SEPARATE OPINION OF SIR HERSCH LAUTERPACHT

While I am in general agreement with the Opinion of the Court, I have concurred in it subject to reservations both with regard to the scope of the operative part of the Opinion and the reasons adduced in support of it. Moreover, I feel it my duty to elaborate in more detail certain questions relating to the main problem confronting the Court.

I

There arises in the present case a preliminary issue which is to a large extent responsible for the division of the Court and which is connected in a significant manner with the exercise of its advisory function.

The request for the present Advisory Opinion of the Court is stated in apparently general terms. It runs as follows: "Is it consistent with the Advisory Opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly Resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the territory of South West Africa?" Thus put, the question does not seem to refer to any specific situation. In view of this, it has been suggested—a suggestion to which the Court, rightly in my view, has declined to accede—that the reply of the Court must be of a general character unrelated to the events and providing no answer to the difficulty which underlay the request for the Opinion. Yet it is clear from the documents transmitted to the Court by the Secretary-General that in asking the Court for an Opinion on the question whether oral hearings of petitioners on matters relating to the territory of South West Africa are consistent with the Opinion of the Court of 11 July 1950, the General Assembly was referring not to this question in general but to one aspect of that question as it results from a particular situation. The gist of that situation is that, while the General Assembly has with practical unanimity approved the Opinion of the Court of 11 July 1950, the Union of South Africa has declined to accept it as expressing the correct legal position and that it has refused to comply with its principal obligations in respect of the supervision of the legal régime of the mandated territory of South West Africa as ascertained by the Court in its Opinion of 11 July 1950. In particular, it has declined to provide the supervising authority with annual reports and to lend its assistance by forwarding, commenting upon, or participating in the examination of written petitions

submitted to the Committee on South West Africa. It is on account of that situation that the Court has been requested to give the present Advisory Opinion. So far as I am aware, no suggestion has been made from any quarter that the Committee on South West Africa is or should be entitled to grant oral hearings even if the Union of South Africa fulfils her obligations as Mandatory in the matter of annual reports and petitions. It cannot be reasonably assumed that in framing its request the General Assembly intended no more than to obtain the confirmation of a proposition which has not been disputed and which is not at issue. The General Assembly could not have intended to confine the task of the Court to an academic exercise not requiring any notable display of judicial effort.

This being so, the Court cannot answer the question put to it without direct reference to a situation of which a complete picture is presented in the documents which have been sent to it by the Secretary-General and of which it must also otherwise take judicial notice. Moreover, that particular situation is set out in the very terms of the request for an Advisory Opinion. The request expressly refers to Resolution 749 A (VIII) of 28 November 1953 which, in its recitals, includes an account of the attitude adopted by the Union of South Africa. Even if the Court were to ignore the official documents, minutes and reports submitted to it by the Secretary-General, the wording of the request, in embodying Resolution 749 A (VIII), must be held to give, in considerable detail, a picture of the problem confronting the General Assembly. It is clear, therefore, that there is no warrant in the present case for extracting from the wording of the request for the Opinion of the Court all possible element of generality and abstraction with the object of producing an answer which is entirely academic in character.

There occurs in the Advisory Opinion of 28 May 1948 on the *Conditions of Admission of a State to Membership in the United Nations* a passage which, when read in isolation, seems to give support to a view contrary to that here advanced. In that case the Court said : "It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it ; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances." (*I.C.J. Reports 1947-1948*, p. 61.) That passage seems to lend colour to the suggestion that the Court ought also in the present case to answer the question put to it without reference to the circumstances which prompted the General Assembly to make the request. However, on reading the relevant paragraph as a whole it is clear that the passage quoted is not germane to the present issue. The Court was on that occasion concerned with the objection that "the question put [to it] must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court". The Court rejected that contention on the ground that it "cannot attribute a

political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision" and that "it is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body". There followed the sentence quoted at the beginning of this paragraph. It will thus be seen from this bare recital that the passage in question is not relevant to the issue now before the Court.

At the same time, while I am in agreement with the present Opinion of the Court as to this aspect of the matter, I do not consider that the question put to it by the General Assembly can accurately be answered by way of a simple affirmative. The difficulty arises from the fact that the General Assembly, although actually desirous of an answer of the Court bearing upon a specific situation, cast its request in an apparently general form unrelated to that situation. This being so, a bare affirmative answer does not seem to me to meet the exigencies of the case. It is a matter of common experience that a mere affirmation or a mere denial of a question does not necessarily result in a close approximation to truth. The previous practice of the Court supplies authority for the proposition that the Court enjoys considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its advisory function effective and useful. Thus, for instance, in the *Jaworzina* case (Series B, No. 8, p. 50) the Court amplified the question submitted to the Court. Although the request for an Advisory Opinion in that case seemed to be confined to the frontier region of Spisz, the Court came to the conclusion that it must express an opinion on the other parts of the frontier in so far as the delimitation of the frontiers in the entire region may be interdependent. In the case concerning the *Competence of the International Labour Organisation*, it restated and limited the question put to it (Series B, No. 3, p. 59). In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement*, the Court held that as the request for its Opinion did not state exactly the question upon which the Opinion was sought, "it is essential that it should determine what this question is and formulate an exact statement of it" (Series B, No. 16, p. 14). In the field of the contentious procedure the previous jurisprudence of the Court as formulated in its Judgment No. 11 on the *Interpretation of Judgments Nos. 7 & 8* (pp. 15, 16) contains authority for the proposition that the Court, for the purpose of the interpretation of its Judgments —a matter of some importance for the purposes of the present Advisory Opinion designed to interpret a previous Opinion—does not consider itself as bound simply to reply "yes" or "no" to the propositions formulated by the parties and that "it cannot be bound by formulae chosen by the Parties concerned, but must be able to take an unhampered decision".

