DISSENTING OPINION OF VICE-PRESIDENT BADAWI AND JUDGES BASDEVANT, HSU MO, ARMAND-UGON AND MORENO QUINTANA

[Translation]

We regret that we are unable to concur in the Opinion of the Court and we believe it necessary to state the main grounds upon which we dissent.

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The Court has usefully defined the meaning which it attaches to the question which has been put to it by the General Assembly.

In the first place, it has stated that it understood this question as having reference to the hearing, by the Committee on South West Africa, of persons having submitted written petitions. This clarification is useful, for in the debates in the Committee on South West Africa and in the Fourth Committee there were those who discussed what have been called "oral petitions".

We shall place ourselves on the same ground as the Court, namely, that of the hearing of a person who has previously submitted a written petition in due form. We shall merely make one observation in this connection. If it be considered that the grant of a hearing to one who has submitted a written petition is not consistent with the Opinion of 1950, the same will be true *a fortiori* of permission to submit an oral petition. If, on the other hand, the hearing of one who has submitted a written petition is found to be consistent with the Opinion of 1950, that view will leave open the question whether it is consistent with that Opinion to permit the submission of an oral petition.

It is further stated in the reasoning of the present Opinion, though not repeated in the operative part, that, while the question submitted to the Court in terms refers to the grant of oral hearings by the Committee on South West Africa, the Court interprets this question as meaning : whether it is legally open to the General Assembly to authorize the Committee to grant oral hearings to petitioners. We accept this interpretation, which seems to us to follow from the fact that the Committee having requested the General Assembly to decide whether or not the oral hearing of petitioners is admissible before that Committee, the General Assembly considered it desirable to seek the opinion of the Court.

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The request for an Opinion submitted to the Court on December 19th, 1955, in stating the question put to it, refers solely

to the compatibility with the Opinion of 1950 of a decision to grant hearings to petitioners. "Is it consistent with the advisory opinion ... [of 1950] for the Committee on South West Africa ... to grant oral hearings to petitioners... ?" It is thus compatibility with the Opinion of 1950 which is to be appraised, and nothing else. The Request for an Opinion, in this respect, contains an exact statement of the question upon which an Opinion is sought, as required by Article 65, paragraph 2, of the Statute. One can understand why the General Assembly should have put the question on this ground, since it had previously adopted the Opinion of the Court as the basis for its action. In putting the question in this way, it has submitted a legal question to the Court.

It is therefore in the Opinion of 1950 that the Court must seek the elements for its reply.

The General Assembly has not asked it to seek them in factual or legal considerations outside the scope of that Opinion, in particular in the attitude of the Union of South Africa, nor to take note of the latter's refusal to submit to the exercise of supervision by the United Nations. The Request for an Opinion makes no allusion either to that attitude or to that refusal. These facts were subsequent in date to the Opinion of 1950, which was confined to describing the legal position in the light of then existing factors : they cannot therefore constitute factors to be considered in ascertaining the meaning and scope of that Opinion.

The Resolution setting forth the Request for an Opinion twice refers to Resolution 749 A (VIII). The first reference, in the preamble, is designed to serve as an indication of a function assigned to the Committee on South West Africa ; the second, in the operative clause, has as its purpose the identification of that Committee. There is nothing there which expressly or impliedly indicates the General Assembly's intention to request the Court, which is called upon to determine the meaning and scope of its Opinion of 1950, to have regard to all that is stated in Resolution 749 A (VIII), and particularly to what is said concerning the attitude of the Union of South Africa, its refusal to co-operate in the exercise of supervision and the sentiments of the General Assembly in this regard. The facts thus set out and the regret expressed with regard to them in Resolution 749 A (VIII) are not repeated in the Request for an Opinion : it is not there stated that the Court should itself take note of these facts, still less that it should evaluate them for the purpose of arriving at a conclusion as to the compatibility of the grant of hearings to petitioners with its Opinion of 1950.

It is not, moreover, clear how a resolution adopted by the General Assembly in 1953 could, by referring to facts subsequent to the Opinion of 1950, enlighten the Court as to the meaning and scope of that Opinion which is precisely what is now the issue.

It may furthermore be observed that it is only if it should be found that a proper interpretation of the Opinion of 1950 leads to the conclusion that the hearing of petitioners is not consistent with that Opinion, that the question may arise whether the refusal of the Union of South Africa to submit to the exercise of supervision constitutes a new element such as nevertheless to justify such a hearing. That would be neither to have regard to the meaning of the Opinion of 1950 nor to ascertain whether the hearing of petitioners is or is not consistent with that Opinion, which is a purely legal question and, as such, one suitable for submission to the Court. It would be to enquire whether that refusal constitutes a ground justifying the supervising authority in departing in this respect from observance of the Opinion of 1950. Such a question might be asked, but the considerations upon which a reply to it might be based would go beyond the scope of legal considerations and would involve political elements the appraisal of which is not within the domain of the Court, and such a question has not been put to it.

