SEPARATE OPINION OF JUDGE LAUTERPACHT

In the present case the General Assembly has asked the Court for an Advisory Opinion on the question whether the special Rule F, which, on 11 October, 1954, the Assembly adopted with regard to the voting procedure to be followed by it in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa is a correct interpretation of the Opinion of the Court given in 1950 on the International Status of South-West Africa. Rule F laid down that such decisions shall be regarded as important questions within the meaning of Article 18 (2) of the Charter, that is to say, that a majority of two-thirds shall be required for their adoption. In the Preamble to its request the General Assembly drew special attention to certain passages of the Opinion of 1950. These passages are referred to below.

I have considered it incumbent upon me to append the present Separate Opinion for, while I concur in the unanimous Opinion of the Court inasmuch as it gives an affirmative answer to the question put to it, I do so on grounds and by a method substantially different —and differing—from those on which that Opinion is based. On the subject of method I find it necessary to devote some preliminary observations to the question as to the legal issues which ought to find an answer in the Opinion of the Court. This matter raises the more general question of the character of the function of the Court and the nature of its judicial pronouncements.

The present Opinion can be decided, in addition to what may be described as the method of pure construction, by exclusive reference to any of the following three legal questions :

(1) Inasmuch as the main issue arises from the contention of South Africa that absolute unanimity was required for the decisions of the Council of the League of Nations acting as a supervisory organ of the Mandates System, the Opinion could be based on the rejection of that contention as being unfounded in law. In that case it might be said—though, as will be seen, not quite accurately— that Questions (2) and (3) do not arise.

(2) It is possible to base the Opinion of the Court on the view adopted by the Court that whatever may be the answer to the other two questions the General Assembly is absolutely prevented from acting by a method of voting other than that laid down in Article 18 of the Charter, and that for that reason it must be held, in adopting Rule F, to have complied "as far as possible" with the Opinion of the Court given in 1950. If that view is adopted, it might be said that Questions (1) and (3) need not be answered.

(3) It is possible to base the Opinion of the Court on the view that as, unlike the decisions of the Council of the League, the decisions of the General Assembly are not legally binding, Rule F clearly does not imply any excess of supervision as compared with that of the Council of the League and that therefore neither Question (1) nor Question (2) need be answered.

Finally, and this is substantially the method followed by the Court, it is possible to answer the question put to the Court without primary reference to any of these questions but merely on the basis of a construction of the relevant passages of the Opinion of the Court of 1950.

In my view it is essential, having regard both to the circumstances of the case and to the objects of the judicial function of the Court in general, that its Opinion should contain an answer to the legal issues relevant to the case, especially when relied upon by the Members of the General Assembly, including South Africa.

Thus with regard to Question (1)—namely, that arising out of the contention of South Africa that the absolute unanimity of the Members of the Council of the League was required for its Resolutions relating to mandates—although the Court has come to the conclusion that the relevant passage of its Opinion of 1950 does not apply to the voting procedure, I consider that that argument of South Africa ought to be answered in all requisite detail. It ought not to be disregarded on the ground that it is irrelevant for the reason that it is ruled out by what is described as the ordinary and natural meaning of the words of the Opinion of 1950. For this was the main argument put forward by South Africa in the course of the discussions before the General Assembly and its Committees. It was the question of the justification of that contention which exercised Members of the General Assembly, which troubled their consciences, and which was largely responsible for the request for the present Opinion. The circumstances of the case are such that full consideration ought to be given to the principal legal argument of the State which, as a mandatory, has put itself in opposition to the repeatedly expressed judgment of the United Nations and whose conduct has been the object of wide disapproval. For this reason, although I do not accept this particular contention of the Government of South Africa, I must consider it in detail.

The same considerations apply to what may be called the constitutional issue as expressed in Question (2). The Opinion of the Court is based on the view that the General Assembly is absolutely precluded from acting by a voting procedure other than that laid down in the Charter and that for that reason Rule F complies with the Opinion of the Court, given in 1950, which laid down that the procedure of the General Assembly must approximate to that of the Council of the League "as far as possible". It is possible to

dispose of the entire issue by reference to the simple proposition that the provisions of the Charter in the matter of voting are mandatory and peremptory and that any modification of the voting procedure of the General Assembly, designed to meet the circumstances of the case, would constitute a violation of the Charter or, more emphatically, that it would constitute a juridical impossibility. But that proposition is controversial. Some previous practice, to which reference will be made later, suggests the permissibility of a different voting procedure if an extraneous instrument so provides—although the Court seems to have accepted the view that there is no such instrument in the present case seeing that the powers of the General Assembly are, it is said, derived from the Charter and not from an extraneous instrument. That, too, is controversial. Above all, it appears that the constitutional problem as stated underlay a great deal of the debate before the General Assembly and that most of its Members—as indeed does the Opinion of the Court—were prepared to regard the constitutional objection as decisive and sufficient. This being so, it seems to me desirable that the solution of that aspect of the matter should not be taken for granted or as being self-evident. For this reason, having regard to conflicting considerations of principle and to divergence of practice, I believe it to be my duty to examine fully that aspect of the matter.

The same considerations apply, once more, to Question (3)—a question by reference to which it may be possible to dispose of the issue before the Court on the ground that the decisions of the General Assembly are of no legal effect or of more limited effect than those of the Council of the League. It is a ground by reference to which—and mainly to which—it may be thought, as I do in the present Opinion, that an affirmative answer can be given to the question put by the General Assembly. For this reason I am not at liberty to disregard that issue on account of any difficulties or complications inherent in it. The absence, in general, of full legal binding force in the Resolutions of the General Assembly is a proposition so fundamental and so rudimentary that an attempt to apply and to circumscribe it need not be regarded as dangerous or unhelpful. I cannot disregard that aspect of the matter on the alleged ground that the Court cannot answer this—or any other legal question—incidental to the Opinion, seeing that the General Assembly has not specifically asked for an answer to these questions. The General Assembly has asked only one substantive question ; that issue, and that issue only, is answered in the operative part of the unanimous Opinion of the Court. Clearly, in order to reply to that question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions which carry

conviction and clarify the law.

For these reasons I cannot attach prominent—and certainly not exclusive—importance to what may be described as the "mere construction" point of view, such as that implied in the argument that the question of voting is not at all germane to either of the two crucial passages of the Opinion of the Court of 1950, namely, those relating to "degree of supervision" and "procedure" of the Council of the League. It is possible to hold the view that there is an implied reference to voting procedure in both these expressions ; it may be held that such reference is implicit only in one or only in the other of these expressions ; and there is room for the view, which finds some support in the Opinion of the Court, that neither of these expressions contains any reference to voting. This diversity of construction provides some illustration of the unreliability of reliance on the supposed ordinary and natural meaning of words.

Neither, having regard to the integrity of the function of interpretation, is it desirable that countenance be given to a method which by way of construction may result in a summary treatment or disregard of the principal issue before the Court. Thus it may be said that, as according to the Opinion of the Court given in 1950, the General Assembly, acting under Article 10 of its Charter, is to be responsible for the task of supervision, it cannot fulfil that function otherwise than in accordance with its own procedure and that by applying its voting procedure, deemed unalterable, it approximates "as far as possible" to the procedure of the Council of the League. However, this—the "constitutional" issue—is one of the principal questions before the Court. I would not feel justified in answering it—without adequate examination of available pratice—by reference to assumed logical impossibility.

These considerations I believe to be in the highest interest of the authority of international justice. They do not exclude the necessity of basing the Opinion of the Court on, *inter alia*, a construction of the texts before it.

* * *

Do the expressions "degree of supervision" and "procedure of the Council of the League" refer to voting procedure ?

One of the main passages of the Opinion of 1950 which the Court is now requested to interpret lays down two directives: (i) that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System,

and (ii) that it should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.

