DISSENTING OPINION BY M. ZORIČIĆ.

[*Translation.*]

I agree with the Court's opinion as regards its competence to interpret the Charter, but I am sorry I cannot support the opinion, firstly because I consider that the Court should have refrained from answering the question put, and secondly because I cannot accept the conclusions of the reply

I.

The Court's competence in advisory opinions is derived from Article 65 of the Statute, which says that : "The Court may give an advisory opinion on any legal question." It follows from this that the Court is not obliged to give opinions for which it is asked, but on the contrary has a discretionary power in the matter.

The above interpretation is the same as that adopted by the Permanent Court of International Justice on March 10th, 1922. Judge J. B. Moore had written a memorandum on the question of advisory opinions (*Acts and Documents concerning the Organization of the Court*, Series 2, Annex 58 *a*, p. 383), in which he emphasized that the advisory powers were derived from Article 14 of the Covenant of the League of Nations. The French text of Article 14 ("*La Cour donnera aussi des avis....*") differed from the English text ("The Court may also give...."), the word "may" in the English text implying a permission, i.e. a discretion. After careful study of the preparatory work and of the nature of the Court's duties, Judge Moore reached the conclusion that it was for the Court itself "to determine in each instance whether .... it would undertake to give advice" (*l. c.*, p. 384), and that "if an application for such an opinion should be presented, the Court should then deal with the application according to what should be found to be the nature and the merits of the case" (p. 398).

In 1935, Judge Anzilotti relied on this interpretation and added that "there is no reason to suppose that the Court has ever meant to modify its attitude" (Series A./B., No. 65, p. 61).

It remains to be seen whether the powers of the present Court are not more restricted on this subject than were those of the old Court. I do not think so ; for there can be no doubt that Article 65 of the present Statute, in which the French text ("*peut donner*") corresponds entirely with the English text ("may give"), implies that the

authors of the Statute had the question in mind, and that they deliberately adapted the French text to the English, thus giving the Court a discretion to decide whether, in a particular case, it should give an opinion on a question put, even if it were a legal question.

The need for such a discretionary power is derived also from the purposes for which the Court was created, and from its nature as an essentially judicial body, with the task of encouraging and developing between nations the principle and methods of judicial decisions, and of contributing thereby to the peaceful settlement of disputes between States. The Court can only fulfil this important task in complete independence.

Neither the Charter nor the Statute of the Court contain any provision to the effect that the Court, even if it considered itself competent, would be obliged to give an opinion ; Article 65, on the contrary, reserves for the Court a right to take such action as it thinks fit, on a request for an opinion. I therefore think that the Court should have abstained from replying to the present question, for the reasons that I will set out briefly below :

The Assembly resolution and the documents submitted to the Court by the Secretary-General show that the request for an opinion had its origin in a divergence of views that arose in the Security Council as to the attitudes adopted by Members of the Council during the discussion on the admission of certain States. These were views expressed in a political body relating essentially to political acts, and based on arguments and appreciations of a political nature. Moreover, I feel bound to conclude from the circumstances that the request was made to the Court for a definitely political purpose.

It is true that the request submits the question in an abstract form, but it is no less true, and is beyond doubt, that the Court's answer lends itself to a different interpretation, namely that it relates to the above-mentioned discussions. And although the Court has stated that it only considers the question in the abstract, the reply will, in my view, be interpreted as containing a judgment on the action of members of the Security Council. The Court is thus drawn on to the slippery ground of politics, and its reply may well become an instrument in political disputes between States. This may do considerable harm to the Court's prestige and to the confidence that the Court should inspire in all nations if it is to fulfil its important duties as guardian of the law and principal judicial organ of the United Nations.

II.

As however the Court has decided to give an opinion, I must state the reasons for which I am not in agreement with that opinion.

I would begin by saying that, in substance, I agree with what is said in the joint opinion of the Vice-President and of Judges Winiarski, Sir Arnold McNair and Read. My chief reason for writing a separate opinion is that I look at the question put to the Court from a somewhat different angle, having in view the concrete cases which gave rise to the request for an opinion.

