

## DISSENTING OPINION OF M. AZEVEDO

[*Translation*]

I regret that I am unable to concur in the opinion of the majority of the Court for the following reasons :

1.—First of all, I cannot agree to the omission of what I consider to be the most important part of the question submitted to the Court.

The Request does not ask the Court to say in a general way whether a State could be admitted when the Council had made no recommendation. It refers precisely to the case when absence of recommendation is due to specified reasons, consideration of which would give rise to two entirely different questions, one dealing with the dual meaning, positive or negative, of the word "recommendation", and the other dealing with the problem of the veto.

Even though the Request for an Opinion has approached the question from an indirect angle, none the less it clearly contemplates the case in which an applicant State, which has obtained seven positive votes, has been opposed by a permanent Member of the Council.

Even viewed from a practical angle, it must be admitted that the questions are interdependent by application of a familiar logical method. If the principal hypothesis is considered, and if, for example, it is decided that the candidate can be admitted in spite of an unfavourable answer from the Security Council, *tollitur quæstio* ; if not, the secondary hypothesis is not prejudged.

For that reason, it cannot be said that words or even entire sentences have been omitted because they were redundant and did not change the scope of the question, where they appeared only for purposes of clarification.

2.—In disregarding the reasons for the absence of recommendation, one is confronted by facts, the importance of which cannot be minimized.

Indeed, it is easy to see that the original proposal of the Argentine Republic made no reference to a case in which a permanent Member had cast a negative vote ; the point was raised only after an intervention by the Belgian delegate. Finally, the Dutch delegate proposed the insertion of the following phrase as a preamble, the scope of which cannot be neglected :

“The General Assembly,  
 Keeping in mind the discussion concerning the admission of  
 new Members in the *Ad Hoc* Political Committee at its fourth  
 regular session,  
 Requests the International Court of Justice to give an advisory  
 opinion on the following question :”

A study of the discussions shows that many States in the Commission and in the General Assembly referred to the veto, approving or criticizing it. Moreover, direct or indirect allusions to the same question were made in the statements submitted to the Court.

3.—On the first question I agree entirely with the majority of the Court ; because it is not possible to draw from the successive intervention of two organs in any matter the conclusion that the first step, which is merely introductory or preliminary, can be overlooked.

I consider also that it is not sufficient to rely upon an historical element to reverse a clear conclusion deriving from the circumstances. It is true that one of the delegates called the attention of his colleagues to the contents of a letter from the Secretary of the Advisory Committee of Jurists, and that a decision was taken, without opposition from the President, to insert the new interpretation in the Report of Committee II/1.

But all this would not justify the conclusion that all delegations gave this modification all the attention it deserved, when it is well known that (according to those who are in favour of using them) the value of *travaux préparatoires* is based, for purposes of interpretation, on the *voluntas legislatoris*, to which no great importance is attached to-day.

4.—It is now possible to pass to the second question, which is much more complex.

First of all, the commentator is struck by the very unusual stress put by the Charter on the aims and principles of the Organization ; by a unanimous vote, the signatories also stressed that the obligations assumed by the Members must be carried out in good faith.

That is why the interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind.

Even more than in the applications of municipal law, the meaning and the scope of international texts must continually be perfected, even if the terms remain unchanged. This proposition is acceptable

to any dogmatic system of law, and even to those who hold that law should be autonomous and free from the interference of forces, tendencies or influences alien to its proper sphere.

Literal interpretation will not prevail, even through the sinister adage *fiat justitia pereat mundus*. The aims of the United Nations must be served so that mankind may flourish.

5.—Even long practice, usually a good guide in interpretation, cannot frustrate a pressing teleological requirement. In the present case, this practice could not be more than four years old and would not have a peaceful and undisputed character because of the opposition raised from the start by such States as Argentina and Cuba, and even Australia, in a very special sense.

Precedents, whether isolated or repeated, prior or subsequent to the Request for Opinion, cannot prevent an organ, even the one which created them, from determining the extent to which they can be legally relied upon. In view of the failure of such means of conciliation, as referring applications back for reconsideration, it is understandable that an attempt should be made to find more energetic methods, but it is necessary to consider first if these methods are legitimate.