To confine attention to the question which has been put and to the terms in which it has been stated, where that statement is an exact one, is the normal course to adopt and one which accords with the respective rôles of the General Assembly, which has put the question, and of the Court, which is called upon to give its reply. That was the course adopted by the Court in the case relating to *Conditions of Admission of a State to Membership in the United Nations* (I.C.J. Reports 1947-1948, p. 61). We would gladly repeat to-day what the Court then said, namely, that it "is not concerned with the motives which may have inspired [the] request".

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Since the reply to the question now put to the Court is to be sought in the Opinion of 1950, it is necessary to seek, in the statements made in that Opinion—in anything which may shed light upon the ideas inspiring it and in the references which it contains—the elements which will determine that reply.

In answer to the first question then put to the Court, the Opinion of 1950 stated "that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920". The operative clause of the Opinion there found that the previously existing situation was maintained.

Having been questioned, in the second place, as to the continued existence and as to the nature of the international obligations upon the Union of South Africa under the Mandate for South West Africa, the Court, in order to reply to this question, made use, both in quotations on which it relied and in the considerations which it directly stated, of expressions such as: "continue to

administer the mandated territories in accordance with their respective Mandates", "will continue to administer the Territory scrupulously in accordance with the obligations of the Mandate", "to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate", "recognition by the Union Government of the continuance of its obligations under the Mandate". Passing then to the mandatory Power's obligation to submit to supervision, the Opinion, in its reasoning, again adopted this idea of continuity and of maintenance of the *status quo* when it said: "It cannot be admitted that the obligation to submit to supervision has disappeared", as the result of the disappearance of the Council of the League of Nations, which together with other considerations upon which there is no need to dwell here, led the Court to "the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations ... and that the Union of South Africa is under an obligation to submit" to such supervision: again the Court speaks of "supervisory functions exercised by the League" and "taken over by the United Nations".

This notion of continuity, of maintenance of the *status quo*, is found again in the Opinion when it sees the right of petition admitted by the Council of the League of Nations as a "right which the inhabitants of South West Africa had ... acquired" and one which the Opinion regarded as "maintained" by Article 80 of the Charter.

The same idea appears again, still more clearly, when the Opinion, in view of the fact of the substitution of the United Nations for the League of Nations in respect of the exercise of supervision, draws this consequence: "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". This wording corresponds exactly to the proposition recalled above, to the effect that "the supervisory functions exercised by the League would be taken over by the United Nations".

In harmony with these considerations set out in its reasoning, the Opinion states, in its operative clause, that "the Union of South Africa continues to have" its obligations as a mandatory Power, both in respect of substantive obligations and in respect of the exercise of supervision.

There are thus many statements in the Opinion which express the idea of the maintenance of the former régime in respect of the position of the Territory of South West Africa, the international obligations upon the Union of South Africa as a mandatory Power and the exercise of supervision.

Is this observation confirmed by the spirit of the Opinion of 1950 ?

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The spirit of the Opinion, which may serve as a guide to its interpretation and therefore to the reply to be given to the question relating to compatibility with that Opinion which has now been submitted to the Court, may be found from a consideration of its purpose and of the circumstances in which it was requested and given.

The purpose of the Opinion of 1950 was to reply to the questions then put to the Court by the General Assembly. These questions related to the status of the Territory of South West Africa and to the obligations of the Union of South Africa. It was necessary to determine with regard to each point whether the former position was maintained. The Court's reply was in the affirmative.

The General Assembly had not requested the Court to determine and to say whether the General Assembly had a part to play in this connection, nor to what extent and in what way such a rôle was to be performed. The Court was faced with this question only incidentally, because recognition of the continuance of the Mandate and of the corresponding obligations on the Union of South Africa might encounter objections based on the disappearance of the supervisory organ, the Council of the League of Nations. The Court then pointed out the importance of "the administration of mandated territories" being "subject to international supervision", but it did not then seek to determine what the powers of the supervising authority should be. It simply sought to ascertain whether, after the disappearance of the League of Nations, there still existed an international authority qualified to exercise this function of supervision. It found it in the General Assembly of the United Nations, and having reached this solution on the basis of the provisions of the Charter, it went no farther : it was unnecessary for it to define the powers with which the Council of the League of Nations had been invested or to have recourse to the notion of a transfer to the General Assembly of the powers of the Council of the League of Nations. The provisions of the Charter were sufficient for the Court to give expression to the main idea to which it held, namely, the need for the maintenance of the supervisory function, that is to say, the idea of continuity.