Before examining the question before the Court, I have the following observations to make :

The Preamble to the General Assembly's Resolution of November 17th, 1947, runs as follows :

> "Considering the exchange of views which has taken place in the Security Council at its 204th, 205th, and 206th Meetings, relating to the admission of certain States to membership in the United Nations...."

This Resolution ends with the following provision :

> "Instructs the Secretary-General to place at the disposal of the Court the records of the above-mentioned Meetings of the Security Council."

There seems to me to be no possible doubt as to the Assembly's intention ; the Assembly states the origin and nature of the request for an opinion in order that the opinion may be given in the light of the facts and circumstances from which it arose.

It may be said that the question itself is in an abstract form. This does not seem to be decisive, for it does not remove the fact that the Resolution of November 17th, 1947, is a whole in which the abstract question is closely connected with the recital which precedes it and explains its meaning and scope. The Secretary-General supplied the Court with a large number of documents, and also instructed his representative to make an oral statement to the Court on the history of the question. It follows from all these facts that the Court is expressly asked in the Assembly Resolution to give an opinion, taking account of the facts in which the request originated.

Nothing could be more natural. In human life, all activity is based on concrete considerations or facts. To attempt to judge and explain such acts in the abstract would be to misconstrue the intentions, to work in a vacuum, and to misunderstand the meaning of real life. This is still more evident in the case of a Court of Justice whose first duty is to decide whether certain acts are in accordance with law.

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The request for an opinion is presented as one single question, but there are in reality two, on different planes :

(1) Is a Member called upon to vote juridically entitled to make its consent to the admission of a State to the United Nations dependent on conditions not expressly provided by paragraph 1 of Article 4 of the Charter, and

(2) Can such a Member, while it recognizes that the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State ?

It is quite clear that the word "conditions" in the first question has a different meaning from that which it has in the second. Article 4, paragraph 1, mentions certain conditions that are to be fulfilled by a State desirous of admission. Thus, it is solely a question of the qualities that must exist at the moment of considering the admission.

In the second question, the word "conditions" has a very different meaning. It is used in its habitual legal sense : the condition mentioned in this part of the application relates to a future and uncertain event, namely, that the other members of the Council would accept the obligation to vote for the admission of other States. This condition concerns the members of the Security Council, who alone could fulfil it, whereas the candidate cannot, in any way, contribute to its fulfilment.

III.

The first part of the question calls on the Court to decide whether a Member called upon to vote is juridically entitled to make its consent to admission dependent on conditions not expressly provided by paragraph 1 of Article 4 of the Charter.

The legal foundation for a certain method of procedure can only be examined in the light of the rules of law that govern it. On the subject of voting in the Council and the Assembly, there are no provisions. Neither the Charter nor the Rules of procedure of the Council or the Assembly contain anything as to what a Member may or should do when it votes and—a point of great importance—there is no obligation on the part of Members to give a reason for their vote. All that is said on the subject is that each Member has one vote (Articles 18 and 27 of the Charter) ; the exercise of the right to vote is left entirely to their discretion.

As a Member who votes is entitled to do so without giving any reasons for his vote, he may act in accordance with his own view of the case ; and it is the question of any possible limits to this view that leads to a consideration of the nature of the provisions of Article 4 of the Charter.

For a State to be admitted to the United Nations the required conditions, or rather qualities, are, according to Article 4, paragraph 1, that it shall be peace-loving, that it shall accept the obligations contained in the Charter, and that it shall be able and willing to carry out these obligations. It is quite clear that the actual appreciation of these qualities, and therefore their existence, may depend on elements of all kinds. But, apart from that, there is nothing in Article 4, paragraph 1, to prevent a Member who votes and thus exercises a political discretion, from taking into consideration elements of a political nature, not contained in Article 4. Thus, while, on the one hand, it is endeavoured to interpret this provision as exhaustive, it is, on the other hand, possible to interpret it as imposing only the minimum of qualities, i.e., the fundamental qualities without which no State can be admitted to the United Nations.