Undoubtedly it is desirable that the request for an Advisory Opinion should not, through excess of brevity, make it necessary for the Court to go outside the question as formulated. Reference may be made in this connection to suggestions bearing upon possible developments in the procedure followed by the General Assembly in making requests for an Advisory Opinion of the Court (see Sir Gerald Fitzmaurice in *Transactions of Grotius Society*, 38 (1952), p. 139). However, the absence of the requisite degree of precision or elaboration in the wording of the request does not absolve the Court of the duty to give an effective and accurate answer in conformity with the true purpose of its advisory function. For these reasons I consider that, having regard to the apparently general form in which the request for the Opinion is framed, the Opinion of the Court in the present case could not properly be couched in terms of "yes" or "no" but ought to have been given in relation both to the specific situation underlying the request for the Advisory Opinion and to the powers of the Committee on South West Africa irrespective of that situation. An answer which concentrates on only one of these two aspects may well be such as either to ignore the true issue before the Court or to open the other for yet another interpretative Opinion.

It may be convenient if, in order to illustrate the above aspect of the present Separate Opinion, I reverse the customary order and give my own version as to what ought to be the answer of the Court in the present case:

(1) It may or may not be consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners on matters relating to the territory of South West Africa.

(2) In circumstances in which there is present the requisite co-operation on the part of the Mandatory complying with his obligation to send reports and transmit petitions to the supervising authority as envisaged in the Opinion of 11 July 1950, it is not consistent with that Opinion to grant oral hearings to petitioners.

(3) It is consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners from that territory whenever, and so long as, owing to the absence of such co-operation on the part of the Mandatory, the Committee feels constrained, in order to fulfil the duty entrusted to it by the General Assembly, to use sources of information other than those which would be normally available to it if the Mandatory were willing to assist the Committee in obtaining information in accordance with the procedure as it existed under the League of Nations.

It will be seen that on the main issue, as formulated under (3), my view is substantially identical with that of the operative part of the Opinion of the Court. I differ from it inasmuch, in consequence of the generality of its answer, the latter may be interpreted as meaning that the Committee on South West Africa is entitled to grant oral hearings even if there is present the necessary co-operation on the part of the Union of South Africa. Any such finding would, in my view, be unwarranted and inconsistent with the Opinion of 11 July 1950.

II

I now propose to examine the main substantive question which is relevant to the answer of the Court, namely, whether oral hearings are consistent with that qualifying clause of its Opinion of 11 July 1950 which laid down that "the degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". That qualifying clause was in the nature of an elaboration—a necessary elaboration—of the governing consideration which underlay that Opinion, namely, that in the absence of a new arrangement agreed to by the Union of South Africa her obligations and her position in the matter of supervision were, in principle, to continue unaltered. No other object can properly be attributed to that qualifying clause. In particular, no intention can reasonably be imputed to the Court to crystallize in absolute terms and in every detail the degree of supervision and the procedure obtaining under the Mandates System. The object was to preserve the degree and the procedure of supervision not as an end in itself or because of any immutable virtue inherent in it, but merely as a means of obviating an extension or diminution of the obligations of the Union of South Africa as a Mandatory. If, as I believe to be the case, the grant of oral hearings does not, upon examination of the entire position ensuing from the attitude of the Union of South Africa, result in any addition to its obligations, then the issue of crystallizing the degree and procedure of supervision cannot properly be deemed to arise.

So far as the language of the above-mentioned qualifying clause is concerned, I have come to the conclusion that normally, i.e., so long as there are available the regular sources of information through annual reports and petitions transmitted by the Union of South Africa in accordance with the Opinion of 11 July 1950, the grant of oral hearings to petitioners would exceed the degree of supervision which applied during the Mandates System and that it would not conform to the procedure followed in this respect, i.e., in the matter of supervision, by the Council of the League of Nations.

Obtaining of information through oral hearings results in a degree of supervision more stringent than that implied in the system of written petitions. Oral hearings were not permitted under the system applied by the Council of the League of Nations. They were expressly disallowed by it on repeated occasions. As will be submitted later on, that attitude of the Council must be viewed in the light of the circumstances which explained its refusal to authorize oral hearings. However, these circumstances, although they are relevant to the more general issue now before the Court, do not alter the fact that oral hearings found no place in the procedure of supervision as applied under the Mandates System. I have little doubt that this would have been the answer—in the nature of a simple and obvious *constatation*—if that question had been asked during the existence of the League of Nations, at the time of its formal demise in 1946, or when the Advisory Opinion of the Court was given in 1950.

Neither have I found it possible to rely to any substantial extent on the view that although the Council of the League did not permit and that although it expressly rejected the procedure of oral hearings, it was *entitled* to grant oral hearings by virtue of its inherent powers in the matter of supervision and that these powers passed from the Council of the League of Nations to the General Assembly of the United Nations in conformity with the Opinion of the Court of 11 July 1950. Any devolution of powers in this respect could take place only subject to the governing rule as laid down in that Opinion, namely, that the degree of supervision by the General Assembly should not exceed that applied under the Mandates System. I find it difficult to accept as a substantial ground for the present Opinion of the Court an interpretation which construes that qualifying rule as referring not necessarily to the system which actually applied but to one which could or might have been applied in certain circumstances. The doctrine of implied powers of the Council might, if resorted to, render meaningless—to a large extent—the rule that there must be no excess of supervision. As the Council of the League, in the exercise of its alleged inherent powers, could introduce any means of supervision not patently inconsistent with the mandate, no means of supervision thus introduced by the General Assembly could conceivably be in excess of the supervision "applied" under the Mandates System. I cannot accept any such interpretation of the Advisory Opinion of 1950 which may go a long way towards reducing its principal qualifying provision to a mere form of words. The word "applied" in the qualifying passage, quoted above, of the Opinion of 1950 means "actually" (and not "potentially") applied just as the words "procedure followed in this respect by the Council" mean the procedure as actually followed and not as it might have been followed.