The expression "degree of supervision" has two meanings: it signifies primarily the means of supervision. Thus it is clear that the place assigned to periodic missions or to petitions in the System of Trusteeship exceeds the degree of supervision adopted in the Mandates System and that that means of supervision by the United Nations cannot, without the consent of the Government of the Union of South-West Africa, be applied to the Mandated Territory of South-West Africa. This is a question of means of supervision in their wider sense. The Court, whose Opinion is requested on the question of voting, is not concerned with them. However, the term "degree of supervision" covers also the methods of ensuring compliance with the means thus adopted and, in particular, the method of deciding whether the administering authority has complied with them and what steps it ought to take with that object in view. If the General Assembly were to be enabled to take binding decisions on petitions and reports subject to voting requirements less stringent than those obtaining in the Council of the League of Nations—such decisions including request for further information, expression of regret at or disapproval of the action or inaction of the Administering Authority, and call for the cessation of the action disapproved of—then the innovation thus effected would appear to amount to a degree of supervision exceeding that previously in force. This is so although on occasions such decisions may amount to an approval or support of the action of the Administering State—in which case it might be argued that the less exacting vote implies a relaxation of the degree of supervision. However, the State subject to supervision is primarily concerned with the potential interference with its freedom of action by the supervisory organ. Thus viewed, the less exacting method of voting adds to the stringency and the degree of supervision—just as a change of the procedure of voting may add to the extent of the obligations. If I agree to accept the obligation to pay taxes in pursuance of unanimous decisions of a committee, then my obligation is increased if the committee, by changing its procedure, can impose taxation by a majority vote. This seems to be a proposition of common sense.

My view, as expressed below, is that Rule F does not result in an excess of supervision for the reason that the decisions of the Council of the League did not require absolute unanimity and that, in any case, the decisions of the General Assembly are not of the same legal authority as the decisions of the Council of the League. But I am not of the view that the Opinion of the Court ought to base the

answer to the question put to it on the ground that the degree of supervision has no relation to the question of voting. The procedure of voting determines the degree of supervision. For even if we do not go to the length—to the unwarranted length—of conceding that a valid decision of the Council of the League of Nations acting as the supervisory organ of the Mandates System could be prevented by a veto of the Mandatory States, the fact remains that, according to the contemplated Rule F, for the otherwise unanimous decisions of the Council which included all the principal Powers that were Members of the League, there is to be substituted a decision of two-thirds of the General Assembly which may or may not include the vote of any permanent Member of the Security Council, which may represent less than one-fourth of the budgetary contributions or less than one-fourth or one-fifth of the total population of the Members of the United Nations, and which acts by methods different from those which characterised the Council of the League which, in turn, in conformity with the entire political climate of the League, tended to proceed, ultimately, by agreement rather than by counting of votes. Neither is it altogether irrelevant that on the Council of the League of Nations that unanimity or quasi-unanimity had the additional safeguard of being influenced by the reports and the point of view of a commission of experts—for the Mandates Commission was a commission of experts—of high standing and independent of governments. The decisions of the General Assembly, which will be reached according to the contemplated Rule F, will be formed under the impact of the Committee on South Africa—a body whose devotion and disinterestedness must not be questioned but which is of different composition.

These factors are directly relevant to the question of the "degree of supervision". This is not inconsistent with the fact that the second part of the passage ("and should conform as far as necessary to the procedure followed by the Council of the League of Nations") also, and more directly, refers to voting. Accepted usage includes voting within matters of procedure. It is probable that, while the first part of the passage refers to the major principle of not exceeding the degree of supervision hitherto obtaining, the last quoted passage is directed to the more specific problem of the approximation, as far as possible, of that procedure to that obtaining under the Council of the League of Nations. For these reasons I am reluctant to admit that the ordinary and natural meaning of words excludes the method of voting from the notion of degree of supervision. There is no ordinary and natural meaning of the term "degree of supervision" in the abstract. Its meaning is not something which appears on the surface ; it is relative to the situations and problems with which the Court is concerned. Moreover, it is relative to the legal issues directly connected with the situation. Thus, assuming that the main South African contention

on the question of unanimity is correct, it would be reasonable to assume that the expressions used by the Court with regard both to "degree of supervision" and "procedure" were not used with the intention of ignoring the legal position thus established. It may not be profitable to regard the entire issue as non-existing on the ground that the words used have a meaning which is fixed, certain and immutable.

It is, of course, possible that the question of voting was not before the mind of the Court when it gave the Opinion in 1950. This does not mean that the procedure of voting is not an essential element in the situation. On the contrary, it is for this Court, confronted as it is with an apparent gap in the Opinion of the Court of 1950 with respect to a situation which calls for clarification, to fill the lacuna by all available means of interpretation. These do not include the knowledge of any particular member of the present Court as to the state of his—or his colleagues'—minds at the time when the Advisory Opinion was rendered in 1950.

* * *

It is of importance, in this connection, to bear in mind the relation between the two passages here discussed. In my view, of the two conditions there prescribed, the first, relating to the degree of supervision, is the governing directive of a substantive character ; the second, which is qualified by the words "as far as possible", is, in terms, procedural. The question is whether the Opinion of 1950 can be properly interpreted in a way which would subject the substantive rule to considerations of procedural conformity and convenience. The question is whether such considerations can properly be permitted to affect or impair the governing principle laid down by the Court in 1950 according to which, in the absence of agreement on the part of the Union of South Africa, the degree of supervision by the United Nations must not exceed that exercised by the Council of the League of Nations.

There is room for the view that the Union of South Africa is legally entitled to resist any attempted extension of the scope of its accountability and of the corresponding degree of scrutiny, interference and supervision by the United Nations, even if such extension is of a procedural nature, for instance, by way of a particular system of voting, so long as no conclusive proof has been adduced that such extension is unavoidable on account of an imperative necessity of relying on the procedure in force in the General Assembly and unalterable in any circumstances.

The System of Trusteeship under the United Nations has not replaced the Mandates System ; the latter remains in force so far

as South-West Africa is concerned. As repeatedly stated in the Opinion given in 1950 the continued exercise of the Mandate must be subject to supervision surrounded by the same, but not greater, obligations and safeguards as those which existed under the League of Nations. Now the obligations of a country can be decisively influenced by the voting procedure in respect of the decisions which interpret and apply those obligations. When the Opinion of 1950 said, and reiterated, that the obligations of the Mandatory remained unaltered, it did not mean only that South Africa continued to be bound by these obligations and that she must not subtract from them ; it meant also that these obligations ought not to be increased. The continuation of the obligation must in all fairness be held to work both ways. This seems to me to be the governing consideration. In relation to it, the interpretation, however necessary, of the terms "degree of supervision" and "as far as possible" seems almost to assume the complexion of a technicality. In relation to it, exclusive reliance on the supposed ordinary and natural meaning of the expression "degree of supervision" as bearing no relation to the voting procedure would seem to me highly questionable.

As I see it, the words "as far as possible" do not mean that the unqualified injunction against exceeding the degree of supervision under the League of Nations is in fact qualified by the obligation to follow "as far as possible"—and only as far as possible —the procedure of the Council of the League of Nations and that if such approximation to that procedure is not possible having regard to the voting procedure of the General Assembly of the United Nations as laid down in Article 18 of the Charter, then the degree of supervision must unavoidably be exceeded. The Opinion of the Court rendered in 1950 did not say that the degree of supervision as it existed under the Mandates System must not be exceeded *provided* that that is possible under the then existing voting procedure of the General Assembly. On the face of it, the words "as far as possible" may be interpreted as meaning that, within the framework of compliance with the overriding prohibition of exceeding the degree of supervision of the League of Nations and if there is a variety of procedures available, that procedure must be followed which corresponds more closely to that of the Council of the League of Nations. For reasons stated elsewhere in this Opinion, I cannot accept the view that the words "as far as possible" contained an implied and imperative reference to an existing and unalterable procedure of the General Assembly and that any such interpretation has the legitimate effect of overriding the basic prohibition of extending the degree of supervision under the League of Nations by dint of the statement that by adopting the rule of two-thirds majority the General Assembly went "as far as possible", i.e., as far as is legally permissible under the Charter. That statement must be proved by a rigorous and searching examination. Such examination may show, as suggested in another part of this Separate

Opinion, that it was legally possible for the General Assembly to go somewhat further than does Rule F in complying with the direction to approximate "as far as possible" to the procedure of the Council of the League.