As the provision is capable of various interpretations, it follows that, in the first place, the preparatory work must be looked at, in order to discover the exact scope of Article 4, in the minds of its authors.

The preparatory work was submitted to the Court, and it appears that the two paragraphs of Article 4 of the Charter were, in San Francisco, each drafted by a different Committee : paragraph 1 by Committee I/2, and paragraph 2 by Committee II/1.

The Rapporteur to Committee I/2 submitted to the First Commission a report on the admission of new Members (San Francisco Conference, Document No. 1160 I/2/76 (1), Vol. VII, p. 308), in which it was said that the Committee had to consider the fundamental problem :

> "The extent to which it was desirable to *establish the limits* within which the Organization would exercise its *discretionary power* with respect to the admission of new Members." (Italics mine.)

Observing that adherence to the principles of the Charter and complete acceptance of the obligations arising therefrom were essential conditions to participation by States, the report explains that :

> "Nevertheless, two principal tendencies were manifested in the discussions. On the one hand, there were some that declared themselves in favour of inserting in the Charter specific conditions which new Members should be required to fulfil especially in matters concerning the character and policies of governments. On the other hand, others maintain that the Charter should not needlessly limit the Organization in its decisions concerning requests for admission, and asserted that the Organization itself would be in a better position to judge the character of candidates for admission."

Then, mentioning the conditions, or rather the qualities agreed on, which are those of Article 4, the Report continues :

> "It was clearly stated that the admission of a new Member would be subject to study, but the Committee *did not feel it should recommend the enumeration* of the elements which were to be taken into consideration. It considered the difficulties which would arise in evaluating the political institutions of States and feared that the mention in the Charter of a study of such a nature would be a breach of the principle of non-intervention, or if preferred, of non-interference. This *does not imply*, however, that *in passing upon the admission* of a new Member, *considerations of all kinds cannot be brought into account.*" (Italics mine.)

And the report ends with these words :

> "The text adopted sets forth more clearly than the Dumbarton Oaks proposals those qualifications for membership *which the delegates deemed fundamental*, and provides a more definite guide to the General Assembly and Security Council on the admission of new Members." (Italics mine.)

This report was approved by Commission I (Report of Rapporteur of Commission I, Conference Doc. No. 1142. I/9, Vol. VI, p. 229).

It would seem that any doubt as to the nature of Article 4 is dispelled by such a clear provision. The authors did not feel they should "recommend the enumeration of the elements which were to be taken into consideration" ; they desired that "considerations of all kinds" should "be brought into account" when it was necessary "to pass upon the admission of a new Member", and finally they stated that the text set forth the conditions "which the delegates deemed fundamental" and constituted a guide for determining elegibility.

The above-mentioned text thus shows that Article 4 does not contain exhaustive provisions, but on the contrary is a guide on admissions, containing only the fundamental and indispensable qualities required of a candidate. In other words, the conditions of Article 4 are minimum conditions that must be fulfilled by new Members, and without which Members cannot be admitted; but these are not the only conditions to be taken into account when a judgment is formed as to the desirability of admission ; for a judgment as to desirability cannot be limited or deemed to be a judgment relating exclusively to the fulfilment of the conditions of Article 4.

The work of Committee II/1 and its Report, relating to Article 4, paragraph 2, confirmed this interpretation. The Committee had

drafted a provision giving the General Assembly a discretionary power as to the admission of new Members. Certain changes were made by the Co-ordination Committee, and Committee II/1 became anxious, as is seen in the minutes of its Fifteenth Meeting :

> "The Secretary reported that he had been advised by the Secretary of the Advisory Committee of Jurists that that Committee felt these texts would not in any way weaken the original text adopted by the Committee. In the light of this interpretation, the Committee approved the text." (Vol. VIII, pp. 487-488.)