It may also be borne in mind that there is a distinct element of unreality in relying, in this and in other matters, on the inherent powers of the Council of the League. Such powers, if any, were powers not of an ordinary legislature or executive proceeding by a majority vote. They were powers of a body acting under the rule of unanimity scrupulously observed. There was, as a matter of reasonable estimate, little prospect of the Council, which included the principal Mandatory Powers as its Members, decreeing by an unanimous vote the authorization of oral hearings which encountered the emphatic opposition of these Powers. There is accordingly no persuasive merit in the argument which relies on inherent powers whose exercise hung on the slender thread of unanimity in circumstances such as these.

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While I am of the view that in normal circumstances the grant of oral hearings to petitioners would result in exceeding the degree of supervision as actually applied under the Mandates System and that it would not conform with the procedure followed in this respect by the Council of the League, I believe that both the excess and the departure are of limited compass. This fact, although it does not affect my answer to the more limited aspect of the question here examined, has a bearing upon what I consider to be the proper basis of the Opinion of the Court.

With regard to degree of supervision, it is difficult to deny that oral hearings, as compared with written petitions, result to some extent in exceeding the degree of supervision obtaining under the League of Nations. In so far as oral hearings accompanied by a detailed examination of petitioners add to the reality and the effectiveness of the scrutiny of the conduct of the administering authority—and it is difficult to deny that they do so—they increase the degree of supervision as compared with a system which knows of no oral hearings of petitioners. It has been suggested that as oral hearings may disclose the spurious or fraudulent nature of some petitions, such hearings are to the advantage of the Mandatory and that they do not therefore increase his obligations in the matter of supervision. This argument I find unconvincing. It assumes that fraudulent petitions are the rule, and not the exception.

Similar considerations apply to the question whether oral hearings constitute a departure from the procedure obtaining under the League of Nations. By and large, oral hearings before the Mandates Commission were not admissible under the procedure of the League of Nations and, in fact, they were never resorted to. On the face of it, recourse to oral hearings would therefore constitute a departure

from the procedure of the Mandates Commission and the Council of the League of Nations.

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Admittedly, the above findings ought to be qualified by reference to certain factors which suggest that the departure consisting in the admission of oral hearings is—although real—less radical than appears at first sight. In the first instance, although the Mandates Commission, in compliance with the attitude of the Council of the League, did not grant oral hearings, that practice was not expressive of its view of the usefulness and of the necessity, in some cases, of relying on that procedure. The record shows that the Mandates Commission felt itself free to approach the Council on future occasions with a view to obtaining a modification of its attitude. Secondly, although the Commission as such did not grant oral hearings, its members and its Chairman, in their individual capacity, did in fact grant oral hearings to petitioners in private interviews outside the meetings of the Commission. Although subsequently some fine psychological distinctions were made between the minds of the members of the Commission as influenced outside its meetings and as formed inside the Commission, the reality of that distinction is limited. Thirdly, the refusal of the Council of the League of Nations to authorize oral hearings did not bear any mark of finality. In stating repeatedly that there was no reason, on the occasions before it, to depart from the previous practice, the Council left the door open for a modification of its practice in exceptional circumstances. It is not certain to what extent such possible modifications included the admissibility of oral hearings. In the report accompanying the Resolution approved by the Council on the last occasion when it declined to authorize oral hearings, it was stated that if in any particular circumstances it should be impossible for all the necessary information to be secured with the assistance of the Mandatory Power, the Council could "decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances". (Report approved on 7th March 1927.) It is possible —we cannot put it higher than that—that, having regard to the circumstances which brought about the Resolution, the Council, in referring to "such exceptional procedure", was referring to oral hearings. The particular situations, referred to in the Resolution, may fairly be assumed to arise when, owing to an attitude of total non co-operation on his part, no assistance whatsoever is forthcoming from the Mandatory. Fourthly, it appears from the replies which the Mandatory Powers gave in 1926 and in which they rejected the principle of oral hearings that one of the main reasons for their attitude was the assumption of the continuing co-operation and assistance on the part of the Mandatory. It is

noteworthy that throughout the existence of the League of Nations there were no instances of a Mandatory Power refusing to supply information with regard to a complaint brought before the Mandates Commission. (In the case of the Bondelzwarts rebellion, which has been referred to as an instance of that nature, although the Government of South Africa refused to accept and comment on a report of a local commission of enquiry, the South African administrator of the territory in question was questioned at length by the Mandates Commission in the presence of the South African representative and submitted a detailed memorandum on the subject of the complaint (*Permanent Mandates Commission, Minutes of Third Session*, 1923).)

When, therefore, it is said that oral hearings did not exist under the League and that recourse to them by the Committee on South West Africa would be a departure from that practice, this statement—although strictly true—is a simplification of the situation. This is so not only because the exclusion of the oral hearings was less rigid than cursory examination seems to indicate. This is so mainly because the exclusion of oral hearings was a practice adopted within the orbit of the normal operation of other aspects of the machinery of supervision. These have now ceased to operate in consequence of the attitude adopted by the Union of South Africa. To put it in different words, the departure from the legal procedure involved in the system of oral hearings is substantial only if viewed against the background of the situation as it obtained during the existence of the League when reports and petitions were regularly transmitted by the Mandatory. The departure is less drastic when viewed in the light of the cessation of that system as the result of the attitude of non co-operation as adopted by South Africa. For this reason there is no warrant for treating the practice under the League of Nations as being so unequivocal and decisive as to rule out all other factors of a legal or practical nature.

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The above considerations do not decisively affect my answer to the general question whether oral hearings are consistent with the Court's Opinion of 1950. That question, when answered in the abstract—i.e., without reference to the existing situation underlying the request for the Advisory Opinion—must be answered in the negative. However, as already explained, it is not open to the Court to confine itself to an answer in the abstract. For this reason these considerations are of some indirect importance for the specific question as to whether oral hearings are consistent with the Opinion of 1950 having regard to the actual situation in respect of the territory of South West Africa.