My own conclusions with regard both to construction and the three main questions as formulated above are such that it is not necessary for this Court to adopt an interpretation of the Opinion given in 1950 which in my view would amount to saying that in that Opinion the Court laid down, as the result of an oversight or otherwise, two mutually contradictory directives, and that, by way of an implied reference to an unalterable voting procedure of the General Assembly, it reduced to meagre proportions the essence of its substantive ruling on one of the principal aspects of its Advisory Opinion on the International Status of South-West Africa.

* * *

Question 1 : *Did the Rule of Absolute Unanimity obtain in the Council of the League acting as a Supervisory Organ of the Mandates System ?*

I now come to the first of the three principal legal issues with which the Court must properly be deemed to be confronted in the present case : Does the contemplated Rule F correctly interpret the Opinion of the Court inasmuch as it replaces by a less stringent system the rule of absolute unanimity which, according to the contention of the Government of South Africa, obtained in the Council of the League of Nations in respect of its supervisory functions under the Mandates System ? Did any such rule obtain in the Council of the League of Nations ?

With regard to this question, I am unable to accept the contention advanced by the Government of the Union of South Africa that there is an inconsistency between the proposed Rule F and the procedure followed by the Council of the League of Nations for the alleged reason that the latter was based on the rule of absolute unanimity, including the vote of the Mandatory State concerned. This has been the principal view put forward by the Government of South Africa in the matter. I have given reasons why it was desirable that the Court should examine it in all its aspects.

Admittedly, the procedure of the Council of the League of Nations was governed by the principle of unanimity not only of the Members of the Council but of States who, though not ordinarily

Members thereof, were invited to sit at its table in connection with a matter under its consideration—a rule which applied also to the representatives of the Mandatory State invited to take part in the proceedings of the Council. However, having regard both to principle and practice, as I interpret them, the ruling of the Court given in its Twelfth Advisory Opinion on the *Interpretation of the Treaty of Lausanne* must be held to apply also to the question with which the Court is now concerned. In that case, the Court held that the principle which was enshrined in Article 15 of the Covenant and which excluded the vote of the parties to the dispute from the requirement of unanimity as a condition of the validity of a recommendation made by the Council, was of general application in so far as it embodied the "well-known rule that no one can be judge in his own suit" (Series B, No. 12, p. 32). That "well-known rule", henceforth sanctioned by a pronouncement of the Permanent Court of International Justice, must be held to apply to the case in which an international organ, even when acting otherwise under the rule of unanimity, judges in a supervisory capacity the legal propriety of the conduct of a State administering an international mandate or trust. The supervisory organ may do so either directly by pronouncing a verdict upon the conformity of the action of the administering State with its international obligations or indirectly by calling upon it to adopt—or desist from—a certain line of action.

In the absence of cogent proof to the contrary, there is no justification for rendering legally permissible a situation in which a State, bound by virtue of solemn international obligations to observe a definite rule of conduct and to submit to the international supervision of its observance, is at the same time entitled to render, by its adverse vote, such supervision nominal and ineffective. Undoubtedly, international practice knows instances of States reserving for themselves the right to determine the extent of their own obligation and, in a sense, to remain judges in their own case. However, unless such right is reserved in explicit terms, States which thus attempt to avail themselves of their contractual capacity for purposes alien to its primary purpose—which is the creation of binding obligations—act at their peril. Such express reservation of this exceptional right, obnoxious to legal principle and to tenets of good faith, cannot be conclusively inferred from the mere fact that the basic instrument provides for the rule of unanimity. It could not, in particular, be inferred from the rigid wording of Article 5 of the Covenant, which laid down that, unless expressly provided to the contrary, the rule of unanimity should obtain. For, in the absence of a clear provision to the contrary, that rule is in itself qualified by the principle laid down by the Permanent Court of International Justice in the Advisory Opinion on the *Interpretation of the Treaty of Lausanne.* In that Opinion the

Court considered this rule to be of general application for the decisions of the Council when acting in a judicial or arbitral capacity. Its ruling was not limited to cases brought before it by virtue of an extraneous treaty.

It must be conceded that the application of the principle *nemo judex in re sua* to what is in essence a controversy between the mandatory and the otherwise unanimous Council constitutes an extension of that principle as laid down by the Court. However, the extension is more apparent than real. For the reasons stated above, there does not seem to exist any solid ground for dinstinguishing between decisions taken in pursuance of the supervisory functions of an international organ and decisions of a judicial or arbitral nature such as that with which the Council of the League was confronted in the matter of the determination of the boundary between Turkey and Iraq. In all cases in which there is a difference of opinion, brought to the point of a formal discordant vote, between the supervising organ and the administering authority as to the conformity of the conduct of the latter with its international obligations, such difference has the essential elements of a dispute as to the application of a binding international instrument. In any such controversy the principle that no one is judge in his own cause must be deemed to apply. To put it differently, there is no valid reason for distinguishing, in connection with the applicability of the principle that no one is judge in his own cause, between the judicial and the supervisory organs. Both administer, in different ways, a system of binding rules of conduct.

* * *

I will now turn from principle to practice. The practice, as I read it, of the League of Nations, does not conclusively support the view that there was an invariable, or even predominant, tendency—in cases in which a Member of the Council was itself a party to the dispute—to attach literal importance to the seemingly rigid or exhaustive provisions of Article 5 of the Covenant in the matter of unanimity. On occasions, the principle of absolute unanimity, including the votes of the parties to the dispute, was acted upon with some rigidity. This occurred in two cases in connection with the application of Article 11 of the Covenant, namely, in the dispute between Poland and Lithuania in 1928 (*Official Journal of the League of Nations*, 1928, p. 896), and, in particular, in the course of the Sino-Japanese dispute in 1931 (*Official Journal of the League of Nations*, 1931, p. 2358). In both cases a resolution of the Council, assented to by all its Members save one of the parties to the dispute, was formally stated not to be binding. It may be observed that with regard to

the latter case, Professor Brierly, a writer of authority noted for his restraint, stated that the interpretation of Article 11 then adopted was "unexpected and doubtfully correct" (*The Covenant and the Charter*, 1947, p. 15). Apart from these rare cases, the tendency was either in the direction of an express amendment of these provisions of the Covenant which, on the face of it, left room for the frustration of an otherwise unanimous decision by a vote of an interested party or in the direction of regarding such amendment as unnecessary and of acting on the view that the principle *nemo judex in re sua* was already an integral part of the Covenant. Thus, in 1921, the Assembly recommended that, pending the ratification of an express amendment of the Charter to that effect, the votes of the parties to the dispute should be excluded in the voting on the question whether a Member of the League had gone to war in breach of the Covenant (*Records of the Second Assembly, Plenary Meeting*, p. 806). In 1922, the Council seems to have proceeded in two cases on the view that when acting in an arbitral or semi-judicial capacity it was bound to exclude the votes of the parties for the purpose of ascertaining the unanimity required by the Covenant. The first of these cases concerned the claim of India to be included among the eight States of chief industrial importance in connection with representation on the Governing Body of the International Labour Organisation. In that case, the Council endorsed and acted on the legal opinion submitted to it by the Secretariat to the effect that "the Council would act in this affair as arbitrator, and that India could not be both judge and party to the case" (*Official Journal*, 1922, p. 1160). The case is of special importance in the present connection inasmuch as the Council acted in an administrative rather than judicial capacity. In the acute Greco-Bulgarian dispute in 1925, the Council, acting in a private meeting in the absence of the representatives of the two parties, prepared what was described as a "dictatorial request" for acceptance by the parties who declared themselves ready to accept the *decision* of the Council thus subsequently sanctioned by a unanimous vote (*Official Journal*, 1925, p. 1700). In the same year, in the Hungarian Optants dispute between Hungary and Roumania, which came before it under Article 11, paragraph 2, of the Covenant, the Council accepted a recommendation by a unanimous vote exclusive of the representatives of the parties after the President of the Council stated that, in inviting the Council to pronounce itself on the recommendation contained in the report, he "deliberately excepted two members of the Council who are parties to the dispute" (1927, p. 1413).