It is always possible to retrace one's steps. For instance, the efforts of the Argentine Republic failed one after the other, until the time when, under the pressure of the needs which the U.N. are called upon to satisfy, it was possible to gather forty-two votes, even though this majority was formed only to clarify the doubts expressed by a Member of the Organization, and even though it does not imply acceptance of the arguments presented by this Member. However, this is no reason for not answering the question.

It is also superfluous to quote the texts of the Rules of Procedure, as these cannot be contrary to the law, of which they are only a complement. These texts merely confirm a practice, the strength of which has just been shown.

6.—In the course of interpretation, one often tends to remain within the limits of a preliminary question. This is obvious in the present case, in connexion with the capacity of the organ taking the decision to examine the validity of the intervention of another organ, in the first phase of the procedure. In this connexion, one may seek to establish as a natural rule the complete separation of activities, so as to limit the task of the second organ to the consideration of the purely formal aspect of the "recommendation".

For instance, in the present case, the question would depend upon whether the word "recommendation" is used or not.

I cannot accept such a strict view, even if it is out of place to refer by analogy to the practice of countries which, in their municipal law, apply the judicial control of the constitutionality of laws, even to such defects in the procedure of law-making, as an error in the right of initiative of a particular Chamber, the absence of constitutional quorum, etc.

Only excessive respect for form will give it priority over substance.

7.—It is necessary to begin by rejecting the complete separation of the vote and the recommendation; this is more a quarrel of words than a difference in substance.

There are not two deliberations, or even different aims. If there were, this would lead to an absurdity, namely, the recognition that, in spite of a unanimous vote or of a qualified majority under Article 27, paragraph 3, the Security Council could refuse to make an explicit recommendation, on the pretext of a mere interpretation of its votes.

The recommendation is based on the vote and cannot deviate from it. Therefore, it is necessary to follow closely the true elements of the problem and not the phraseology of the document of transmission, or even the name or title it has received, provided it contains all the elements essential to the decision which the competent organ is about to take.

8.—As a preliminary, it must be observed that the General Assembly, notwithstanding express (Art. 12) or implied exceptions (Arts. 5, 32 and 83, and 35, para. 2, of the Statute of the Court), has retained a right to watch over all matters concerning the United Nations, a right which was laid down in Article 10 of the Charter, the general scope of which is confirmed in Article 11, paragraph 4.

The right to discuss questions concerning the powers and functions of any one of the other organs justifies, in principle, the Assembly in considering the validity of an act of the Security Council from which it receives ordinary and special reports (Art. 24, para. 3). This intervention is even more natural in connexion with a preliminary act, following which the Assembly plays the principal and final part and therefore is in a position to examine the entire previous procedure.

The fact that in such cases the recommendations of the Security Council are a necessary requirement is not incompatible with their procedural character. It often happens that neglect of certain acts of procedure having a specific purpose make the final decision of any Court null and void.

9.—It is evident that the Charter has granted a sort of dual personality to the Security Council. On one side, it is entrusted with a series of functions which it performs in complete autonomy and without interference, and it may even take the place of the Assembly, as in the case of strategic areas. On the other hand, it is placed on the same level as the other deliberative organs of the United Nations.

In addition to the serious measures which the Council may take independently of the control of any other organ, it acts, outside its own sphere, as the preparatory agent in cases where decision rests with the Assembly. For example, the Security Council makes "recommendations" to the Assembly, in cases where the latter has to decide (Art. 4), suspend (Art. 5), expel (Art. 6), determine (Art. 93), appoint (Art. 97) or adopt (Art. 69 of the Statute of the Court).

In this second field, at least, it would not be possible to consider as applicable without qualifications the rule whereby each organ is competent to interpret the use of its own powers as it prefers. Moreover, this rule, which could never justify arbitrary action, flows *a contrario sensu* from the same feeble source already mentioned, namely, the rejection of an amendment during the drafting of the Charter. The same *travaux préparatoires* would show that in this case also possible conflicts between the interpretation of the same text by two organs had been contemplated. Should these conflicts remain unsolved, chaos would result in this Organization, which is so complex that it has no water-tight compartments, save in exceptional and "transitory" cases.