III

As stated, if the Court were not confronted with a situation created by the attitude of the Government of South Africa and if it were merely called upon to reply in the abstract to the question put to it, I would feel bound to answer that the grant of oral hearings constitutes a sufficient addition to the degree of supervision and that it departs sufficiently from the procedure obtaining under the League of Nations to bring it within the two restrictive clauses, referred to above, of the Opinion of 11 July 1950. However, this is not the situation with which the Court is faced. The Court is now called upon to answer not an abstract question, but—primarily—the question as to the consistency of oral hearings with its Opinion of 11 July 1950 in a situation in which the two positive dispositions of that Opinion for securing the international supervision of the Territory have become inoperative. These are the provisions, repeatedly affirmed in the Opinion, referring to the obligation of the Mandatory Power to submit annual reports and to transmit petitions from the inhabitants of the Mandated Territory. They are the basic provisions whose place as such must be kept in mind. For this reason any preoccupation with the two limitative clauses of the Opinion ought not to be allowed to overshadow its main purport. There has been a tendency to describe these limitative clauses as the basic provisions of the Opinion of 11 July 1950. Any such emphasis distorts that Opinion.

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It is submitted that in answering the question put to it against the background of the fact that the two basic provisions of the operative part of its Opinion of 1950 are in abeyance owing to the attitude adopted by the Union of South Africa, the Court must be guided by established principles of interpretation and the applicable general principles of law.

In the first instance, in accordance with a recognized principle of interpretation, its Opinion of 11 July 1950 must, like any other legal text, be read as a whole. It must be read as a comprehensive pronouncement providing for the continuation of the administration and the continued supervision, by the United Nations, of the administration of South West Africa as a Mandated Territory. All other dispositions, injunctions and qualifications of the Opinion of 11 July 1950 must be regarded as subservient to that overriding purpose. The principal means for fulfilling that purpose—namely, annual reports supplied by the Mandatory and written petitions transmitted, commented upon and explained by him before the supervising body—which were in operation under the Mandates System

are now in abeyance owing to the attitude adopted by the Union of South Africa. If the Opinion of 11 July 1950 is read as a whole, then it is impossible, without destroying its effect, to maintain fully and literally provisions qualifying the operation of a system whose main characteristics have become inoperative. It seems unreasonable to uphold fully and literally the limitations of a rule after the possibility of giving effect to the rule itself has disappeared. To do that is to elevate the exception into a rule and to reduce the governing rule to a nullity. A court of law cannot give its sanction to any such simplification of logic. Neither can it avoid its judicial duty by declaring that only a political or legislative body is competent to resolve the conflict which has arisen, as the result of the action of a party, between the overriding purpose of the instrument and its individual provisions and limitations. To resolve that conflict, in the light of the instrument as a whole, is an essential function of a judicial tribunal.

In particular, if we act on the principle that the Opinion of 11 July 1950 must be read and interpreted as a whole, then it is necessary to apply that principle to the interpretation of that clause of that Opinion which lays down that the degree of supervision must not exceed that obtaining under the Mandates System. That clause, properly interpreted, does not rigidly and automatically apply to each and every aspect of supervision. If, owing to the attitude of the Government of South Africa, the degree of supervision as applied under the Mandates System is in danger of being severely reduced with regard to the principal aspects of its operation, it is fully consistent with the Opinion of the Court of 11 July 1950 that in some respects that supervision should become more stringent provided that it can be said, in reason and in good faith, that the total effect is not such as to increase the degree of supervision as previously obtaining. It is in accordance with sound principles of interpretation that the Court should safeguard the operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose. This is, in the present context, the meaning of the principle that that Opinion must be interpreted as a whole. The question is not whether the admission of oral hearings of petitioners implies an excess of supervision with regard to this particular means of supervision. The decisive question is whether, owing to the situation brought about by the Union of South Africa, oral hearings of petitioners would result in an excess of supervision as a whole. It may be admitted that the procedure of oral hearings of petitioners connotes in itself a degree of supervision of a stringency greater than that obtaining in the matter of petitions under the Mandates System. But if, as the result of the attitude of the Union of South Africa, the degree

of supervision is substantially reduced in other respects, then the total effect of the departure here contemplated will not be such as to result in exceeding the degree of supervision as a whole. On the contrary, however effective oral hearings of petitioners may be, they are unlikely to restore to the procedure of supervision the effectiveness of which it is being deprived as the result of the attitude of non co-operation on the part of the Union of South Africa. Thus viewed, the authorization of oral hearings is no more than a specific application of the principle that a legal text must be interpreted as a whole.

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The second principle of law of general import in the present case is connected with the nature of the régime of the territory of South West Africa as declared in the Opinion of 11 July 1950. Inasmuch as that Opinion laid down, by reference to the Covenant of the League of Nations and the Charter of the United Nations, the status of South West Africa—a régime in the nature of an objective law which is legally operative irrespective of the conduct of the Union of South Africa—that status must be given effect except in so far as its application is rendered impossible, in terms of its general purpose, having regard to the attitude adopted by the Union. To that extent there are permissible such modifications in its application as are necessary to maintain—but no more—the effectiveness of that status as contemplated in the Court's Opinion of 1950. It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument—not to change it.

Consequently, there can be no question here of the Union of South Africa having been divested, owing to the attitude adopted by her, of any safeguards which the Opinion of 11 July 1950 provided in her interest as the Mandatory with the view to not increasing her obligations. No countenance can be given to the suggestion that, as the result of the attitude adopted by South Africa, the régime as established by that Opinion of the Court is liable to changes—except in pursuance of the principle that that régime as a whole must be and remain effective. The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law—a question upon which the Court need not express a view—it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to

accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.