The report of the Rapporteur to Committee II/1 is categorical. It states briefly that the Committee considered a revision of the text "in order to determine whether the power of the Assembly .... was in no way weakened by the proposed text", and that "the Committee was advised that the new text did not .... weaken the right of the Assembly". It goes on as follows :

> "The Committee agreed that this interpretation should be included in its minutes as the one that should be given to this provision of the Charter, and on this basis approved the text as suggested by the Co-ordination Committee." (Vol. VIII, p. 495.)

It is quite clear that the Committee took special care that the Assembly should have a discretionary power at the moment when it decides, on the recommendation of the Council, whether a new Member shall be admitted or not.

The two reports of the Committees were approved by the respective Commissions, and it is difficult to suppose that the carefully chosen wording of these reports, considered first in the Committees, and then by the Commissions, does not express their thoughts and true intentions. On the contrary, I believe that these reports are to be taken as agreements on the interpretation of the provisions in question, and that consequently their terms must be understood and applied in their normal meaning as forming the surest means of interpreting Article 4 of the Charter. In my view, the reports quoted indicate the intention of the authors of the Charter not to limit either the Security Council or the Assembly by the provisions of Article 4, but to give them full freedom in the exercise of their political duties, always with the exception that they should not admit a State which, in their judgment, did not satisfy the minimum conditions of Article 4, paragraph 1.

From what is said, it follows that the argument to the effect that the terms of Article 4 : "any such State", would prohibit any account being taken of political considerations not provided for in Article 4, paragraph 1, is not convincing. The interpretation of paragraph 2 cannot be based on a few isolated words, but depends on the whole paragraph. The paragraph says that the admission "of

any such State will be effected by a decision of the General Assembly upon the recommendation of the Security Council". Consequently, it is not sufficient to be "such" a State ; it is also necessary for the Council to decide to make a recommendation, and for the Assembly to decide whether it is willing to accept this recommendation or not. The Charter therefore does not provide for the automatic admission of "any such State" ; it subordinates submission to the decisions of political organs with a discretionary power to base their decisions (as has been shown) on any kind of considerations.

In any case, it would seem difficult to assert, on the one hand, that the words "any such State" in paragraph 2 of Article 4, prohibit the introduction of political considerations which could be superimposed on the conditions of paragraph 1 and, on the other hand, to maintain that paragraph 2 is concerned only with the procedure for admission.

An interpretation to the effect that decisions on admission are governed by political considerations notwithstanding Article 4, appears to have been given by the General Assembly itself, as is seen in the first Resolution adopted by it on November 17th, 1947, by 46 votes against 1, with 6 abstentions. The Resolution recommends the permanent Members of the Security Council to consult together with a view to reaching an agreement on the admission of candidates whose admission has not yet been recommended, and to submit their conclusions to the Security Council. (*Journal of the General Assembly*, No. 56, November 19th, 1947, p. 4.) Can it be suggested that the only purpose of this Resolution was to invite the permanent Members to agree solely on the question whether the conditions of Article 4 were fulfilled or not ? I do not think it can be contested that the Assembly here had in view a political agreement based on quite general political considerations.

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Apart from the preparatory work, the general structure of the Charter shows the conclusions drawn from the preparatory work to be exact. This will be seen from a study of (1) the powers and duties of the Security Council, and (2) the method of admission of States to the United Nations.

(1) Article 24 of the Charter places on the Security Council "Primary responsibility for the maintenance of international peace and security". This duty comes before all others, and, failing an express provision, I do not think that the powers and duties of the Council under Article 24, a fundamental article of the Charter, can be limited merely by a restrictive interpretation of Article 4 ; particularly as, in my opinion, such an interpretation would be quite

contrary to the intentions of the authors of these provisions, as expressed in the reports quoted above. Moreover, there can be no doubt that it is because of this duty that Article 4, pararaph 2, only gives to the Assembly the right to decide on the admission of new Members subject to the previous recommendation of the Security Council. This constitutes an exception to the general rule contained in Article 10 as to the rights of the Assembly ; this exception can only be understood by bearing in mind the task entrusted to the Council by Article 24. As the report of the Rapporteur of Committee II/1 shows, the principle whereby the Assembly must admit new Members on the recommendation of the Security Council only, is derived from the idea that "the purpose of the Charter is primarily to provide security against a repetition of the present war and that, therefore, the Security Council should assume the initial responsibility of suggesting new participating States". (Doc. 666, II/1/26/1 (*a*), San Francisco Conference, Vol. VII, p. 451.)

