SEPARATE OPINION OF JUDGE BASDEVANT

[Translation]

While fully accepting the operative clause of the Opinion, I have, to my regret, reached the same view by a different path from that followed by the Court. I in no way intend any criticism of the latter which, I consider, would be out of place in a separate opinion written by a Judge, but I believe that I should indicate briefly the means by which I am enabled to subscribe to the Opinion given by the Court.

In order to give a reply to the question put to the Court, I feel that it is necessary to consider, in the first place, the operative clause of the Opinion given in 1950. I there find an assertion of the competence of the United Nations in respect of supervision, but no indication of the competent organ or of the way in which its decisions are to be reached. This seems to me to involve reference on these points to the provisions of the Charter, and particularly to Articles 10 and 18, and consequently to involve the conclusion that Rule F, which has been submitted for the Court's consideration, accords with a correct interpretation of the Opinion of 1950.

From this point I pass to a consideration of the reasons on which the Opinion of 1950 was based. Among these I find an assertion of the competence of the General Assembly based on Article 10 of the Charter. Since what is involved is a competence conferred by the Charter, it is quite natural that the Assembly should exercise it in accordance with the provisions of the Charter, in this case, of Article 18. This is what is prescribed by Rule F. The tentative conclusion previously anticipated is thus confirmed.

Is there to be found, in the grounds on which the Opinion was based, any indication of sufficient strength to upset this conclusion ? It is at this point, and at this point only, that it becomes necessary to consider the sentence, quoted by the Assembly's Resolution, from the reasons given in support of the Opinion of 1950, a sentence which has doubtless given rise to the hesitation displayed by the General Assembly, but which, in order to arrive at a correct interpretation of the Opinion of 1950, must be considered with due regard to the place which it occupies in that Opinion.

In this sentence there are two propositions.

The first is, as is clear from its terms, concerned with the determination of the framework within which supervision is to be exercised, with the fixing of limits beyond which supervision should not extend. This is confirmed by the place in the Opinion in which this proposition is to be found ; it appears after a reference to annual reports and petitions. With this purpose in mind, it defines the substance of the obligation to submit to the exercise of super-

vision, which is in consonance with the request for an Opinion addressed to the Court, whereas the Court was not, in 1950, questioned as to the way in which decisions of the General Assembly were to be made. Rule F, which is now submitted for the Court's consideration, makes reference to reports and petitions : it is in this respect within the limits stated by the Opinion. The marking out of those limits is one thing, the fixing of a rule for the making of decisions with regard to reports and petitions is another. The first proposition now being considered is in no way inconsistent with the conclusion as to the compatibility of the Rule so far contemplated.

The second proposition prescribes or recommends that the degree of supervision to be exercised by the General Assembly should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. This doubtless includes the provision to be made for an organ corresponding to the Permanent Mandates Commission, its method of operation and its relationship with the General Assembly. But does it apply to the way in which the General Assembly is to make its decisions—a qualified majority instead of the unanimity prescribed by the Covenant for decisions of the Council of the League of Nations ?

Resolution 904 (IX) of the General Assembly would tend to suggest that it does, since it speaks of voting procedure in connection with Rule F which, by reference to Article 18 of the Charter, adopts the two-thirds majority rule for the making of a decision. But this Resolution cannot furnish any assistance in the interpretation of a sentence in the Opinion of 1950, with regard to the interpretation of which this very Resolution seeks elucidation by the Court.

The word "procedure" is often used to include not only the way in which votes are cast, but also the determination of their weight in the making of a decision. The word "procedure" is then used in a general and a vague sense. Was it such a sense that the Court intended to be given to this word when it referred, in connection with the supervision to be exercised by the General Assembly, to the procedure followed by the Council of the League of Nations ?

If the Court had so intended, it would have constituted disregard by it of the more precise terminology adopted by the Charter in connection with the General Assembly and repeated in connection with the Security Council, the Economic and Social Council and the Trusteeship Council. The rules governing the way in which the General Assembly is to make its decisions (Article 18) are set out under the heading "Voting", and not under the heading "Procedure" ; under the latter heading, Articles 20 to 22 contain provisions of lesser importance. The limited scope of the word "procedure" is again demonstrated by the fact that, under Article 27 of the Charter, a majority constituted by seven members is sufficient to make decisions on procedural matters, whereas the requirement is greater for the making of decisions on all other matters. It is

difficult to suppose that the Opinion was disregarding this terminology and using the word "procedure" in its general and vague sense.

It is the more difficult in that the classification thus made by the Charter corresponds to a profound reality. The majority rule laid down by Article 18 of the Charter and the unanimity rule prescribed by the Covenant of the League of Nations are something other than rules of procedure ; they determine an essential characteristic of the organs in question and of their parent international institutions. The character of these rules appears to me to be beyond question and, in my view, it provides a decisive element in reaching the answer to be given to the question which has been put.

Furthermore, when the Opinion, in setting forth the grounds on which it was based, stated the proposition now under consideration, it did so in connection with the obligation binding upon the Union of South Africa to submit to supervision exercised by the General Assembly. The Union of South Africa, it was intended to say, is only bound to submit to this supervision in so far as such supervision is effected in accordance with a procedure which conforms as far as possible to that followed in this respect by the Council of the League of Nations. But when, at the close of the discussions in the Assembly, that body proceeds to vote, the Union of South Africa does not take part in the voting in its capacity as a mandatory Power, in pursuance of its obligation to submit to supervision by the General Assembly ; it does so as a Member of the United Nations, and consequently has the rights and duties flowing from the Charter and not those flowing from the Mandate. The Opinion of 1950 was concerned with the obligations of the Union of South Africa by virtue of the Mandate ; it was not necessary in that Opinion to deal with the Union's participation in the decisions of the General Assembly, and the Opinion cannot be interpreted on the basis that that was done.

It may be added that when the Opinion of 1950 stated that, in exercising its supervision, the General Assembly should conform as far as possible to the procedure followed by the Council of the League of Nations, it intended to indicate that the Assembly would, in this connection, have a certain discretion in determining to what extent it was possible for it so to conform. This can be easily understood in respect of decisions as to the organ it would call upon for assistance and as to the form such assistance should take : such matters must be left to the discretion of the General Assembly. The position is entirely different with regard to the way in which the Assembly must make its decisions ; this is not a matter in which it has any discretion. It cannot be open to the General Assembly, depending upon its assessment of what it regards as possible in this connection, to alter what is laid down by Article 18 of the Charter in order to adapt that Article more or less to the methods employed in the League of Nations for the making of decisions of the Council. It cannot have been supposed, and therefore cannot

have been accepted in the Opinion of 1950, that the General Assembly was invested with any such power in the case now under consideration.

These considerations lead me to think that the Opinion of 1950 intended no derogation, in respect of decisions to be made by the General Assembly with regard to reports and petitions concerning the Territory of South-West Africa, from the application of Article 18 of the Charter. The rule submitted by the General Assembly for consideration by the Court refers to this Article ; it therefore appears to me to correspond to a correct interpretation of the Opinion of 1950.

In setting forth the above considerations, I lay no claim to have presented a complete argument. To do so, I should be prepared to adopt parts of the reasoning set out in the Opinion. I have sought only to indicate the general outline of my argument.

(Signed) BASDEVANT.