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At the same time, and for the same reasons, in so far as the Opinion of 1950 is relied upon for the purpose of upholding literally all the safeguards and restrictions formulated in the interest of the Mandatory, it must, like any other legal instrument, be interpreted reasonably and in accordance with legal principle. The jurisprudence of the Court in the matter of treaties and otherwise provides by analogy some useful instruction in this respect. In the fifteenth Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, the Court formulated the principle that a State cannot avail itself of an objection which would amount to relying on the non-fulfilment of an obligation imposed on it by an international engagement (Series B, No. 15, p. 27). It is not suggested that these principles are directly germane or applicable to the present case. For this is not the case of a treaty—although the Opinion of 11 July 1950 did no more than to formulate a régime resulting from two multilateral conventional instruments, namely, the Covenant of the League of Nations and the Charter of the United Nations. Neither do I suggest that this is technically a case of estoppel—though there is a measure of contradiction, reminiscent of situations underlying estoppel, in the fact that an instrument repudiated by a Government is being invoked for the benefit of that Government. (While the Government of South Africa did not participate in the present proceedings before the Court, in the Fourth Committee of the General Assembly of 1955 it opposed oral hearings in reliance on the Advisory Opinion of 11 July 1950 (Official Records, Fourth Committee, 500th Meeting, 8 November 1955, p. 182).) Finally, I do not attach any decisive importance to the possible submission that this is an instance of a Government claiming to benefit from its own wrong by declining to supply and transmit information which, according to the Opinion of 11 July 1950, it is legally bound to supply and transmit and at the same time resisting the contemplated effort to obtain alternative information. For it may not be easy to characterize precisely in legal terms a situation in which South Africa declines to act on an Advisory Opinion which it was not legally bound to accept but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.

Nevertheless, the above considerations are not wholly extraneous to the case now before the Court. For these are not technical rules of the law of contract or treaties. They are rules of common sense

and good faith. As such they are relevant to all legal instruments, of whatsoever description, inasmuch as their effect is not to permit a party which repudiates an instrument to rely literally on it—or have it invoked for its benefit—in a manner which renders the fulfilment of its purpose impossible. In particular, these principles are relevant to the question—which ought not to remain unanswered—as to the legal basis of a judicial decision which by way of interpretation substitutes a measure of supervision or an act of performance for one repudiated or frustrated by the party affected by the instrument in question. What, apart from the general principles of interpretation as set out above, is the authority for the proposition that the Court may replace one means of supervision by another, not previously authorized—nay, expressly disallowed? This, it may be objected, is not the way in which courts normally proceed in the matter of contracts between individuals (though in many countries courts, when confronted with a situation in which a substantive provision of the instrument governing succession is in danger of being frustrated owing to an obscurity of expression or an event subsequently arising, will vary the original disposition in such a way as to make it approximate so far as possible to the general intention of its author. It will be noted that the supervision by the United Nations of the mandate for South West Africa constitutes the most important example of succession in international organization).

However, this is not a case of a contract or even of an ordinary treaty analogous to a contract. As already pointed out, this is a case of the operation and application of multilateral instruments, as interpreted by the Court in its Opinion of 11 July 1950, creating an international status—an international régime—transcending a mere contractual relation (*I.C.J. Reports 1950*, p. 132). The essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected. Their continuing validity implies their continued operation and the resulting legitimacy of the means devised for that purpose by way of judicial interpretation and application of the original instrument. The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law—the existing law as judicially interpreted—finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the

provisions of an ordinary treaty—which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.

IV

It is now necessary to enquire to what extent the situation with which the General Assembly—and the Court—are confronted call for and permit the application of the principles of law as here outlined. To what extent has the refusal of the Union of South Africa to submit annual reports and to transmit and comment on written petitions in conformity with the obligations established in the Opinion of 11 July 1950, created a gap so serious in the system there contemplated as—in conformity with these principles—to render legitimate alternative sources of information not exceeding the total degree of supervision envisaged in that Opinion? These principles are that the Opinion of 1950 must be read as a whole; that it cannot be deprived of its effect by the action of the State which has repudiated it; and that the ensuring of the continued operation of the international régime in question is a legitimate object of the interpretative task of the Court.

Having regard to the non co-operation of the Mandatory, what is the position in the matter of the sources of information available to the supervising agency and indispensable for the proper working of the system of supervision and the implementing of the Opinion of the Court of 11 July 1950?

In the first instance, the annual report of the Mandatory, as provided by the Opinion of the Court of 1950 and as forming an integral part of the procedure of the League of Nations, has disappeared. It has been replaced by a conscientious and well-documented volume prepared by the Secretary-General and entitled "Information and Documentation in respect of the Territory of South West Africa" (such as in Doc. A/AC 73 L 3; Doc. A/AC 73/L 7). That volume provides, to a considerable extent, the substance of the report which the Committee on South West Africa submits to the General Assembly. But this is not a document in the same category as a report submitted by the Man-

datory and explained by it point by point, if necessary, at the meetings of the Committee. The supervising authority is thus deprived of an authentic source of information which is one of the two main pillars of the system of supervision. There is a gap here and a resulting diminution of the degree of supervision as previously existing and as envisaged by the Court in its Opinion of 1950. It is consistent with that Opinion to interpret it in a manner which authorizes the filling of that gap—provided that the result is not to increase the total degree of supervision of the system as a whole.

