SEPARATE OPINION OF JUDGE KLAESTAD

I have arrived at the same final conclusion as the Court ; but as my approach to the matter is entirely different, I consider it my duty to state as briefly as possible the reasons upon which I base my opinion.

I. In the Resolution by which the present Request for an Advisory Opinion was adopted, the General Assembly of the United Nations referred to a statement made by the Court in giving the reasons on which its Advisory Opinion of July 11th, 1950, was based—a statement which, for the purpose of answering the Question now put to the Court, calls for a brief comment. After having expressed the view that South-West Africa was still to be considered as a territory under the Mandate of December 17th, 1920, and that the Union of South Africa was under an obligation to submit to the supervision and control of the General Assembly, the Court stated :

> "The degree of supervision to be exercised by the General Assembly should not therefore 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. These observations are particularly applicable to annual reports and petitions."

This statement was made by the Court in connection with its consideration of the international obligations which the Union of South Africa had assumed under the Mandate and which the Union, in the opinion of the Court, continued to have. The General Assembly had, in its Request for an Opinion, asked :

> "Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations ?"

The above-mentioned statement is to be found in the part of the Opinion in which the Court examined this Question relating to the obligations under the Mandate, and when the Court said that the "degree of supervision to be exercised by the General Assembly" should not exceed that which applied under the Mandates System, it was dealing with and referring to the international obligations which the Union of South Africa continued to have, including the obligation to submit to international supervision. As appears from the context, the Court was thereby giving expression to the view that the Union of South Africa should not, as a consequence of a supervision exercised by the General Assembly, be subjected to other or more onerous legal obligations than the Union had under the supervision previously exercised by the League of Nations.

Having due regard to the discussions in the United Nations which preceded the present Request for an Advisory Opinion, including the view expressed by the Union of South Africa, I consider that the task of the Court now is to determine whether decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa would, by the operation of the voting procedure indicated in the Request, subject the Union of South Africa to other or more onerous legal obligations than the Union had previously under the supervision of the League of Nations. On the solution of this question depends, in my opinion, the answer to be given to the present Request.

The determination of this general question necessitates a previous examination of two particular questions relating to

(a) the voting procedure in the competent organ of the League of Nations and in the General Assembly of the United Nations;

(b) the legal effect of decisions taken by the competent organ of the League and by the General Assembly, when applying their respective voting procedures.

II. In accordance with Article 22 of the Covenant of the League of Nations, the supervision of mandated territories was to be exercised by the Council. The Permanent Mandates Commission was to advise the Council on all matters relating to the observance of the mandates. The Assembly had, under Article 3, a general competence to deal with any matter within the sphere of action of the League.

The competence to take decisions with regard to reports and petitions relating to mandated territories was conferred upon the Council. In accordance with Article 5 of the Covenant, these decisions required the agreement of all the Members of the Council represented at the meeting, except in matters of procedure which were decided by a majority. Article 4 prescribed that a Member of the League, not represented in the Council, should be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. Each Member had one vote, including the Member invited to send a representative. By virtue of these rules, the Union of South Africa was entitled to be represented with voting power, when the Council considered matters relating to the Mandated Territory of South-West Africa, and it could, in its capacity as a Member of the League, prevent the adoption of a decision by voting against it.

It has been argued that the rule requiring the agreement of all Members represented at the meeting was subject to an important exception as a consequence of the view expressed by the Permanent Court of International Justice in its Advisory Opinion of November 12th, 1925, concerning the frontier between Iraq and Turkey. It is said that, as a consequence of that Opinion, the vote of a Man-

datory Power should not be taken into account in ascertaining whether there was unanimity, when a question relating to the Mandate of that Power was considered.

The principle enunciated in that Advisory Opinion, namely, that "no one can be judge in his own suit", was found to be applicable in view of the special competence which was conferred upon the Council of the League by the Treaty of Lausanne of 1923—a competence of a judicial character to give a definitive and binding decision in a particular dispute between two States with regard to the final determination of a frontier. As far as I have been able to ascertain, this principle was never extended by the Council to comprise decisions taken by the Council in the course of its supervision of the administration of mandated territories. I am not aware of a single instance in which a resolution concerning reports or petitions was adopted by the Council against the vote of the Mandatory Power.

Article 5 of the Covenant, which lays down the rule of unanimity, makes—apart from matters of procedure—no other exceptions than those "expressly provided in this Covenant or by the terms of the present Treaty". As no such exception was expressly made for matters concerning Mandates, and as the practice of the Council does not disclose any such exception showing that a decision on reports or petitions was ever taken against the negative vote of a Mandatory Power, it is difficult not to conclude that decisions relating to reports and petitions were governed by the general rule of Article 5. It is not for the Court to consider whether the Council would have been justified in modifying the rule of absolute unanimity in matters of Mandates in view of the Advisory Opinion of 1925 or of considerations of reasonableness or general principles of law.

When the Court delivered its Advisory Opinion of 1950, it was not unaware of the fact that the Charter of the United Nations had rejected the principle of unanimity, and when the Court expressed the view that the supervisory functions with regard to the Territory of South-West Africa, previously exercised by the Council of the League, were henceforth to be exercised by the General Assembly of the United Nations by virtue of Article 10 of the Charter, it was implicitly referring to that body with the organization and functions conferred upon it by the provisions of the Charter, including the provisions of Article 18.