The position, at the time when the Opinion of 1950 was requested and given, was that resulting from the disappearance of the League of Nations and the termination of the Covenant under which the Mandate for South West Africa had been entrusted to the Union of South Africa. This situation raised the question whether the Mandate continued to exist and what were the obligations of the Union of South Africa in this connection. It was to this question that the

Court was called upon to reply, and the main feature of its reply was that there had been no change but that there was continuity.

An important element of the situation then existing was referred to on a number of occasions by the Court in the reasoning of its Opinion : that is, the willingness expressed by the Union of South Africa to regard itself as continuing to exercise its Mandate, to continue to administer the Territory in accordance with the provisions of the Mandate and to continue to render reports to the United Nations.

The spirit of the Opinion thus fully confirms what is expressed by its letter : the continuity of the Mandate and of the international obligations of the Union of South Africa which result therefrom.

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What is the meaning of this continuity, of this maintenance of the *status quo* ? Does it, so far as the point at present under consideration is concerned, refer to the supervision which was in fact applied during the existence of the League of Nations or does it refer to the powers possessed by the Council of the League of Nations in the matter of supervision, whether any such powers had been actually exercised by the Council or not ?

In dealing with the question to which it gave its reply in 1950, the Court was not required to express an opinion as to the powers of the Council of the League of Nations. The Opinion of 1950 nowhere alludes to these powers or seeks to determine what they were or what were their limits ; nor is it concerned with the question whether or not they were exercised by the Council.

A consideration of the powers with which the Council was invested would have been necessary if the Court had accepted the idea of the United Nations' succession to the League of Nations, of the transfer of powers from one organization to the other. The Court did not overlook this particular aspect of the problem.

Resolution 24 (I) adopted by the General Assembly on February 12th, 1946, had made provision with regard to the method to be adopted for the examination of any request "that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character". Here appeared the idea of a possible transfer of powers entrusted to the League of Nations. But the course indicated by that Resolution was not followed. The Union of South Africa has not submitted to the General Assembly any request that the latter should assume the "powers entrusted" to the Council of the League of Nations. The Opinion of 1950 did not therefore place itself on the same ground as Resolution 24 (I). On the contrary, it stated in its reasoning that "the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United

Nations nor expressly assumed by that organization". The Opinion does not base itself on the idea of succession, on the idea of the transfer of powers.

The Court, unattracted by the idea of succession, of the transfer of powers, based itself on the objective elements of the situation—the importance of international supervision under the Mandates System as well as the provisions of the Charter of the United Nations. It was in these elements that the Court, in its Opinion of 1950, found "decisive reasons" for the view that "the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations".

At no time did the Court base itself on the extent of the powers which the Council of the League of Nations exercised or could have exercised. An opportunity was in fact offered to it to embark upon such a consideration when it referred to the innovation brought about in 1923 by the institution of the right of petition. But the Court did not raise the question whether that had constituted the exercise of a power belonging to the Council of the League of Nations or whether it was the result of an express or tacit agreement. Here, as elsewhere, the Opinion did not seek to determine with what powers the Council was invested. It limited itself to stating the existing situation for the purpose of asserting the maintenance of the right of petition, just as it had referred to that situation in saying that the General Assembly was qualified to exercise the supervisory functions "previously exercised by the League of Nations"—the functions previously "exercised" and not those which it was entitled to exercise or could have exercised.

This reference to the existing situation, to the exercise of the function of supervision as it had been exercised during the time of the League of Nations, is again encountered when the Opinion—defining the proper exercise of that same function by the General Assembly of the United Nations—states, not as a new or isolated proposition but as a consequence of what had previously been said with regard to the continuance of the obligations of the Union of South Africa and the competence of the General Assembly, that "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System". The words are "which applied"—not "which might have been applied" or "which was applicable". These words refer to the practice which was established, whether that practice remained within or went beyond the powers conferred upon the Council. The established practice is the only criterion.