Thus, even in the absence of an express text, and without even needing to refer to the implied powers of the Assembly, it is possible to argue that the latter has a certain autonomy in making a preliminary examination of the scope of the deliberations of the Council concerning admission to membership.

10.—Before considering the substance of the voting problem, it is necessary to make another preliminary remark.

The Charter is based on the principle of sovereign equality (Arts. 2, para. 1, and 78), the strength of which was beyond dispute when the fifty States signed the San Francisco document. Most of them were free from commitments and in particular from those assumed by the Powers which had carried the heaviest load in the fight against fascism. In any case, other nations which had also taken effective part in the war, and even those which had preferred to abstain *de jure* or *de facto*, could conclude agreements freely, having due regard, moreover, to the enormous contribution made by the sponsoring Powers in favour of the restoration of peace.

Article 24, which is the keystone of the Charter, embodies the alienation of their natural freedom accepted by the nations convened at San Francisco—alienation which would have a final or perpetual character if no provision had been made reserving the right to withdraw. The signatories of the Pact have granted exceptional faculties to the Security Council, which, on the other hand, has assumed duties, for the performance of which it has required that proper, specific and clearly defined powers be granted to it. This is the basis of a system which attempted to balance two forces which enter into play : sovereign equality and concern for security by means of world peace. The normal operation of the Organization rests upon the even balance of these forces.

The concession accepted by the majority of States has led to a series of consequences which are laid down, for example, in Articles 25, paragraphs 2 and 5, 43, paragraph 1, 48 and 49. But it also resulted in a series of duties for the Members of the Security Council, especially those enjoying the privilege of a permanent seat.

II.—In any case, this exceptional situation, which is the particular attribute of the Security Council, is linked to the primary responsibility for the maintenance of peace, embodied in Chapters VI to VIII of the Charter. To include an exceptional case, which fell outside this field (Art. 83), it was necessary to extend to Chapter XII the reference in Article 24, paragraph 2.

The idea of security cannot assert itself with the same strength wherever reference is made to the action of the Council ; a gradation at least would be justified in view of a text which is so important and under which such specific powers are granted (Art. 24, para. 2 ; see also Art. 15, para. 1, *in fine*).

It is necessary to refer to the *odiosa restringenda* as a tribute to this equality. Privileges cannot be interpreted in an extensive way. It will therefore be necessary to consider each case with the greatest care, in order to determine whether the limits indicated above are exceeded, which limits characterize the autonomous aspect of the Council's activity. Article 25 is nothing more than a corollary to the mandate conferred, and it cannot therefore have a broader scope than the text which precedes it. It would also be useless to recall the discussions and hesitations to which the application of this text has given rise, without forgetting even the unfailing appeal to *travaux préparatoires*.

But, even though such an article cannot solve the problem finally, it will always be useful to consider the extension of the concept of "decision" which appears in it. Does it extend to "recommendations" ?

12.—One cannot expect the Charter to be a model of precision and technique, made as it was by the hasty adjustment of separate parts prepared in different workshops.

Of course, any "recommendation" resulting from an act of will may range from a mere opinion of no consequence to a determination, based on the inherent moral strength of the organ which has given it, and on indirect sanctions.

It is therefore impossible to confuse the two species, but if, setting aside all logical rigour, "decisions" were raised to the rank of a genus, the specific characteristic of "recommendations" would be that they do not carry the same degree of compulsion as laid down in various provisions of the Charter. The two words have even been used one beside the other, in order to indicate a difference in the strength of the action of the Security Council (Arts. 37, para. 2, 39 and 94).

It is useless to run the whole gamut of "recommendations" of the Security Council to discover whether or not there are exceptions falling under Article 25. In any case, it must almost be recognized *a fortiori* that this article cannot apply to "recommendations" made by one organ to another, since the Members of the Organization are not directly called upon therein to take a certain action.