The second main source of information which forms an important part of the system of supervision and to which the Opinion of the Court of 1950 refers in passages of particular emphasis are petitions sent by the inhabitants of the administered territory. Under the League of Nations only petitions in writing were admissible. These, when supplemented by the observations of the Mandatory and the explanations supplied by him in the course of the proceedings of the supervising organ, are a weighty instrument of supervision and an important factor in the formation of the judgment of the supervising authority. As the result of the attitude of non co-operation adopted by the Union of South Africa, the efficacy of that source has been substantially reduced. The Mandatory, who is absent from the meetings of the Committee, provides no comment of his own and does not assist the supervisory body by explanations supplied at its request during or subsequent to its meetings. Moreover, the Mandatory has declined to transmit petitions submitted by the inhabitants of the administered territory. If the procedure of the Mandates Commission were adhered to in this respect, it is difficult to see how written petitions from the inhabitants of the territory could come at all before the Committee on South West Africa. That Committee has now adopted a deliberate change in the procedure obtaining under the Mandates System. The rules of procedure as adopted in 1923 by the League of Nations provided that petitions by communities or sections of the population of mandated territories shall be sent to the Secretariat of the League through the mandatory governments concerned and that any petitions received by the Secretary-General of the League through any channel other than the mandatory government should be returned to the signatories with the request that they should re-submit the petitions in accordance with the above procedure. As the Government of South Africa has refused to transmit the petitions thus received, the Committee on South West Africa has provided in its Provisional Rules of Procedure—Rule 26—that on receipt of a petition the Secretary-General shall request the signatories to submit the petition to the Committee through the Government of South Africa but that if, after a period of two months, the petition has not been received through the Government of South Africa, the Com-

mittee shall regard the petition as validly received. It is also provided that the Committee shall subsequently notify the Government of South Africa as to the conclusions it has reached on the petition. It does not appear that objection has been raised against that particular—and important—departure from the procedure obtaining under the Mandates System.

However, although thus made available to the supervising organ, the written petition no longer fulfils the same function and no longer partakes of the same effectiveness as written petitions examined in the presence and with the co-operation of the Mandatory. It is in the nature of *ex parte* information which may or may not be capable of verification. This does not mean that the written petition examined without the assistance of the Mandatory is without value or that it can never provide a basis for the conclusions of the supervising Committee. But it is clear that it is not the same thing as and that it is a lesser thing than written petitions within the framework of a machinery operating with the participation of the Mandatory.

* * *

The interpretation, in this matter, of the Opinion of the Court of 11 July 1950 is thus confronted with the fact that owing to the attitude of South Africa the potency of the two principal instruments of supervision is substantially reduced and that other means, not fundamentally inconsistent with that Opinion, must be found in order to give effect to its essential purpose. The crucial question which the Court has now to answer is: Are oral hearings one of these means? Are they truly necessary and effective for filling the gap that has arisen? Do they secure the reality of the task of supervision otherwise reduced below the level contemplated by and underlying the Opinion of 1950? I am of the view that, in the circumstances, they fulfil that purpose. Oral hearings contribute one of the tangible elements of supervision which otherwise—i.e., in the absence of other means of supervision—operates in an atmosphere of unreality. Undoubtedly, the information received through oral hearings may be exaggerated, false and misleading. Oral hearings may be abused by fanatics and seekers for self-advertisement. But these difficulties and dangers are also present, and less capable of correction, in the case of written petitions—especially when examined in the absence of the Mandatory. Moreover, it is clear that the importance of oral hearings increases in proportion as the effectiveness of the other instruments of supervision has been reduced as the result of the attitude of the Union of South Africa. If the United Nations were not confronted with the refusal of the Union of South Africa to abide by its obligations as a Mandatory in conformity with the Opinion of the Court of 1950 and if there remained, in their full effectiveness, the other instruments of supervision therein

provided, then the advantages of oral hearings, considerable as they may be and though being, according to some, in keeping with the recognition within the United Nations of the right of oral hearing as a corollary of the fundamental right of petition, would be no more than an improvement on the existing machinery of supervision. They would not be essential to it. In fact, being in the nature of an excess of supervision as it existed under the League of Nations, they would be contrary, on that account, to the Opinion of 1950. But this is not the position with which the Court is confronted. The Court is not here called upon to express a view on the controversial question of the merits of oral hearings in general. The question before it is the necessity for oral hearings in a situation amounting to a substantial drying up of other sources of information.

There is therefore little force in the argument that, after all, oral hearings are not the only source of information. Admittedly, they are not. There are other sources. In particular, written petitions are still available. However, if the effectiveness of these available means has become drastically reduced owing to the attitude of the Mandatory, then it is open to the Committee on South West Africa, as a matter of effectiveness of the instrument which it has to apply, to fulfil that duty by other means.

It may be objected that oral hearings in the absence of the Mandatory are a procedure which amounts to passing of judgment in default upon that authority in its absence and that for that, if no other, reason it constitutes a particularly flagrant excess of supervision. But is that so ? When the Committee on South West Africa examines written petitions in the absence of the Mandatory, that procedure may also be said to amount to passing of judgment by default. The Committee simply informs the Government of South Africa of its conclusions. But it has not been denied that the Committee is entitled to do so and that the rule of procedure which it has adopted for that purpose is in accordance with the Opinion of the Court of 11 July 1950. Moreover, when the supervising authority hears petitioners in person it has the opportunity of checking and verifying their statements by a direct and efficacious method which is not available when written petitions are examined in the absence of their authors.

This, then, is the principal question before the Court. Is the need for oral hearings real ? If permitted, would they, in the situation before the Court, contribute to exceeding the total degree of supervision as circumscribed in the Opinion of the Court of 1950 ? For it is only under the following two conditions that oral hearings of petitioners can be held to be consistent with that Opinion : the need for them must be real in terms of implementing the two

basic provisions of that Opinion of the Court ; secondly, they must not add to the degree of supervision in such a way that in the aggregate it becomes more stringent than under the League of Nations. Oral hearings of petitioners would not be permissible if they were attempted not because of that real need but as an expression of the disapproval of the attitude of South Africa. Any such innovation implying that the Opinion of 1950 has lost its regulating and restraining force would not be permissible. The Opinion of 1950 is not a treaty whose provisions can be discarded for the reason that South Africa has declined to comply with them. It gives expression to an objective legal status recognized by the United Nations and it must be acted upon. But it must be acted upon in a reasonable—and not in a one-sided and literal—manner.