This is, moreover, implicitly confirmed by the remainder of the sentence, if not by its letter, at least in its spirit. This second part of the sentence introduces an element of flexibility in the domain of procedure, when it states 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 General Assembly is thus invited to conform to the procedure previously followed, but it is given certain discretionary freedom, as indicated by the words "as far as possible". This restriction is of value after the principle has been laid down that the degree of supervision should not exceed what it was in the former practice. But if the idea be accepted as a basis that the General Assembly has the same powers as the Council of the League of Nations, and if it be admitted that the latter had the power to modify its procedure in respect of supervision, the General Assembly would *ipso facto* have the same power of modifying its procedure : the second part of the sentence in question would then be pointless, since it purports to confer on the General Assembly a discretionary power which, on that interpretation, the Assembly would already possess. Indeed, by the idea of conformity stated in that sentence, it would limit the freedom of the General Assembly, a freedom which on that interpretation should remain unimpaired.

This confirms that the Opinion, when speaking of supervision, intended to maintain the former practice and not to refer to powers which might subsequently be held to have belonged to the Council, although the latter never exercised them. It was a little late in 1950, and it is still later at the present time, to seek to list such powers for the purpose of ascertaining those of the General Assembly.

The maintenance of the former régime, that is the dominant idea in the determination by the Opinion of 1950 of the status of the Territory of South West Africa and of the obligations of the Union of South Africa, particularly of that obligation which relates to the point at present under consideration : the obligation to submit to the exercise of supervision.

It follows from the maintenance of the former régime that the functions of the General Assembly, in its capacity as supervising organ, are limited to those which the Council of the League of Nations in fact exercised before its disappearance. The General Assembly cannot introduce any method of supervision which the Council did not in fact establish, even if it could have done so, in accordance with the terms of the Covenant and of the Mandate. Any such new method would exceed "the degree of supervision which applied under the Mandates System".

This stabilization of the former régime may be explained by the fact that the Court was unable to find any decision that it should be modified at the time of the disappearance of the League of Nations. That no such decision was taken may be fully explained by the expectation that the mandatory States would conclude Trusteeship Agreements, an expectation to which the Court referred in its Opinion. At the time when it gave that Opinion, the Court did not regard this expectation as a forlorn one, since it considered it appropriate to repeat that "the normal

way of modifying the international status of the Territory would be to place it under the Trusteeship System".

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Having thus come to the conclusion that the criterion of compatibility with the Opinion of 1950 involves reference to the former practice, it is necessary to determine the position in this respect with regard to the hearing of petitioners.

The hearing of petitioners is not referred to in the Opinion of 1950, which had to determine what were the obligations of the Union of South Africa. The Opinion referred to the obligation to submit to the exercise of supervision : it did not refer to the hearing of petitioners, nor, consequently, to any obligation to accept such hearings. This may give rise to a presumption that such hearings by the Committee on South West Africa would not be consistent with the Opinion of 1950. It may, however, be thought that such a presumption should be submitted to closer consideration.

The Opinion of 1950 having, as has been said, found that the Mandates System continued to be applicable to South West Africa and that the obligations of a mandatory Power, including the obligation to submit to the exercise of supervision and the maintenance of the system of supervision in accordance with the former practice, except for the substitution of the United Nations for the League of Nations for the exercise of supervision, remained binding on the Union of South Africa, it is necessary to consider what was the position, under the system in force in the League of Nations, with regard to the hearing of petitioners.

The Court has in this connection made two observations with which we are in agreement. It has stated in the first place that the functions of the Committee on South West Africa are analogous to those of the Permanent Mandates Commission established by the Council of the League of Nations, pursuant to Article 22 of the Covenant : the Court had already so stated in its Opinion of 1955 (*I.C.J. Reports 1955*, p. 72). In the second place, the Court has stated that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time.

The Permanent Mandates Commission had, however, been concerned with the question of such hearings and in 1926 it expressed the opinion that in certain cases "it might appear indispensable to allow the petitioners to be heard by it". It submitted the question to the Council of the League of Nations, which considered that there was no occasion to introduce this innovation (Resolution of March 7th, 1927).

The Report, on the conclusions of which the Council of the League of Nations adopted this negative solution, stated, among other things, that it was important that the Commission should have

"at its disposal all proper means for obtaining ... information". It thus placed the question on the ground of what the Opinion of 1950 called "the degree of supervision". The Report added that "it would not, however, be desirable to seek to attain this object by means which might alter the very character of the Commission". It tempered the negative conclusion which it reached, or sought to quiet the fears which that conclusion might arouse in the minds of some, by adding: "If in any particular case the circumstances should show that it was impossible for all the necessary information to be secured ... the Council could ... decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances."

This reservation was not repeated in the Resolution adopted by the Council of the League of Nations. The Council directed the Secretary-General to transmit copies of the Report, of the Resolution and of the replies of the mandatory Powers to the Permanent Mandates Commission.