It would thus appear that the Twelfth Advisory Opinion of the Court, in addition to being based on a general principle of

law of cogent application, was not without support in the practice of the League, both prior and subsequent to the time when it was rendered. It may be useful in this connection to draw attention to the official publication of the Secretariat of the League of Nations, entitled "The Council of the League of Nations, 1920-1938", in which, on page 69, according to the view of the Secretariat, on the question of the inclusion of the votes of the parties in determining unanimity "there is a certain division of opinion as to whether the votes of the parties should or should not be counted".

It has been maintained that whatever may have been the practice of the Council of the League of Nations in the matter of international disputes, in other spheres it strictly adhered to the principle of absolute unanimity. From this the conclusion is drawn that the Mandatory State enjoyed a power of veto with regard to the supervisory function of the Council. I am not persuaded of the accuracy either of what is supposed to be the factual premise or of the conclusion which is being drawn from it. An account of some of the practice of the Council in this sphere is given in a paper prepared by the Secretariat of the United Nations for the working group of the Committee on South Africa and included as No. 39 in the file of documents put at the disposal of the Court. There are other cases to which reference will be made presently. My reading of the practice as recorded is that, while there is no instance of a resolution of the Council being formally declared adopted as against the opposing vote of the mandatory State, there is, on the evidence, no authentic and recorded instance of a contemplated resolution of the Council being frustrated as the result of the adverse vote of the mandatory State. A study of these cases, which were concerned with the mandated territory of South-West Africa, shows that while in no instance a resolution was adopted contrary to the express attitude of the Government of South Africa, this was not necessarily so because of any threatened exercise of the power of veto. In some of these cases, that Government, after having stated its doubts or objections, did not insist on them ; in two other cases the Council modified an alternative text submitted by the representative of South Africa ; in the sixth case the Government of South Africa eventually decided not to be represented at the resumed discussion of the issue in question. The same solution was adopted by the South African Government in some other cases, of which one relating to the status of the South African Mandate calls for special mention. In its Report, made in 1935, the Mandates Commission noted that it had been informed by the Mandatory Power that the latter had appointed a special Committee to study certain constitutional problems raised by a motion of the Legislative Assembly of the territory aiming at its incorporation as "a fifth province of the Union". The Report concluded with the following passage : "As the guardian of the integrity of the institution of Mandates, the Commission therefore expects to be informed of the Mandatory

Power's views on the question, which it will not fail to subject to that careful examination that its international importance demands. The Commission wishes, on this occasion, to draw attention to the Mandatory Power's fundamental obligation to give effect, not only to the provisions of the Mandate, but also to those of Article 22 of the Covenant." (*League of Nations Official Journal*, 1935, p. 1235.) The Report of the Commission on this and other matters was adopted by the Council which instructed the Secretary-General to communicate to the Mandatory Powers the observations of the Commission and to request them to take the action asked for by the Commission (*ibid.*, p. 1148). The Government of South Africa informed the Secretary-General that it would not be represented at the meeting of the Council. It may or may not be profitable to enquire into the reasons which prompted abstention from participation in a decision which had a distinct bearing on an important issue touching upon an essential aspect of the rights and duties of the mandatory. At least on six other occasions the Government of South Africa was not represented at meetings of the Council at which Resolutions were adopted or discussions took place concerning South-West Africa.

The fact which thus emerges with some clarity from a survey of the practice of the Council of the League of Nations on the subject is that it supplies no conclusive or convincing evidence in support of the view that as a matter of practice the rule of unanimity operated and was interpreted in a manner substantiating any right of veto on the part of the mandatory Power. It would probably be more accurate to say that, assuming that it existed during the initial period of the functioning of the League, that right fell into desuetude and lapsed as the result. Undoubtedly, importance was attached to securing the concurring vote of the Mandatory Power by patient efforts at compromise and accommodation, especially with respect to the language of the Resolutions of the Council. It is therefore probable that a case, repeatedly—though rather vaguely—referred to in the argument of the Government of South Africa before the United Nations, in which the Council of the League of Nations desisted in deference to the attitude of South Africa from a proposed course of action, is not wholly apocryphal. There were bound to be a number of cases of that nature. However, these do not tell the whole story. In other—and probably more frequent—cases unanimity was achieved for the reason that the Mandatory Power adapted its attitude to the general sense of the Council, or, in some cases, for the reason that it decided not to participate in the meeting at which the Council accepted the Resolution. It is probable—we cannot put it higher than that—that it adopted that course because it deemed it preferable to open disagreement with an otherwise unanimous Council or to a public debate before an antagonistic and practically unanimous Assembly. From this point of view there is a distinct

measure of unreality in the insistence on the absolutely unanimous vote in the Council. The Council was not a mere voting machine.

It is of interest to note that Professor Quincy Wright, in the most exhaustive treatise on the subject of mandates, comes to the following conclusion : "Thus it is possible that a resolution dealing with a particular mandatory might be effective over the adverse vote of that mandatory. On the other hand, it may be thought that the Council in dealing with mandates acts in an administrative rather than a quasi-judicial character, in which case absolute unanimity might be required. It is probable that the character of the particular question before the Council would determine the matter but up to date there has always been absolute unanimity." (*Mandates under the League of Nations* (1930), p. 132. A similar view is expressed on p. 522.) However, as already suggested, the Council, in passing resolutions on mandates, acted essentially in a quasi-judicial capacity. Apart from procedural safeguards, there is probably no basic difference between the judicial and the administrative application of the law. As shown, the circumstance that resolutions had in fact been accepted by absolute unanimity throws no decisive light on the legal position here examined. When Professor Wright stated—a statement subsequently repeated by other well-informed commentators (see Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), p. 175)—that as a matter of fact decisions of the Council in the matter of mandates were unanimous, the statement, if we disregard the occasional abstention of the Mandatory Power from participation in the meetings, was on the face of it correct. But, as shown, it was clearly intended only as a statement of fact, not of law. That fact is open to varying—and divergent—legal construction.

There is thus in the practice of the Council no conclusive factor which is apt to override the basic legal considerations to which I have referred above, namely, that in an instrument such as the Covenant of the League of Nations the general requirement of unanimity is not in itself sufficient to displace the principle that a party cannot be judge in its own case ; that the requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle ; and that nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed. This principle ought to be kept prominently in mind when it is a question of the supervised State claiming the right to frustrate by its own vote the legal efficacy of the supervision. The effectiveness of international obligations may not be the only governing consideration

in the interpretation of treaties seeing that the parties occasionally intend to render them less effective than is indicated by their apparent purpose. But it is a consideration which cannot be ignored. In so far as the principle *nemo judex in re sua* is not only a general principle of law, expressly sanctioned by the Court, but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application. This, too, is a general principle of law recognized by civilized States. There is therefore no sufficient reason for assuming that if the Permanent Court of International Justice had been called upon to apply its ruling in the Twelfth Advisory Opinion to the question of unanimity in connection with the supervisory function of the Council in the matter of mandates, it would have abandoned the principle there enunciated. It may be strange that ten years after the dissolution of the League this Court should be confronted with the same question, but this is not a valid ground for departing from that principle. There is, it may be added, no reason why the Court should not interpret the Covenant of the League as it existed in 1945. The determination of rights validly acquired under treaties or statutes which have lapsed is a frequent occurrence in judicial practice. There is no occasion for any excess of judicial caution in this respect. Moreover, in the present case the Court interprets primarily the Mandate which, as it repeatedly stated in its Opinion of 1950, continues to exist.