In accordance with Article 18, decisions of the General Assembly on "important questions" shall be made by a two-thirds majority of the members present and voting. Decisions on other questions shall be made by a simple majority of the members present and voting. In virtue of the competence conferred upon it by Article 18, § 3, the General Assembly, by Resolution 844 (IX) of October 11th, 1954, adopted a special rule on voting procedure, to the effect

that decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa should be regarded as important questions within the meaning of Article 18, § 2, of the Charter.

It is this difference between the voting procedure in the Council of the League of Nations and in the General Assembly of the United Nations which has given rise to the question now before the Court, namely, whether the Union of South Africa, by the operation of this rule as to a two-thirds majority of the General Assembly, would be subjected to other or more onerous legal obligations than it had previously under the rule of unanimity of the Council of the League. In order to answer this question it becomes necessary to consider the legal effect of decisions taken by the Council of the League and by the General Assembly with regard to reports and petitions concerning the Territory of South-West Africa.

III. As mentioned above, the Council of the League of Nations was governed by the rule of unanimity when voting on matters relating to Mandates. When the Union of South Africa, by a concurrent vote in the Council, gave an expression of its acceptance of a Resolution concerning reports or petitions relating to the Territory of South-West Africa, the Union Government became, by reason of that acceptance, legally bound to comply with the Resolution. This view finds support in the Advisory Opinion of the Permanent Court of International Justice of October 15th, 1931, concerning railway traffic between Lithuania and Poland. The Court expressed the view that the Governments of Lithuania and Poland, by participating in the adoption of a Resolution of the Council of the League, became bound by their acceptance of the Resolution.

As to the legal significance of decisions taken by the General Assembly of the United Nations on questions of reports and petitions, the following considerations appear to be relevant:

In its Advisory Opinion of 1950 the Court stated that the competence of the General Assembly to exercise supervisory functions with regard to a mandated territory and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions within the scope of the Charter and to make recommendations on these questions to the Members of the United Nations. Such recommendations relating to reports and petitions concerning the Territory of South-West Africa shall, as already mentioned, in accordance with the General Assembly's Resolution 844 (IX) of October 11th, 1954, be regarded as important questions within the meaning of Article 18, § 2, of the Charter and therefore be made by a two-thirds majority of the Members present and voting.

Article 18 does not make any distinction between "decisions" and "recommendations". It refers to "decisions" as including "recommendations". These decisions of the General Assembly on

"important questions" are of different categories. Some are decisions with a final and binding effect, such as, for instance, the election of members of the various organs of the United Nations or decisions approving the budget of the Organization by virtue of Article 17. Some other decisions are recommendations in the ordinary sense of that term, having no binding force. Recommendations adopted by virtue of Article 10 concerning reports and petitions relating to the Territory of South-West Africa belong in my opinion to the last-mentioned category. They are not legally binding on the Union of South Africa in its capacity as Mandatory Power. Only if the Union Government by a concurrent vote has given its consent to the recommendation can that Government become legally bound to comply with it. In that respect the legal situation is the same as it was under the supervision of the League. Only a concurrent vote can create a binding legal obligation for the Union of South Africa.

It is true that against a negative vote of the Union Government no decision could be reached in the League, while a decision in the United Nations can be made by a two-thirds majority of the General Assembly without the concurrent vote of that Government. But such a decision (recommendation) adopted by the General Assembly without the concurrent vote of the Union Government does not create a binding legal obligation for that Government. Its effects are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation. But a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation, and it does not in any case involve a binding legal obligation to comply with the recommendation.

IV. As far as the binding force of a decision is concerned, there is thus no difference between the rules on voting procedure in the Council of the League and in the General Assembly of the United Nations. In order to become legally bound to comply with a decision, the Union Government must, in the League as well as in the United Nations, have consented to the decision by a concurrent vote. By the operation of the rules on voting procedure in the General Assembly, the Union Government cannot therefore become subjected, against its will, to other or more onerous legal obligations than it had under the supervision of the League.

This view—that a concurrent vote of the Union is necessary for the extension of its obligations under the Mandate—is confirmed by a consideration of another nature, deduced from the Advisory Opinion of 1950. In reply to the last Question put to it in the Request for that Opinion, the Court expressed the view :

> "that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations".

In the reasons given in support of this answer, the Court stated :

> "The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate."

The international status of the Territory is thus determined, *inter alia*, by the provisions of the Mandate which lay down, in Articles 3-6, the particular obligations of the Union of South Africa as the Mandatory Power, such as obligations with regard to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries, and the obligation to make an annual report containing full information with regard to the Territory.

An extension of any of these obligations relating to the administration of the Territory and the supervision of that administration would affect the international status of the Territory and would consequently, in accordance with the previous Advisory Opinion, necessitate an agreement between the Union of South Africa and the General Assembly. Such an extension would not be legally binding upon the Union unless its consent has been given.

For these reasons I am of opinion that an application of the rule on the voting procedure indicated in the Request does not conflict with the previous Advisory Opinion and may be considered as corresponding to a correct interpretation of that Opinion.

(Signed) Helge KLAESTAD.