How could the Council fulfil its duties if it was strictly limited by the criteria mentioned in Article 4, paragraph 1 ? Such a limitation on the Council would prevent it from declaring against the admission of a State even if it thought that such admission would have serious consequences for general international stability and consequently for the maintenance of peace. Such a case may well arise even though the candidate fulfils all the conditions of Article 4 ; for the admission of a State might create tension with other Members or non-Members of the Organization, and might give rise to expressions of mistrust, discontent and injustice ; whilst, on the other hand, its admission might be held undesirable from the point of view of harmonious co-operation within the Organization. These are essentially political considerations that could not be, and are not, limited by Article 4. Evidently the authors of the Charter could not impose such extensive duties on the Council (Article 24) and, at the same time, limit its powers in such a way as to prevent it from carrying out properly its main task.

In the supreme interests of the Organization, the members of the Council must therefore have a wide discretion. They can and must take account of every kind of political considerations, even if these do not fall within Article 4.

(2) It has already been said that nothing obliges a Member to give a reason for its vote. The vote is by "yes" or "no", unless the Member abstains. Consequently, at the moment of voting, there is no possibility of imposing a condition. A condition could only be expressed in the discussion that takes place in the competent organs before the vote. The documents placed before the Court show that, during these discussions, Members have adopted very

different positions, according to the political requirements of the case under discussion. Not only have some delegations adopted differing points of view, but the same delegations have often put forward one argument in one case, and a contrary argument in another.

There is nothing surprising in this. It is a question of policy. The Council is an essentially political organ and not a Court of Justice. How then could freedom of speech in this political organ be limited? If a Member was not legally entitled to take account of political considerations in the statements made by him on the subject of the vote which takes place at the end of discussions, these latter would become particularly difficult. The result would be to encourage hypocrisy and mental reservations. Moreover, discussion and political reasons of any kind may no doubt decide a vote, but they do not necessarily do so. It is possible that a Member may state certain views and that then, convinced by the arguments of others, or for a political reason, he may, when voting, be influenced by considerations quite different from those he had put forward during the discussion.

Consequently, it is quite impossible to determine the reasons on which a Member's vote depends, for they are the subject of a mental process that cannot be controlled. As a result, seeing that there is no rule of law obliging a Member to give reasons for his vote, he is juridically entitled to vote according to his own opinion, subject to what follows:

If the exercise of the right to vote is left to the discretion of Members of the Council and of the Assembly, it must be emphasized that this cannot upon any pretext authorize them to act arbitrarily. Any organization, and especially that of the United Nations, is, as a general principle, founded on good faith. This rule, which all States have bound themselves to observe when signing the Charter (Article 2/2), requires that a Member shall fulfil its obligations in accordance with the purposes of and in the interests of the Organization. This rule is assumed to have been observed, failing proof to the contrary.

The work of a Court of Justice involves primarily the application of rules of law to concrete cases. It follows that the first task of the Court is to consider what are the concrete cases from which the application for an opinion arises. That this should be the Court's procedure is the more evident from the fact that concrete examples have been drawn to its attention in the documents supplied by the Secretariat of the United Nations. These documents show that there was only one case in which a Member expressly made his vote dependent on the realization of a condition. It was in regard to the admission of ex-enemy States. I shall come to this later. In no other case was there a question of any conditions to

which a vote was made subject, but rather of various elements of appreciation such as might all, moreover, come within the class of qualities required in Article 4, paragraph 1.