I cannot say that I have arrived without hesitation at my conclusion on this aspect of the question or that I would have been prepared to base my affirmative answer to the question put by the General Assembly solely on this ground. I am impressed by the doubts voiced in this connection by Judge Klaestad in his Separate Opinion. For we ought to attach due weight to the general rule of unanimity in the Covenant and the fact that there is no explicit case on record in which the Council affirmed its right to give a valid decision in face of a formal objection of the interested mandatory State. At the same time, I must attach equal —and, I believe, decisive— weight to the general principle as here outlined and as acted upon by the Court itself in the Twelfth Advisory Opinion; to the preponderant practice of the Council of the League in a sphere not confined to the settlement of disputes; and, above all, to the custom—to what in English practice is referred to as a constitutional convention—according to which the Mandatory States never in fact exercised any right of veto. Also, I have some doubts as to the existence of any vested right of South Africa to an immutable system of voting in face of actual or potential changes in the practice of the League of Nations on the subject of the voting procedure. There is no doubt that, in the

course of time and without any formal amendment, the rule of absolute unanimity ceased to be a factor to which there was invariably attached decisive importance. This, in addition to the practice outlined above, is shown by the gradual adoption of such practices as passing of resolutions by way of a "vœu" or recommendation by simple majority ; by treating some substantive matters as being questions of procedure ; by considering abstention as absence ; and by the practice of majority voting in Committees. When in 1937 Members of the League of Nations expressed their view as to whether absolute unanimity of the Council was required for a request for an Advisory Opinion, a large majority of those who formulated their attitude denied the existence of any such requirement. This was so although in this case there were reasons of some cogency for maintaining the rule of absolute unanimity having regard to the principle that States cannot be compelled, directly or indirectly, to bring their disputes before the Court. A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization. This being so, although I am not prepared to say that the main contention of South Africa was wholly unfounded, I cannot accept it as being legally correct.

For these reasons, my conclusion is that the proposed Rule F is not inconsistent with a correct interpretation of the Opinion of the Court of 1950 inasmuch as it is based on the view that the opposing vote of the mandatory State could not in all circumstances adversely affect the required unanimity of the Council of the League of Nations.

* * *

Question 2 : *Has the General Assembly the Power to Proceed by a Voting Procedure other than that laid down in Article 18 of the Charter ?*

Although the Court has decided that it is not necessary for it to consider the South African contention in so far as it is based on the notion that the absolute unanimity of the Council of the League was required for the validity of its decisions, it has not thereby disposed of the issue before it. For there remains the possibility, foreshadowed in the Request for the present Opinion, of alternative voting procedures other than absolute unanimity or the two-thirds majority of Rule F. The General Assembly expressly asked the Court to indicate what other voting procedure should be followed in case it finds that Rule F is inconsistent with its Opinion of 1950. There may be a qualified unanimity (i.e., one

not including the vote of the Administering State), or some kind of majority half-way between unanimity and two-thirds such as a majority of three-fourths or four-fifths, or any kind of majority which includes certain States or groups of States such as the States represented on the Trusteeship Council or such of these States as administer Trust Territories. Can it be said that all these procedures, as well as that of absolute unanimity, are ruled out for the reason that they are constitutionally inadmissible having regard to the Charter of the United Nations and the fact that the only voting procedure permitted to the General Assembly is that of simple majority or of a two-thirds majority ? Is it legally possible for the General Assembly, in any circumstances, to adopt a voting procedure different from that laid down in the Charter, namely, simple majority or a two-thirds majority? Is it legally possible for it to determine that a certain type of question shall be decided in the future by any of the alternative voting procedures as outlined above ? If it is legally possible for the General Assembly to adopt any of these voting systems and if Rule F, which replaces the unanimity rule by a two-thirds majority, is not, upon examination, shown to represent the closest possible approximation to the procedure of the Council of the League of Nations, then there arises in an acute form the question of its compatibility with the Opinion of the Court given in 1950. What is the answer to these questions ?

To put it in different words, must Rule F be regarded as approximating "as far as possible" to the procedure of the Council of the League for the reason that under the voting system of the Charter no other voting procedure save that of simple majority or a two-thirds majority is possible or permissible ? Did the Court have that limitation in mind when it used the expression "as far as possible" ? That this was so was repeatedly asserted during the debates in the General Assembly and in the Committee for South-West Africa. It is a problem which is essential to the whole question. Its examination—and an answer to it—cannot be avoided on the ground that a positive answer constitutes a juridical impossibility. The General Assembly did not consider it in that light for, as stated, it specifically asked the Court to say what should be its alternative voting procedure in case the Court should give a negative answer to the main question put to it. Neither can the answer to the constitutional aspect of the question be taken as self-evident by way of "construction" in the sense that as the Court held that the supervision must lie with the General Assembly, the General Assembly can resort for that purpose to a procedure no other than that laid down in the Charter, and that by adopting Rule F it followed the procedure of the Council of the League as far as possible. To do so is to beg the question. Neither do I think it permissible to avoid it because of

the difficulty raised by a baffling practice and by conflicting considerations of principle.

Principle would seem to suggest that it is not legally possible for the General Assembly to decide—whether by an ordinary majority or a two-thirds majority—that any question or category of questions, or all questions, shall be in the future decided by a majority of three-fourths or four-fifths or by a unanimous vote. The reasons for that view are persuasive. If the General Assembly were to make any such decision, it would be depriving some, as yet undetermined, Members of the General Assembly of the right, safeguarded by the Charter, to have a matter determined by a two-thirds majority in which they participate. If that is so, then it would appear that the General Assembly is not legally in the position to adopt any such special procedure of voting even in pursuance of an Advisory Opinion of the Court. Any such change must be the result of an amendment of the Charter. This view is strengthened by jurisprudential considerations of obvious cogency :

The size of the majority required for the validity of the decisions of a corporate political body is not a mere matter of technical convenience or mathematical computation. It is expressive of the basic political philosophy of the organization. A study of the preparatory work of the Conference of San Francisco, including that of the Dumbarton Oaks proposals, shows that the adoption of the existing system of voting was the result of prolonged deliberation. In any case it now forms part of the law of the Charter. Unlike in the League of Nations, the basic philosophy of the Charter of the United Nations is, to put it in a negative form, that of the rejection of the rule of unanimity. There is not a single provision of the Charter which prescribes or authorizes for voting in the General Assembly the requirement of unanimity or any kind of majority other than a simple or two-thirds majority (although, significantly, there is in Articles 108 and 109 a provision for a majority which must include permanent Members of the Security Council). It is outside the purpose of this Opinion to enquire into the reason and objects of that system of voting based on the rejection of unanimity or anything approaching it. It suffices to say that the system as adopted is in accordance with the structure of the United Nations conceived as an entity existing, as it were, independently of its Members and endowed with a personality of its own—one aspect of which is vividly illustrated by the Opinion of the Court in the *Injuries* Case—as distinguished from the League of Nations which in acting, by virtue of the principle of unanimity, by agreement rather than by majority, bore the character of an association of a different character.

Principle would seem to demand that whenever the basic instrument of a corporate political body prescribes the manner in which its collective will is to be formed and expressed, that basic instrument is in this respect paramount and overriding and nothing save a constitutional amendment as distinguished from legislative action can authorize an alternative procedure of voting. On that view it would not seem to matter, in the case of the United Nations, whether the action is taken in pursuance of the objects of organization, or in pursuance of a function accepted under some extraneous instrument such as a treaty. Such function must in any case lie within the orbit of its competence as laid down in the Charter. For the organization cannot accept the fulfilment of a task which lies outside the scope of its functions as determined by its constitution. Thus, for instance, if two or more States were to confer by treaty upon the General Assembly certain functions in the sphere of pacific settlement—e.g., by appointing an arbitration commission or by deciding itself the disputed issue—and if the treaty provided that these functions shall be fulfilled by a three-fourths or four-fifths majority or qualified unanimity, principle would seem to suggest that the General Assembly cannot act in that way. It cannot override a seemingly mandatory provision of the Charter by the device of accepting a task conferred by a treaty. It might otherwise be possible to alter, through extraneous treaties, the character of the Organization in an important aspect of its activity.