In the view of the Rapporteur, consideration of a "particular case" such as he envisaged was to be within the domain of the Council of the League of Nations, and it was not a matter in respect of which provision should be made in advance by means of any "general rules". It would therefore be contrary to the proposal enunciated by the Rapporteur to proceed by virtue of a delegated power authorizing the Committee on South West Africa to assess the requirements of a particular case and to determine the exceptional procedure warranted by the particular circumstances, or for the General Assembly to proceed on the basis of "general rules" authorizing, in greater or lesser measure, the hearing of petitioners. Lastly, it is to be observed that, although the Report was prepared with reference to the question of the hearing of petitioners, "such exceptional procedure as might seem appropriate and necessary in the particular circumstances" which it envisages need not necessarily involve hearings, but might consist of something else.

If it were necessary to determine what were, in the view of the Rapporteur, the powers of the Council, this point would require more detailed consideration. But having regard to the question which has been put to the Court and to what is, in our view, the meaning of the Opinion given by the Court in 1950, it is sufficient for us to observe that the Report had no practical consequences, so far as the hearing of petitioners was concerned, and that the Permanent Mandates Commission continued to refrain from hearing petitioners.

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Since the Opinion of 1950 made reference to the former practice and since the Permanent Mandates Commission did not have recourse to the hearing of petitioners, we are compelled to take the view that such hearings by the Committee on South West Africa would not be consistent with the Opinion given by the Court in 1950.

In reaching this conclusion, we have not had regard to the fact, noted by the General Assembly in Resolution 749 A (VIII), that the Union of South Africa is not submitting to the exercise of supervision. Consideration of this fact did not appear to us to fall within the scope of an examination of the question put to the Court in the Request for an Opinion submitted to it.

We do not, however, overlook the fact that the question of the hearing of petitioners by the Committee on South West Africa might be placed on another ground than that of the compatibility of such hearings with the Opinion of 1950. The General Assembly might be led to enquire whether that refusal, which it had noted, of the Union of South Africa to submit to the exercise of supervision by the United Nations did not authorize it to allow the hearing of petitioners, even though it should thereby depart from the Opinion of 1950 which it had adopted as a rule governing its action. Certain considerations of a legal character might enter into an examination of that question : the importance of international supervision under the Mandates System and the obligation of the Mandatory Power to submit to the exercise of supervision, both of which were recalled in the Opinion of 1950. It might also be recalled that, while proposing that the hearing of petitioners should not be sanctioned by any provision more or less general in character, the Rapporteur indicated to the Council of the League of Nations in 1927 that in any particular case it would be open to the Council to "decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances". Whatever the importance of such considerations, they would not be sufficient by themselves to provide an answer to such a question : in considering that question the General Assembly could not avoid taking into account considerations of a political and practical character which are within its own competence and not within that of the Court.

The question here envisaged, which relates to the possibility of the General Assembly's authorizing the hearing of petitioners even if, by so doing, it should depart from the Opinion of the Court, is, by reason of its object and of the considerations which its examination would involve, different from the question of compatibility with that Opinion. It is the latter question only that the Dissenting Opinion seeks to answer. The answer which we give cannot prejudge the General Assembly's answer to the altogether different question to which reference has just been made.

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For these reasons, it is not possible for us to subscribe to the Opinion now given by the Court.

(Signed) A. BADAWI.
BASDEVANT.
HSU MO.
ARMAND-UGON.
Lucio M. MORENO QUINTANA.

Declaration by Vice-President Badawi

[Translation]

While subscribing to the above opinion, I feel it proper to add the following consideration.

In fact, the former practice under the Mandates System in respect of the hearing of petitioners was as described in the foregoing opinion. However, the decision of the Council of the League of Nations to communicate to the Permanent Mandates Commission—together with the Resolution of 1927 according to which "there is no occasion to modify the procedure which has hitherto been followed by the Commission in regard to this question"—the Report on the basis of which that Resolution was adopted and the replies of the mandatory Powers, conferred upon these documents the character of an explanatory note to the Resolution of the Council. The Report should accordingly, in my view, be regarded as forming part of the Resolution.

Looked upon in this light, the Report made available to the Council, and now makes available to the General Assembly, the possibility, in the particular cases there referred to, of undertaking the hearing of petitioners as such an "exceptional procedure as might seem appropriate and necessary in the particular circumstances". Any decision authorizing such a course would essentially be a decision on the particular facts of the case and should be taken by the General Assembly itself wherever it considers that it would be desirable to authorize such a hearing : in other words, any general delegation to another organ of the powers of the General Assembly in this connexion should be excluded.

(Initialled) A. B.