This refers merely to recommendations taken in

"the normal meaning of the word recommendation, a meaning which this word has retained in diplomatic language, as is borne out by the practice of the Pan-American Conference, of the League of Nations, of the International Labour Organization".

This is what seven judges of this Court said on the occasion of the decision on the preliminary objection in the Corfu Channel case (I.C.J. Reports 1947-1948, p. 32).

13.—The really important thing is to verify whether the expression "decision" has the same meaning in Articles 25 and 27, for it could well be argued that, while denying that "recommendations" have compulsory character, it was necessary to apply the rule of the unanimous vote for the adoption of these "recommendations". In that case, "decisions" under the meaning of Article 25 would not be "decisions" under Article 27, where the same word would have a broader meaning. But to reach this conclusion it would be necessary to depart from the literal interpretation of texts.

Moreover, the Security Council has given a first example of departure from the letter of the texts by considering all along that abstention during the vote was compatible with the fact that Article 27, paragraph 3, required the vote of all permanent Members—even when the latter were carrying out duties and acting on behalf of third parties (Art. 24, para. 1). It was considered that this faculty was established for the sole benefit of the voter,

and, therefore, that the latter could decide not to use it, in application of the ancient adage *invito beneficium non datur*.

After all these difficulties, it would never have been possible to include "recommendations" in the concept of "decisions", except in cases dealt with in the chapters mentioned in Article 24, paragraph 2, especially when the recommendation was addressed precisely to the organ which had to take the only "decision" in the matter.

14.—But if one considers that "recommendations" outside the specific sphere of the Council do not come under Article 27, what voting system should be applied to them?

The classic rule of international law requiring a unanimous vote has already been impaired, in the regional American agreements (see Treaties of Rio de Janeiro and Bogota, 1947/1948); and the Charter, too, has rejected it even in the most important cases (Articles 108 and 109, para. 1).

The majority of seven votes could be considered by the commentator as the one which best corresponds to the system of the Charter, for the simple majority constitutes an exception in the sole case of the election of judges (Statute, Article 10). This solution can be reconciled with the provisions of Article 18 requiring a qualified majority for the vote in the Assembly. This majority, moreover, has no analogy with the case of the veto, which is characterized as an individual privilege. In addition, Article 18 reveals a certain hesitancy in the choice of matters requiring a 2/3 majority—budgetary matters have been included, whereas the appointment of the Secretary-General has been left out.

In order to reach such a conclusion, it is of course necessary to extend the sphere of analogy. But in my opinion it would be much bolder to generalize an exceptional rule, which, as we shall see later, was adopted with great difficulty.

15.—If one should refuse, however, to accept any other general voting rule outside Article 27, and if one were compelled to bring the case of admission within the rigid framework of this text, the solution would not be different unless, this time, one confined oneself to the literal meaning of the words.

Volume 11 of the works of the San Francisco Conference gives clear indications concerning the Yalta formula, the adoption of which assumed almost dramatic character. Frequent and energetic appeals by the sponsoring Powers were necessary and more than once reference was made to the memory of President Roosevelt. Professions of moderation, wisdom, discretion in the use of the veto (without abuse) were made in Committee III/1.

A substantial majority which opposed this privilege finally consented to cast a favourable vote or to abstain, not without

stating the extreme reasons which brought about this capitulation, namely, that a high price had to be paid for the creation of the United Nations. Some of the States even explained that they consented in the hope that the voting procedure would be made more flexible when consideration of the texts dealing with the procedure of revision of the Charter was taken up. Subsequently, this hope was also frustrated.

In accepting this abdication, the signatories of the Charter did not fail to say that they trusted that the Great Powers would make reasonable use of the exceptional powers which they consented to grant them.

16.—The commentator cannot overlook such elements in studying the consequences to be drawn from the aims and principles which are constantly referred to.