These were probably the reasons—although they do not seem to have been expressed in articulate language—which made some Members of the United Nations insist that in giving its Opinion in 1950 the Court must have envisaged the voting procedure of the General Assembly such as it is and must have ruled out the possibility of its being adapted to the governing requirement that the degree of supervision must not exceed that under the System of Mandates. In doing so, they were able to point to the Advisory Opinion No. 12 on the *Interpretation of the Treaty of Lausanne* in which the Court appeared to have laid down the principle that a political body entrusted with a decision by virtue of an extraneous instrument can proceed in the matter only in accordance with its own procedure of voting. If that view, so cogently supported by principle and, apparently, by the Court, is correct, then, clearly, Rule F cannot be challenged on the ground that it is tainted by an avoidable failure to approximate to the voting procedure of the Council of the League. It means, to put it in different words, that Rule F is a correct interpretation of the Opinion of 1950 for the reason: *(a)* that the absolute unanimity rule, even if it were correct, could not be given effect having regard to the binding character of the voting procedure of the Charter; and *(b)* that, for the same reason, it was not legally possible for the General Assembly to

contemplate or to adopt any alternative procedure falling short of absolute unanimity.

* * *

However, although the view as here outlined seems to be supported by principle and practice, there are opposing considerations both of practice and principle. In fact, the Permanent Court of International Justice, after enunciating in the Twelfth Advisory Opinion the rule which seems to go one way, qualified it in the same Opinion in the opposite direction. It began by rejecting the view, put forward by Great Britain, that the unanimity rule as laid down in Article 5 of the Covenant, contemplated only the exercise of powers granted in the Covenant itself. It said: "The fact that the present case concerns the exercise of a power outside the normal province of the Council, clearly cannot be used as an argument for the diminution of the safeguards with which, in the Covenant, it was felt necessary to surround the Council's decisions" (Series B, No. 12 p. 30). It thus seems to have adopted the view, which I have described as seemingly being in accordance with principle, that a political body can act only in accordance with the procedure as laid down in its constitution. However, after having said that, the Court proceeded to qualify the apparent general rule. It said: "On the other hand, no one denies that the Council can undertake to give decisions by a majority in specific cases, if express provision is made for this power by treaty stipulations" (at p. 30). Again, after referring to the binding character of the voting procedure of a "body already constituted and having its own rules of organization and procedure", it qualified that statement by adding: "unless a contrary intention has been expressed" (at p. 31).

In thus qualifying the major principle which it enunciated and on which it acted, the Court was in fact able to rely—although it did not refer to—on some substantial practice of the League of Nations. Of that practice the Rules of Procedure adopted by the Assembly and the Council of the League provide a significant example. Article 5 (1) of the Covenant laid down as follows: "Except when otherwise provided in this Covenant or by the terms of the present treaty, decisions of any meeting of the Assembly, or of the Council, require the agreement of all the Members represented at the meeting." However, the Rules of Procedure, subsequently framed with respect to both the Assembly and the Council, effected in this matter an important—though at first sight inconspicuous—change. In Rule 19 (1) of the Rules of Procedure of the Assembly the words of Article 5, paragraph 1, of the Covenant were reproduced with a significant modification. In place of the words "by the terms of the present treaty" there were substituted the words "of *a* treaty". Article 8, paragraph (1), of the Council's Rules of Procedure

made the same change. In the Rules of Procedure of the Council adopted on May 26th, 1933, this aspect of the matter was expressed even more clearly. Article 9 of the revised Rules provided as follows: "Except where otherwise expressly provided by the Covenant, or by the terms of any other instrument which is to be applied, decisions at any meeting of the Council require the agreement of all the Members of the League represented at the meeting."

Moreover, in a large number of treaties adopted subsequent to the Peace Treaties and in some cases expressly accepted by the Council, provision was made for voting by some kind of majority as distinguished from unanimity. This applied in particular to the "Minorities Treaties" which all contained provisions allowing the Council to proceed by a majority of votes in proposing modifications to these treaties. Similar provisions were incorporated in some other instruments such as Article 4 of the Declaration of November 9th, 1921, of the Principal Allied Powers concerning Albania; Article 15 of the second Geneva Protocol of March 14th, 1924, concerning the economic rehabilitation of Hungary; Article 14 of Annex 2 and Article 4 of Annex 3 of the Memel Agreement of May 8th, 1924, between the Principal Allied Powers and Lithuania; Article 9 of the Financial Agreement of 9 December, 1927, between Bulgaria and Greece; Article 7 of the Agreement of 20 October, 1921, concerning the non-militarization and neutralization of the Aaland Islands; Article 8 of the Locarno Pact of October 16th, 1925; Article 28 (3) of the Agreement on Financial Assistance of 2 October, 1930. And, of course, there were numerous provisions to that effect in the various Peace Treaties to which, as stated, express reference was made in the Covenant. There was no disposition among authors who commented in detail upon the amended Rules of Procedure and the provisions of these treaties to question their propriety in any way (see Schücking-Wehberg, *Die Satzung des Völkerbundes*, 3rd ed., Vol. I (1931), pp. 517, 521; Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 226, 227; Stone in *British Year Book of International Law*, 14 (1933), pp. 33-35).

Having regard to the practice of the League of Nations and to the important qualification of the apparent major principle expressed by the Court in the Twelfth Advisory Opinion, as well as to considerations of a practical character, it cannot be said, by way of an absolute rule, that in no circumstances may the General Assembly act by a system of voting other than that laid down in the Charter. There is no room for any emphasis of language suggesting that any such modification of the voting procedure is a juridical impossibility. Frequent practice of the League of Nations accomplished that juridical impossibility and the Court expressly gave it its approval. On the other hand, in view of the persuasiveness of the contrary considerations outlined above, it does not seem to me permissible to go as far as the Rules of Procedure of the Assembly

or the Council of the League—or, indeed, the Court itself in the Twelfth Advisory Opinion—went in this respect and to hold that a modification of the system of voting is permitted every time when the Organization acts under a treaty other than its own constitutional Charter. The correct rule seems to lie half-way between these two solutions. The available practice and considerations of utility point to the justification of a rule which recognizes in this matter a measure of elasticity not inconsistent with the fundamental structure of the Organization. Within these limits, it is in my view a sound legal proposition that such modification is permissible under the terms of a general treaty, in the general international interest, and in relation to institutions and arrangements partaking of an international status—in particular, in cases in which the General Assembly acts in substitution for a body which has hitherto fulfilled the functions in question. This is the position in the present case. While the powers of the General Assembly in the matter are to be exercised primarily in pursuance of the Charter as interpreted by the Court in its Opinion rendered in 1950, and in particular of Articles 10 and 80, they are also to be exercised in pursuance of the continuing system of Mandates whose obligations were declared by the Court to be binding upon the Union of South-West Africa in respect of the territory which continues to be held under the international Mandate assumed by her in 1920. In view of this, there is room, as a matter of law, for the modification of the voting procedure of the General Assembly in respect of a jurisdiction whose source is of a dual character inasmuch as it emanates both from the Charter and the Mandate. In so far as considerations of international interest constitute a legitimate factor in the situation, they do so with much cogency in a situation which concerns the exercise of an international trust in respect of a territory which is endowed with an international status, which is the subject of an Opinion of this Court, and which has been the cause of international friction.

The question which calls for an answer is whether in the present case there exists a treaty of a character as described above. The words of the Opinion of 1950 seem to suggest a negative answer inasmuch as the Opinion lays down that "the competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter" (at p. 137). However, the passage must be read not in isolation but in the general context of the Opinion and in the light of the dual character of the source of the supervisory function of the General Assembly. The true meaning of the passage in question is that Article 10 of the Charter confers upon the General Assembly the competence to fulfil the functions as derived from the international instrument which establishes the international status of the territory in question, namely, the Mandate. It is the Mandate which is the original source of the

powers of the General Assembly. The competence to apply the Mandate is derived from Article 10.

It follows from what has been said above that there is no warrant for considering as a dogma, for which no proof is required and with regard to which any contrary evidence can be ignored, the rule that under no circumstances may the General Assembly act under a voting procedure other than that laid down in Article 18. This being so, what are the modifications of the voting procedure of the General Assembly which may properly be contemplated in this connection ? It is clear that any application of the principle of absolute unanimity—which in any case would be ruled out by virtue of the answer given above to Question 1—is inadmissible under the legal principle here formulated for the reason that it offends against a fundamental tenet of the constitution of the United Nations, namely, the abandonment of the doctrine of unanimity. For the same reason there would seem to be no room for a system of qualified unanimity not including the vote of the administering State—a system which would be open to the additional objection that it would place South Africa in some ways in a better position than that obtaining under the procedure of the Council of the League. For the number of States required for unanimity in the General Assembly is about four times as large as in the Council of the League.