My conclusion is, therefore, that there is a true need for oral hearings in order to supplement sources of information which have become incomplete in consequence of the attitude of the Union of South Africa and that, if adopted, they would not result in exceeding the total degree of supervision as laid down in the Opinion of 11 July 1950. This being so, they must be held to be consistent with that Opinion. They would be so consistent even if the Opinion of 11 July 1950 were in absolute terms, namely, if it did not contain the qualification "as far as possible".

V

In view of the preceding observations I need only refer briefly to the second qualifying clause of the Opinion of 11 July 1950, namely, that "the degree of supervision ... should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". The expression "as far as possible" is a form of words of pronounced elasticity. Its interpretation is a matter of degree. It is "possible" for a system of supervision to continue without reports of the Mandatory, without written petitions accompanied by his comments and explanations, without the representatives of the latter being present at the meetings of the supervisory organ, and without oral hearings filling the gap which has thus arisen. But that would not be a supervision as contemplated by the Opinion of 1950. It would be a supervision falling short not only of the assumption of effectiveness which underlay that Opinion of the Court, but also of what must be regarded as a reasonable measure of effectiveness. It has been suggested that the Committee would meet with no difficulty if it were to abstain from oral hearings of petitioners. Admittedly, there is as a rule no difficulty encountered by doing nothing or little, but this is hardly a reasonable standard by which to gauge the fulfilment of the task of the supervising authority. There is no occasion to go to the extreme length

in thus interpreting away the requirements of satisfactory supervision in deference to a persistent attitude of non co-operation on the part of the Mandatory. There is no general interest involved in weakening the system of supervision so considerably below the level contemplated in the Opinion of 1950. For these reasons I find no difficulty in accepting the view that the saving expression "so far as possible" can properly be relied upon in this case so as to permit oral hearings of petitioners. I cannot accept the argument that the expression "as far as possible" should be reduced to insignificance for the reason that the Opinion of 1950 intended to crystallize the substantive and procedural *status quo* as it then existed. Reasons have been given above why there is no merit in the view that the Court ought to lend its authority to the continued and unaltered maintenance of that *status quo* by upholding the two qualifying clauses of its Opinion of 1950 after the two basic provisions which it thus qualified have ceased to be operative as the result of the attitude of the Mandatory.

* * *

There is one point which requires some explanation in this connection. In its Opinion of 7 June 1955 on the *Voting Procedure*, the Court, in explaining the expression "as far as possible" as being "designed to allow for adjustments and modifications necessitated by legal or practical considerations" (at p. 77)—an explanation which fully covers the issue now before the Court—seemed to give a restricted scope to that expression. It explained that phrase as "indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council" *(ibid.)*. It might thus appear that the Court was limiting the operation of the "as far as possible" principle to the exigencies of the Charter and of the procedure of the General Assembly. It is not believed that this is so. In the case of the *Voting Procedure* the Court was concerned with this particular aspect of the question and it was therefore natural that its reasoning should have concentrated on that issue. There is no reason to assume that it intended to limit generally the apparent comprehensiveness of the clause "as far as possible". Similar considerations apply to those passages of the Opinion of 1955 in which the Court attached importance to stating that the expression "degree of supervision", inasmuch as it related to the "measure and means of supervision" and to "the means employed by the supervisory authority in obtaining adequate information", should not be interpreted as relating to procedural

matters (at p. 72). The correct view is that the issue of oral hearings is both a question of substantive supervision and of procedure. It is clear that a procedural measure may decisively affect the rights and obligations of the parties. There would be a disadvantage in basing the Judgments and Opinions of the Court not on legal considerations of general application but on controversial technicalities and artificial classifications.

VI

There remains the question whether, assuming that there has been created a real gap in the system of supervision and that oral hearings may be instrumental to some extent in filling that gap, the consistency of oral hearings with the Opinion of 11 July 1950 can be ascertained by way of judicial interpretation or whether it can only be decreed, by way of legislative change, by the General Assembly. This question, it is believed, must be answered affirmatively in the light of the general legal considerations outlined above.

There are three possible methods of approach for a court of law confronted with a situation such as the present, namely, that of a party refusing to recognize or to act upon a legal instrument which purports to express the legal obligations of that party and whose validity must, as in the present case, be regarded as continuing:

(1) It is possible to hold that, even if that party refuses to be bound by any of the obligations or limitations of the legal instrument in question, the other party—in this case the United Nations and the Committee on South West Africa are the other party—must fulfil literally and abide by all the restraining provisions enacted for the benefit of the recalcitrant party even if such one-sided application results in reducing substantially the effectiveness of the instrument. Any such method I consider to be unsound.

(2) The second method is to assert that, as the legal instrument in question has been repudiated by one party, a new factual and legal situation has arisen in which the other party is free to act as it pleases and to disregard all the restraints of the instrument. This, I believe, is not the view which the Court can properly adopt. The Opinion of 1950 continues to be the law. It established —or recognized—a legal status of the Territory. It is the law binding upon the Committee for South West Africa.

(3) The third possibility, which appears to me most appropriate as a legal proposition and in accordance with good faith and common sense, is to interpret the instrument as continuing in validity and as fully applicable subject to reasonable re-adjust-

ments calculated to maintain the effectiveness, though not more than that, of the major purpose of the instrument.

