community in the realization of international peace and security? The Applicants contrast those interests which they describe as "material", "pecuniary", "narrow", with higher legal interests.

It is unnecessary to dwell at length upon the concepts of action and interest. In the works of writers there is an abundance of interpretations and formulae. But the classic definition may be taken to be that of Chiovenda: "An interest is a pre-condition of an action and is to be understood in this way, that without the intervention of judicial organs, the plaintiff would suffer some unjust prejudice." An interest is therefore personal and direct.

It was not necessary for the Court to examine the question whether, in the present cases, the Applicants have such an interest since they themselves say that this is not the way in which they understand it. They assert that they have a sufficient legal interest to institute the present proceedings (Memorial, pp. 62-63): "a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated". But such a legally protected interest has not been conferred on them by any international instrument; such an action is not within the contem-

plation of Article 7. They lack the capacity to take legal action. The decisive element for the interpretation of the second paragraph of Article 7 is to be found in the very form of words used in that hotly contested provision.

The second paragraph of Article 7 refers to a dispute which "cannot be settled by negotiation". The Applicants assert, and the General Assembly has decided (resolution 1565 (XV) of 18 December 1960): "The dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other ... has not and cannot be settled by negotiation." The Respondent denies that the dispute cannot be settled by negotiation. There is here a misunderstanding. The issue is not whether there have really been negotiations and whether they have reached a deadlock.

When Article 7 lays down the condition "if it cannot be settled by negotiation", it is following the example of the traditional arbitration clause. It refers to a dispute which by its nature lends itself to settlement by negotiation but which in a particular case cannot be so settled for one reason or another, that is, a dispute in the classic sence, recognized by general international law for more than forty years. In the case concerning *Rights of Nationals of the United States of America in Morocco* (*I.C.J. Reports 1952*, p. 189) the Court said: "It is necessary to take into account the meaning of the word 'dispute' at the times when the ... treaties were concluded."

By negotiations between States, however, it can only be possible to settle disputes in which the parties can deal freely with their rights and their interests. The condition laid down in Article 7 decisively proves that that Article envisages only legal cases in the true, the only universally accepted sense of the expression, where States, believing themselves to possess legally protected rights and interests, and which have been unable to settle their dispute by negotiation, ask the Court to decide as between them.

In the cases referred to the Court the three States are unable to settle by negotiation between themselves the questions which are the subject-matter of the submissions of the Applicants because they do not involve their rights and interests.

It is sufficient to refer to the nine claims in the Memorials which constitute the merits of the case to see that questions such as the qualification of the General Assembly to exercise the supervisory functions, or the duty to render annual reports, or that of preparing the inhabitants for self-government, could not be settled by negotiation between the Mandatory and another Member of the League of Nations. They do not have control over these problems, over these duties and these interests. This condition forbids the construction of Article 7 put forward by the Applicants; consequently it is unnecessary to examine the impossible situation in which the Council would have found itself if these problems had had to be settled by

negotiations between States Members in their own way and to suit their own convenience; or if a problem which had been settled by the Council in agreement with the Mandatory could be brought before the Court by no matter what Member of the League of Nations.

The Judgment recognizes as an undeniable fact that a general judicial supervision, available to all the Members of the League of Nations, was from the beginning regarded as an essential security in the Mandates System: the Council in the last resort was powerless in the face of the refusal of a Mandatory to comply with its decisions and recommendations; the Assembly, which in any event was normally called upon to exercise no more than a moral influence in this domain being likewise impotent; any opinion which the Permanent Court of International Justice might give was not binding; there remained therefore individual or collective action by Members of the League of Nations by means of contentious proceedings, since neither the Council nor the League of Nations was entitled to appear as a party before the Court.

This hypothesis is quite improbable; it is not and cannot be supported by any evidence. Article 22, paragraph 1, of the Covenant provided *in fine* "that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant". These securities are set out in the following paragraphs of Article 22. The Mandates System was perfectly well able to do without that "security" now recognized by the Court and for which the Council probably felt no need, just as it felt no need for any enforcement action, the provisions of the Covenant and of the Mandate Agreement being considered sufficient by the authors of those instruments.

If the General Assembly and the Republic of South Africa encounter very serious difficulties in finding a satisfactory solution to what is unquestionably an abnormal situation, the Court, which is not called upon to decide *ex aequo et bono*, notwithstanding its desire to contribute to a settlement of the conflict, cannot do so without infringing the legal provisions governing the matter, and the Court's jurisdiction must be clearly established in the interest of the international community.

(Signed) B. WINIARSKI.