In the light of the foregoing, I arrive at the following reply to the first part of the question :

A Member of the United Nations, which is called upon to vote, is juridically entitled to make its vote depend on conditions not expressly provided by paragraph 1 of Article 4 of the Charter. This right is derived from :

(1) the supreme duty of the Security Council, i.e. the main responsibility for the maintenance of peace and security. This responsibility rests in particular on the permanent Members of the Council, and the exercise of their political prerogatives is not limited by Article 4, but only by the legal obligation to act in good faith and in the interest of the Organization ;

(2) the discretionary right to vote without giving reasons for the vote, and

(3) the nature of Article 4 of the Charter, which cannot be considered as exhaustive, but on the contrary as only indicating the minimum conditions, without the fulfilment of which a State cannot be admitted.

IV.

I now come to the second part of the question put to the Court, which is, in substance, whether a Member may subject its affirmative vote on the admission of a State to the condition that other States be admitted together with that State.

As I have already said, there is nothing in common between the conditions in Article 4 and the condition that several States should be admitted together. Article 4 only concerns the qualities required of a State for admission, whilst the candidate State has no influence on the result of an application made to other Members of the Security Council. The condition of simultaneous admission has nothing to do with Article 4 of the Charter, but is a political matter for States.

The Court has decided to give an answer to this question, and to give it in an abstract way. This leads me to make the following remarks :

Although the second question is an abstract one, it must evidently relate to the only concrete case of this nature that has arisen, namely to the discussion on the admission of ex-enemy States. This discussion took place in the Security Council during the meetings referred to in the recitals to the General Assembly's Resolution of

November 17th, 1947. Consequently, however abstract the Court's reply may be, it will necessarily be understood as relating to this case and will be interpreted as an indirect judgment on the action of certain members of the Council. Moreover, this interpretation will be given in complete ignorance of the exceptional circumstances of the case and of the arguments then put forward.

It follows, in my view, that, having decided to give an answer, the Court should have done so by dealing with the concrete case from which the question arose ; especially as there are legal elements in that case which, when separated from the political elements, would permit of the giving of a reply based on law. The facts were as follows :

A permanent member of the Security Council had declared that he would only vote for the admission of two ex-enemy States on condition that the other members of the Council would undertake to vote for the admission of the three other ex-enemy States. This was truly a condition, the only one that has ever been laid down ; a previous proposal made by another permanent member, for the simultaneous admission of several other States, contained no condition and, in particular, did not make the admission of one group depend on the admission of the other. The admission of the ex-enemy States is thus the only case to which the request for an opinion can refer.

The declaration of the member in question was founded on legal arguments drawn from the Declaration of Potsdam and from the peace treaties with the five ex-enemy States. These instruments have been invoked on the ground that they contain an obligation by the Signatory Powers to support the application for admission, and it has been maintained that the Potsdam Declaration makes a very clear distinction between the admission of the five ex-enemy States and all other States.

The Court has not been asked to consider or interpret the provisions in question, but I consider that the above facts cannot be disregarded ; for the whole question depends on them. The following considerations will serve to show the importance of these facts :

(1) They show that the question relates to a special unprecedented case, and one that cannot recur ; it follows that the question raised by this case cannot be treated in the abstract ; and

(2) they are decisive on the point whether, in the particular case, the member who asked for the simultaneous admission of all ex-enemy States was legally entitled to introduce this condition into the debate, and to make his vote depend on it.

The permanent member in question, rightly or wrongly, maintained its interpretation of the Declaration of Potsdam and of the peace treaties. For that member, these instruments involved an obligation on signatory States to support applications for admission. The Declaration of Potsdam and the treaties of peace were subsequent to the Charter, and as such an obligation does not conflict with those arising from the Charter (Art. 103 of Charter), the member in question was entitled to rely on them.

It goes without saying that the co-signatories of these instruments were free to accept this interpretation or not. What is decisive, for the question before the Court, is not the correctness of the interpretation made by that State, but the right of that State to rely on it, in the same way as the other signatory States were entitled to rely on their interpretation. This right is guaranteed by the principle of the sovereign equality of States which underlies the organization of the United Nations (Art. 2 of Charter). It follows that the member in question was juridically entitled to maintain its interpretation and therefore to call for the simultaneous admission of the ex-enemy States.

(*Signed*) ZORIČIĆ.