Nor is that all. At a certain time the delegations opposed to the formula stated their objections and requested the sponsoring Powers to answer a questionnaire. It must be noted in passing that the questions put, as well as the amendments proposed by several countries (including France, before she accepted the Yalta formula), confined themselves to giving the same meaning to the word "decision" in the present texts of Articles 25 and 27 or, more clearly, to exclude from the privileged vote the "recommendations" made under Chapter VI. In respect of powers conferred upon the Council outside its own sphere of activity, there is no indication of any intention of applying the Yalta formula to them.

The answer to the questionnaire assumed a solemn character; besides constituting a fresh declaration of impartial intentions, this document is the basis of any study of the problem.

It matters little that it was not formally voted on or that it did not have the value of a pact. It cannot be denied that this reply was the instrument which permitted the formation of the reluctant majority necessary for the adoption of the Yalta formula. Several delegations made reservations as to the terms of the document which did not give them full satisfaction, particularly the answer to the only question retained. But it is indisputable that the signatories of the document bound themselves by determining the true sense of the said formula. Moreover, they are constantly invoking it and stressing its binding force.

It must be noted that this is not an ordinary element of the *travaux préparatoires*, which can often lend themselves to contradictory use, like a double-edged weapon.

Four Members of this Court have already said

"Without wishing to embark upon a general examination and assessment of the value of resorting to *travaux préparatoires* in the interpretation of treaties, it must be admitted that if ever there is a case in which this practice is justified, it is when those

who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty." (I.C.J. Reports 1947-1948, p. 87.)

There is much more in the present case : a preliminary agreement was made to break the deadlock involving a matter which is at the very heart of the Charter. This was pointed out in Committee III/1. This exchange of view did not result in the expression of an individual thought, but in the determination of the value of words, thus making possible a common denominator or a single language.

17.—The parties were thus prepared to determine the concept of "procedure" to which it was probably possible to give by agreement a particular sense, which departed more or less from the usual and traditional meaning in order to characterize an entirely new balancing process.

With this determination in mind, the so-called method of "residues" was applied, and those cases were described in which complete agreement of the Five Powers was required; by a process of elimination there remained cases of "procedure" chosen by an opposite process to the one which the reading of the texts which were proposed and finally adopted would lead one to suppose (Art. 27, paras. 2 and 3).

Such is the method adopted in the letter of June 7th, 1945 (U.N.C.I.O., Vol II, p. 754, English text Vol II, p. 711), the signatories of which stated that the Security Council,

"in discharging its responsibilities for the maintenance of international peace and security, will have two broad groups of functions".

They then proceeded to explain the nature of the measures to be taken in settling disputes, removing threats to the peace, etc., by adding :

"it will also have to make decisions which do not involve the taking of such measures. The Yalta formula provides that the second of these two groups of decisions will be governed by a procedural vote, that is, the vote of any seven Members. The first group of decision would be governed by a qualified vote...."

They were saying, not that *questions of procedure* would be submitted to a certain *quorum*, but that a *procedural vote* would be applied to questions other than those which entailed specific measures—which is an entirely different thing, although the letter of the texts is deliberately departed from.

18.—In this famous Declaration of San Francisco, the Great Powers then showed the necessity of submitting to the same qualified vote the measures laid down in Chapter VI :

“This chain of events begins when the Council decides to make an investigation or determines that the time has come to call upon States to settle their differences or makes recommendations to the parties.”

The truth of this argument cannot be denied in spite of the strong opposition which it met. Indeed, the action of the Security Council makes itself felt only in stages, although it requires an uninterrupted and uniform direction. It would not be desirable to start in a certain direction and change this direction half-way. This would create conflicts instead of solving them. Therefore, the same voting system must be applied from the first measures taken by the Council, even if these are merely preventive.

That is why it was necessary to adopt in Article 27, paragraph 3, the formula “decisions .... on all other matters”, decisions which always fall within the limits indicated above. The document doubtless mentions in detail hypothetical cases of procedure by referring to the present text of Articles 28 to 32 and even to Article 35. But this is only *by way of an example*.

Except for this continuity, there would be no sufficient reason for strengthening the value of the word “decision” wherever it is used. A conflict would thus be created with the system of the Charter by extending the formula beyond the limits of former Chapter VIII of the Dumbarton Oaks proposals.