Yet there was—and there is—room for exploring the practicability of voting procedures lying half-way between qualified unanimity and a two-thirds majority. This Opinion is not the appropriate occasion for an examination of these solutions. There may be an element of artificiality in some of them inasmuch as they must of necessity leave out of account the differences in the composition of the General Assembly and the Council of the League. The discussions on the General Assembly show a somewhat disturbing absence of attempts to explore some of the more practicable possibilities—though this fact may perhaps be explained by the repetitive and rigid adherence on the part of the Government of South Africa, an adherence unrelieved by alternative proposals, to the notion of absolute unanimity. In particular, there is room for the consideration of a solution consisting, on the analogy of Articles 108 and 109 of the Charter, in qualifying the requirement of a two-thirds majority, as laid down in Rule F, by the additional requirement that it must include either all the Members of the Trusteeship Council other than South Africa or all its Members other than South Africa administering Trust Territories. I am not prepared to say that some such solution, couched in the very language of Article 18 of the Charter, would be inconsistent with it. There is only limited merit in a judicial interpretation intent upon extracting every ounce of rigidity from a written constitution or in simplifying the issue by concentrating exclusively on extreme

solutions. Thus, while unanimity, absolute or qualified, may be entirely alien to the spirit of the Charter and as such inconsistent with it, this does not apply to alternative solutions falling short of unanimity. In particular, when the General Assembly takes over functions from a body whose procedure it is enjoined to follow as far as possible, it seems to me reasonable to explore, in a spirit of accommodation free from exaggerations of language, other solutions appopriate to the situation and not basically inconsistent with the Charter.

Accordingly, in so far as Rule F fails to provide for practicable modifications of the voting procedure of the General Assembly, not inconsistent with the fundamental principles of the Charter of the United Nations on the subject, I might, if not prevented by my answer to Question 3, feel bound to hold that Rule F does not approximate as far as possible to the voting procedure of the Council of the League and that in so far as it involves a higher degree of supervision it fails to conform with the Opinion rendered in 1950. However, I cannot so hold for the reason that my answer to Question 3 is that, as the decisions of the General Assembly are not of a legal effect equal to that of the decisions of the Council of the League, Rule F does not involve a degree of supervision exceeding that in force under the Mandates System and that it therefore constitutes a correct interpretation of the Opinion rendered by the Court in 1950.

* * *

Question 3: *Do the decisions of the General Assembly possess the same legal force in the system of supervision as the decisions of the Council of the League of Nations?*

The final, and in my view, decisive question is whether it cannot correctly be said that Rule F is in accordance with the Opinion of the Court rendered in 1950 for the reason that what South Africa is now asked to accept are majority decisions which are not binding or not fully binding in place of decisions which were binding—which means in effect that she is asked to accept a system of supervision which, far from being more exacting, is much less so. Even if it is assumed that she was not bound by decisions of the League Council to which she did not agree and that she could prevent any such decision from coming into force, can it not be said that she is not

bound or not fully bound by the decisions of the General Assembly for the simple reason that these are not binding or not fully binding ? If the Court were to accept that argument, it would have to reject the assertion that Rule F implies a degree of supervision in excess of that obtaining under the System of Mandates. There would be such excess of supervision if the decision of the General Assembly reached by a two-thirds majority had the same legal and binding force as unanimous resolutions of the Council of the League of Nations. On the other hand, if the position is in fact that, while the supervision by the General Assembly exceeds that of the Council of the League of Nations inasmuch as it is exercised by a majority vote of two-thirds and thus deprived of the safeguards of unanimity, it is at the same time less exacting inasmuch as it is exercised by means of decisions of a character less binding than those of the Council of the League of Nations—if that is the position, can it not be fairly held that there is established a rough equivalence of supervision which brings Rule F within the terms of the ruling of the Court in its Advisory Opinion rendered in 1950 ? My view is that that contention is fully relevant to the present case and that it is substantially correct.

Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres, it may be said, by way of a broad generalisation, that they are not legally binding upon the Members of the United Nations. In some matters—such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses—the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them. This is so although Rule F and the General Assembly's request for the present Opinion both refer to "decisions" which, in ordinary connotation, signify binding expressions of will. In fact, the request of the General Assembly and the special Rule F, in referring to "decisions", contemplate decisions in their wider, somewhat non-technical, sense as used in Article 18 of the Charter of the United Nations. The intended reference is to Resolutions generally, a generic term which, although it does not occur in the Charter, has found an accepted place in the practice of the United Nations. Now "resolutions" cover two distinct matters : They cover occasionally decisions which have a definite binding effect either in

relation to Members of the United Nations or its organs or both, or the United Nations as a whole. But normally they refer to recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation.

This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council. This is so as a matter both of existing law and of sound principles of government. The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory. There is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory. Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly has no legal power to legislate or bind its Members by way of recommendations, but, for reasons stated, also to cogent considerations of good government and administration.

In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged. There are numerous examples of express refusal on the part of the Administering Authority to comply with a recommendation. This occurred, for instance, with regard to the recommendation of the Trusteeship Council at its Third Session (A/603, *Official Records of the General*

Assembly, Third Session, Suppl. No. 4, p. 31) which considered that the existing tribal structure in Tanganyika is an obstacle to the political and social advancement of the indigenous inhabitants—a recommendation which the Administering Authority rejected on the ground that "the great mass of the people everywhere are strongly attached to their tribal institutions and in most cases offer strong resistance to any suggestions of serious modification" (*Report for 1948*, p. 52). When the Trusteeship Council recommended that consideration be given to the introduction of a system of universal suffrage applicable to all inhabitants of Western Samoa (A/933, *Official Records of the General Assembly*, Fourth Session, Supplement No. 4, p. 58) the Administering Authority informed the Council that "it would be entirely wrong to force on the Samoans any radical change in their customs since the introduction of universal suffrage at this stage would be incompatible with that respect for Samoan culture to which it and the Government of Western Samoa are equally urged by the Trusteeship Council" (Document A/1903/Add. 2, p. 9). When the Trusteeship Council recommended in respect of Nauru that the long-term royalty investment funds should not necessarily be limited to Australian Government securities, but should be invested freely in the best interest of the Nauruans, the Administering Authority explained why it was unable to act upon the recommendation (A/933, *Official Records of the General Assembly*, Fourth Session, Suppl. No. 4, p. 77, A/1306, Fifth Session, Suppl. No. 4, p. 134). When the Trusteeship Council recommended the reconsideration of the head tax in the Pacific Islands, the Administering Authority explained why in its opinion this was a satisfactory and desirable form of tax under the economic and political conditions prevailing in the Trust Territory (S/1358, p. 13; S/1628, p. 15: Reports of the Trusteeship Council to the Security Council).

* * *

I have elaborated at what may appear to be excessive length a point which seems non-controversial, namely, that recommendations of the General Assembly are not binding. I have done it by reference to recommendations which are relevant to the issue now before the Court, namely, the recommendations with respect to Trust Territories. They are so relevant although, of course, the territory of South-West Africa is not a Trust Territory. However, unless adequately explained and qualified, this statement of the legal position is bound to be incomplete to the point of being misleading. For reasons stated at the end of this Opinion, although I am basing my answer to this question on the view that the decisions of the General Assembly do not possess the same legal value

as those of the Council of the League, I consider it essential to explain and to qualify this aspect of the present Separate Opinion. It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly in the matter of trusteeship or otherwise addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that therefore they cannot be regarded as forming in any sense part of a legal system of supervision.

In the first instance, not all the resolutions of the General Assembly in the matter are in the form of recommendations addressed to the Administering Authority. They are often, in form and in substance, directives addressed to the organs of the United Nations such as the Trusteeship Council or the Secretary-General. As such, they are endowed with legal validity and effect. They are measures of supervision of a force comparable with the legal effects of such acts of the General Assembly as the election of members of the Trusteeship Council or the confirmation of the Trusteeship Agreements. A survey of the resolutions passed by the General Assembly in the sphere of trusteeship shows the frequency of this aspect of the supervisory function of the General Assembly.