Similarly, it is in the light of the general principle as thus stated that there must be considered the contention that if as the result of the attitude of South Africa and the situation which has thus arisen it is necessary to effect changes in the Opinion of the Court of 11 July 1950, such changes must be accomplished by the General Assembly and not by the Court. For it would appear that that argument begs the question. The Court, in finding that oral hearings are consistent with its Opinion of 11 July 1950, is not changing the law as laid down in that Opinion. It interprets it in accordance with good sense and sound legal principle. This in fact was the method which the Court followed in its Opinion of 11 July 1950, when it was called upon to interpret the relevant clauses of the Covenant of the League of Nations and of the Charter of the United Nations. In answering the question as to the existing international legal position of South West Africa it applied the relevant international instruments in so far as this was possible. It did not change the law as contained therein. The essence of that Opinion was that the Court declined to apply literally the legal régime which it was called upon to interpret. It declined to admit that the continuity of the mandatory system meant necessarily that only the League of Nations—and no one else—could act as the supervising authority. On the face of it, the Opinion, inasmuch as it held that the United Nations must be substituted for the League of Nations as the supervisory organ, signified a change as compared with the letter of the Covenant. Actually, the Opinion did no more than give effect to the main purpose of the legal instruments before it. That is the true function of interpretation. The Opinion gave effect to the existing law in a situation in which otherwise its purpose, as the Court saw it, would have been endangered. This is essentially the situation with which the Court is confronted in the present case.

There is one further consideration which must be borne in mind in relation to the suggestion that although the Court cannot declare oral hearings of petitioners to be consistent with its Opinion of 1950, the General Assembly—and the General Assembly only—has the power to do so. The Preamble to the request for the present Opinion begins as follows: "The General Assembly, having been requested by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the territory of South West Africa is admissible before that Committee..." The Court is requested to advise the General Assembly whether, as a matter of law embodied in the Opinion of the Court of 11 July 1950, the General Assembly is entitled to decide that oral hearings are admissible. In view of this, it is hardly possible for the Court to give a negative answer to the question put to it and to say—or imply—that if any change

is required as the result of the attitude of South Africa then that change must be effected by the General Assembly and not the Court. For this is the very question which the Court has been asked to answer. It is not possible for the Court to say that it would be contrary to the Opinion of 11 July 1950 for the General Assembly to authorize oral hearings and at the same time to say, or imply, that the General Assembly may do it. If the General Assembly had felt at liberty to authorize oral hearings regardless of whether such authorization is consistent with the Opinion of 11 July 1950 or not, it would have hardly found it necessary to request the Court to give the present Advisory Opinion. This being so, the Court could not, in the present case, renounce its legitimate function on the ground that the appropriate result can be achieved by the legislative action of the political organ. Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute. The Court cannot properly be concerned with any political effects of its decisions. But it is important, as a matter of international public policy, to bear in mind the indirect consequences of any pronouncement which, by giving a purely literal interpretation of the Opinion of 11 July 1950, would have rendered it impotent in face of obstruction by one party.

In fact, from whatever angle the request for the present Advisory Opinion is viewed, a substantive answer to it seems indicated by reference to general legal considerations such as outlined in this and in the preceding parts of this Separate Opinion. This applies also to that part of the Opinion in which I have come to the conclusion that oral hearings of petitioners would—apart from the situation actually confronting the United Nations—be inconsistent with the Opinion of 11 July 1950 inasmuch as they depart from the system which obtained under the League of Nations. But, as explained, that system was predicated on the fulfilment by the Mandatory of his obligations in the matter of reports and petitions. As the result of the attitude now adopted by the Union of South Africa, that assumption no longer applies. The maxim *cessante ratione cessat lex ipsa* is a trite legal proposition. This circumstance does not affect the propriety and the necessity of its judicial application.

* * *

It is necessary in this connection to refer to the apparent inconsistency between the view which is put forward in this Separate Opinion (and which in effect underlies the present Opinion of the Court) and that on which the Court seems to have based its Opinion

of 18 July 1950 on the *Interpretation of the Peace Treaties (Second Phase)*. In the latter case the Court declined to hold that the failure, contrary to their international obligations, of certain States to appoint representatives to the Commissions provided by the treaties in question for settling disputes justified some alternative method of appointment not contemplated by these treaties. As in the present case, the conduct of the States in question had thus created a gap—in fact, a breakdown—in the operation of the system of supervision contemplated by the treaties. Yet the Court refused to admit the legality of an alternative method designed to remedy the situation. It said :

> "The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing ; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them." (*I.C.J. Reports 1950*, p. 229.)

The resemblance of the two cases is as striking as the apparent discrepancy between the present Opinion of the Court and that in the case of the *Interpretation of the Peace Treaties*. In view of this it is appropriate and desirable to state the reasons, if any, for this seeming departure from a previous Opinion. Without expressing a view as to the merits of the Opinion of the Court on the *Interpretation of the Peace Treaties*, I consider that, in fact, the two cases are dissimilar in a vital respect. The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness—including safeguards to be resorted to in the event of the failure of one of the parties to participate in the procedure of settlement of disputes. This was a case in which the application of the principle of effectiveness in the interpretation of treaties found, in the view of the Court, a necessary limit in the circumstance that the parties had failed—not accidentally, but by design—to render them fully effective. This is not the position in the present case when the Court is confronted with the interpretation of provisions concerning a régime in the nature of an international status of established and continuous operation ; provisions in relation to which the Court, in the Opinion of 11 July 1950 and that of 7 June 1955 on *Voting Procedure*, affirmed in emphatic language the necessity of securing the unimpeded and effective application of the system of supervision in accordance with the fundamental provisions of the Covenant and the Charter ; and with regard to which it qualified the notion of any literal and rigid continuity of the Mandates System by making it obligatory only "so far as possible"—an expression expressly

"designed to allow for adjustments and modifications necessitated by legal or practical considerations" (*I.C.J. Reports 1955*, p. 77).

This being so, the present Advisory Opinion of the Court seems to be fully in accordance with its previous practice of interpreting treaties and other international instruments in a manner calculated to secure their effective operation. For this reason, subject to some doubts as to the formulation of the operative part of the Opinion and as to some aspects of its reasoning such as the extent of the reliance on the implied powers of the Council of the League of Nations, I have no hesitation in concurring in the Opinion of the Court.

(Signed) H. LAUTERPACHT.