In the admission of new Members, the influence of security is remote and, on the other hand, the other aims and principles of the United Nations would undoubtedly play a role of the greatest importance. It may be recalled, incidentally, that various States on several occasions suggested the acceptance of all applications without discrimination in exchange for the withdrawal of objections which had previously been raised.

In this connexion, the assimilation of the case of admission to those of suspension and expulsion is not conclusive, particularly with regard to the faculty which the Security Council admittedly has to restore to its rights and privileges a State which has been suspended by the General Assembly, because this case deals only with specific action previously taken by the Council. On the other hand, Article 5, while reserving this action to the field of world security, seeks to protect Members against an abuse of authority; this protection is obviously granted in the case of restoration of rights and privileges—*sublata causa tollitur effectus*. In a very similar case, outside the field of peace, such as delay in payments, suspension of the right to vote does not depend upon the action of the Security Council.

19.—Finally, it must not be forgotten that after the laborious vote in the Committee the latter, on the initiative of the Steering

Committee, concerned itself with the nomination of the Secretary-General. It was pointed out at the time that the question should be considered prejudged in view of the distinction which had been previously made between substance and procedure, but it was doubtless too late to change what had already been established and to go beyond the limits indicated hereabove.

To accept and generalize such a solution, it would be necessary to attribute exceptional importance to one element of the *travaux préparatoires* which emerged in conditions which were similar, or perhaps even worse, than those surrounding the passage which was originally relied upon by the Argentine delegation.

Indeed, in both cases, what was involved was a modification introduced at the last moment and referred to only in a report by a Committee, although this report is regarded as an integral part of the Commission's report and was adopted at the last moment and immediately by the plenary meeting without special comment, as happened for example in the matter concerning the withdrawal of Members of the United Nations. It might be said that in the case referred to by the Argentine Republic the Co-ordination Committee and Advisory Committee of Jurists could introduce only changes in the form; but actually Committee II/1, in view of a suggestion which might have come from any source whatever, actually deliberated within the framework of its own competence before its work was finished. About the same thing happened in Committee III/1, which, moreover, simply declared null and void a decision which had already been taken by a substantial majority in an organ of the same rank, Committee II/1 (U.N.C.I.O., Vol. II, p. 575).

20.—This is not the place to appreciate the value of declarations and resolutions which have not received sufficient publicity, of which the General Assembly has not been specially informed and to which the ratification by the signatory States did not extend.

It might be sufficient to point out that the case under Article 97 was especially provided for in the decision of June 13th, 1945 (U.N.C.I.O., *loc. cit.*). It would be risky however to generalize this decision.

The *criterium* which was solemnly adopted to characterize the word "procedural" was to continue to be applied to other cases, especially when it was better adapted to them. This applies precisely to cases of admission where the complex character of the procedure was stressed by the amendments to the Rules of Procedure of the Council and the Assembly dealing with the possibility of sending applications back for reconsideration and with the obligation for the Council to report in case of the absence of recommendation.

These modifications stressed a subordination which does not appear at all in cases where the activity of the Council is exercised in an exclusive and principal capacity.

21.—From all the foregoing and in particular from the special agreement which preceded the acceptance by States of a partial restriction of their sovereignty in accordance with Article 24 and related texts, it would seem to emerge that the word “decision”, as it has been used in Article 27, cannot be extended to a “recommendation” of the Security Council addressed to another organ to which has been left the “decision” in a certain case, even if the recommendation is necessary. Even if we preferred that Article 27 should exceed the specific powers of the Security Council, and go so far as to include the case of the admission of new Members, we should be justified in considering such a question as depending upon “procedure” after the technique contained in the solemn explanation which the sponsoring Powers had supplied beforehand had been laid down.

Therefore, if, in the report from the Security Council, the General Assembly observes that the applicant State has obtained the votes of any seven Members of the Council, it may freely decide to accept or reject the applicant. On the other hand, if the application has not obtained seven favourable votes, the Assembly would be under obligation to take note of the absence of a recommendation preventing any final discussion.

(Signed) PHILADELPHO AZEVEDO.