However, even in relation to the Administering Authority the question of the effect of the decision of the General Assembly cannot accurately be answered by the simple statement that they are not legally binding. In general it is clear that as the General Assembly has no power of decision—as distinguished from recommendation—imposing itself with binding force upon the substantive action of the Member States, its Resolutions have *per se* no binding force in relation to the Administering State. Thus that State is not bound to comply with any specific Resolution recommending it to undertake or to abstain from any particular legislative or administrative action. As stated, no considerations of practical persuasiveness permit any different interpretation of the existing law on the subject. I have referred to cases in which the Administering Authority has expressly declined to act upon the recommendation addressed to it. Its right to do so has never been challenged. What has been challenged—and, I believe, properly challenged—is its right simply to ignore the recommendations and to abstain from adducing reasons for not putting them into effect or for not submitting them for examination with the view to giving effect to them. What has been questioned is the opinion that a recommendation is of no legal effect whatsoever. A Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic

and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation ; they have been acknowledged as such by the Administering Authorities. This appears with some clarity from the searching discussion at the Sixth General Assembly in 1952 which followed upon the presentation by the Secretary-General, in pursuance of a previous recommendation of the General Assembly, of a series of documents entitled *Information on the Implementation of Trusteeship Council and General Assembly Resolutions relating to Trust Territories* (Documents A/1903 ; A/1903/Add.1 ; A/1903/Add.2 ; October 1952. In Resolution 436 (V) of 2 December, 1950, the General Assembly requested the Secretary-General to report to it on the measures taken by the Administering Authorities to implement the Resolutions of the General Assembly and the Trusteeship Council and if there had been no action on the part of an Administering Authority in respect of any particular Resolution to set forth the reasons given concerning that matter). While pointing to the difficulties in the way of giving effect to some of the recommendations and while affirming their own final responsibility and their own right of ultimate decision, various delegations of the Administering States made no attempt to assert that these recommendations were *bruta fulmina* devoid of any element of legal obligation. Thus at the Sixth General Assembly, in the course of the debate of the Trusteeship Committee, the representative of the United Kingdom stated as follows : "The United Kingdom considered that, in cases where the Trusteeship Council and the General Assembly had adopted Resolutions concerning the Trust Territories, they were perfectly entitled to be informed of the decisions taken by the Administering Authorities in regard to them." (245th Meeting of 12 January, 1952 ; *Sixth General Assembly*, IVth Committee, p. 295.) Although, as stated, the Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of an organ of the United Nations, they are not in this respect devoid of an element of legal obligation. In practically all of them the Administering Authority undertakes to collaborate fully with the General Assembly and the Trusteeship Council in the discharge of their functions, to facilitate periodic missions, and the like. Such collaboration, which is a matter of legal duty, is initiated by decisions of the organs of the United Nations.

Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administrated by virtue of the principles of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.

Moreover—and for similar reasons—even if the view is adopted that the effect of a decision of the General Assembly is no greater than its moral force, a decision thus conceived still constitutes a measure of supervision. A system of supervision devoid of an element of legal obligation and legal sanction can nevertheless provide a powerful degree of supervision because of the moral force inherent

in its findings and recommendations. It will be noted—and the matter is not without significance—that the Advisory Opinion of 1950 lays down not only that the new system must not add to the legal obligations of South Africa; it says that the degree of supervision must not exceed that obtaining under the League of Nations. The phrase "degree of supervision" used in the Advisory Opinion of 1950 does not refer necessarily or exclusively to supervision exercised by means of legally binding or enforceable pronouncements. Moral reprobation following upon non-compliance with a valid recommendation adopted in conformity with the Charter may provide a means of supervision as potent or more potent than a legal sanction.

This absence of a purely legal machinery and the reliance upon the moral authority of the findings and the reports of the Mandates Commission were in fact the essential feature of the supervision of the Mandates System. Public opinion—and the resulting attitude of the Mandatory Powers—were influenced not so much by the formal Resolutions of the Council and Assembly as by the reports of the Mandates Commission which was the true organ of supervision. In legal theory the Mandates Commission was no more than a subsidiary and expert organ of the Council which received and approved its reports and which occasionally softened their impact by the use of diplomatic language intent upon not offending the susceptibilities of the Mandatory Power. The Commission could not communicate directly with the Mandatory Powers and was often reminded of the limitations of its authority. Its representatives who appeared before the Council often acknowledged those limitations and deprecated any intention of exceeding them. But it was a fact which was generally recognized and of which judicial notice must be taken that the actual scrutiny of the conduct of the Mandatory Power rested with the Mandates Commission. Yet no legal sanction was attached to non-compliance with or disregard of the recommendations, the hopes and the regrets of the Commission. The legal sanction of the judicial supervision by the Permanent Court of International Justice, although forming part of all Mandates, was never invoked. The occasional public and detailed discussions before the General Assembly and the Council, which influenced powerfully public opinion and the conduct of the Mandatory, were in pursuance of the reports of the Mandates Commission.

There are two reasons why I have considered it essential to elaborate the point—which in a sense seems to put in doubt the grounds of my own final conclusion—that decisions of the General

Assembly in the matter of territories administered under the principles of trusteeship have, after all, some legal and certainly some moral effect and that they may therefore be regarded as a factor in the legal system of supervision in which the system of voting is relevant :

In the first instance, the preceding observations show that I have not reached the final conclusion without some hesitation and without having fully weighed the correctness of an opposite conclusion, which is that although the decisions of the General Assembly have no full legal effect they are nevertheless a weighty factor in the system of supervision and that therefore the procedure of the voting by which they are reached is decisive for the purpose of the Opinion of the Court.

The second reason is that, after full allowance has been made for the necessity of stating what is the inexorable legal position resulting from the very nature of "recommendations", it is not admissible to give currency to an interpretation, without qualifying it in all requisite detail, which gratuitously weakens the effectiveness of the Charter. It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly—one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations—and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence.

These considerations, as well as actual practice, prevent me from basing my conclusion on the proposition that the decisions of the General Assembly have no binding effect at all. However, there is no escape from the fact that they are of a legal potency lower than that implicit in the Resolutions of the Council of the League. To that fact I must attach decisive importance. It is unreasonable to claim that decisions of distinctly more limited legal value than that inherent in the decisions of the Council of the League of Nations must be reached by the same exacting and rigid system of voting. The fact that some resolutions of the General Assembly in the matter of trusteeship and elsewhere have a definite legal effect does not alter decisively the normal situation. This being so, I come to the conclusion, with regard to Question 3, that Rule F constitutes a correct interpretation of the Opinion of the Court given in 1950.

* * *

Accordingly, while I have reached the final result on grounds different from those underlying the Opinion of the Court, I concur in its operative part for the reason :

(1) that, in so far as the doubts as to the correctness of Rule F were prompted by the contention that the vote of the General Assembly on reports and petitions from South Africa is subject to the rule of absolute unanimity on the ground that this was the rule obtaining in the Council of the League of Nations, there is doubt whether such rule can correctly be held to have been in actual operation at the time of the dissolution of the League in the Council of the League acting as the supervisory organ of the Mandates System ;

(2) that, in so far as it is contended that the vote of the General Assembly on these questions might be subject to some other procedure of voting more exacting than a two-thirds majority, though falling short of absolute unanimity, Rule F is nevertheless in accordance with a correct interpretation of the Opinion of the Court given in 1950. This is so for the reason that the decisions of the General Assembly in the meaning of Rule F do not possess a degree of legal authority equal to that of the decisions of the Council of the League of Nations. In view of this, although adopted through a less stringent voting procedure, they cannot be held to involve a degree of supervision exceeding that which obtained under the Mandates System. These considerations would also apply if, contrary to the conclusion (1), it could be held that the decisions of the Council of the League on the subject required absolute unanimity.

(Signed) H. LAUTERPACHT.