DISSENTING OPINION BY M. KRYLOV.

[*Translation.*]

To my regret, I am unable for the following reasons to concur in the opinion of the Court.

I.

1. From a legal standpoint, the drafting of the question put to the Court gives rise to some criticism : the word "conditions" is used in this question with different meanings ; the words "consent" and "vote" are used, but in fact the reasons for a vote are meant. These errors of drafting are characteristic. They reveal the secret of the origin of the Resolution of November 17th, 1947. It was not framed in a legal atmosphere.

Appearances are deceptive : though framed in a legal form, it is a question put with a definitely political purpose ; it is political in conception ; though abstract in form, it is a concrete question which expressly refers in one of its paragraphs to the "exchange of views which has taken place in the Security Council at its 204th, 205th and 206th Meetings" ; though impersonal in form, it is a question designed to censure the reasons given by a permanent member of the Security Council.

It has been suggested that the request couched in abstract terms is not of a political character, that the Court is not called upon to consider the reasons which may underly the request and, lastly, that the Court is bound only to envisage the question in the abstract form in which it has been presented by the General Assembly.

I cannot share this view. I hold that it is impossible to eliminate the political elements from the question put to the Court and only to consider it as presented in an abstract form. The reply to the question should refer to concrete cases which have been considered by the Security Council and General Assembly. The legal criteria should be examined in the light of the political grounds on which, in actual fact, the attitude of Members of the United Nations was based.

Clearly to indicate the political character of the question put to the Court, it will suffice to quote the Resolution of the General Assembly dated November 17th, 1947, which contains a passage which is quite conclusive on the point. The Resolution says in particular : "The General Assembly .... decides to recommend to the permanent members of the Security Council to consult with a view

to reaching agreement on the admission to membership of the applicants which have not been recommended hitherto, and to submit their conclusions to the Security Council."

"Reaching agreement" regarding the admission of States to membership in the United Nations means : to settle the dispute by political means within the Security Council itself, a political organ of the United Nations. On this organ rests the primary responsibility for the maintenance of international peace and security (Art. 24 of the Charter). This organ bears the initial responsibility as regards the admission of new Members (U.N.C.I.O., Vol. 8, p. 461).

In view of the fact that the admission of new Members is dependent on political decisions of the Security Council and General Assembly, I should have preferred that the Court should have abstained from giving a reply which might, in the nature of things, be utilized in the political dispute which has been going on for a year and a half in the Security Council and General Assembly and have refused to give an advisory opinion.

2. My view would seem to be borne out by the fact that, during the eighteen years of its activities, the Permanent Court of International Justice was never once asked to give an advisory opinion regarding any article of the Covenant of the League of Nations *in abstracto*. It may be noted, by way of example, that in three of its opinions, the Permanent Court had to deal with articles of the Covenant, but in each of these opinions—(1) Nationality Decrees in Tunis and Morocco ; (2) the Status of Eastern Carelia, and (3) the Frontier between Turkey and Iraq—the Court was considering concrete situations. The interpretation of Articles 5, 15 and 17 of the Covenant was in close connexion, in all these opinions, with the concrete situation.

It is easy to explain why this was so. Quite obviously, it was not desired to involve the Permanent Court in political disputes.

I must even go further : not once did the Permanent Court adjudge any case *ex æquo et bono*, that is to say, it always kept within the limits of existing law, of strict legality.

In the present case, the question put to the Court is couched in abstract form. The Court's opinion will have a quasi-legislative effect, and this, as will be shown later (para. 3), is in no way desirable. From the standpoint under consideration, the practice of the Permanent Court should be taken into account by the Court : the interpretation of the Charter *in abstracto* is not desirable.

3. Whereas the Permanent Court, in interpreting the Covenant of the League of Nations, sought to consider concrete situations, or existing disputes, the Court, in the present case, is about to

make a pronouncement, with quasi-legislative effect, concerning decisions to be taken by the political organs of the United Nations. The Court's answer will amount to a definition of the competence of the organs of the United Nations which decide the question of the admission of a new State to membership in the United Nations. In practice, the terms of opinions of the Permanent Court have always been complied with. But the Permanent Court never had before it a question of such importance formulated *in abstracto*. In the present case, it may be asked whether the political organs of the United Nations, acting under conditions which cannot even be foreseen at the present time, might not one day depart from the precepts of the Court's opinion. International justice must keep within the framework of international law and must not encroach on the political sphere.

I would refer, in this connexion, to the last article by Professor Manley Hudson, a former judge of the Permanent Court, in the first number of the *American Journal of International Law* for 1948. This distinguished author says in this article (pp. 15-19) that it must be borne in mind that in some cases it may be a disservice to the Court to urge that it shall deal with disputes in which legal relations between the parties are subordinated to political considerations involved. Speaking of requests for advisory opinions, Professor Hudson suggests that caution must be exercised in cases where a request for an opinion has to do with questions relating to the powers of organs of the United Nations. I think as he does that in this case the Charter should be interpreted rather by the political organs themselves than by opinions of the Court. The Court's activity must not be "artificially stimulated".

Thus I conclude that it would be better if the Court were to assert its right not to answer the question put, and to state its grounds for so doing (Article 65 of the Statute says : "the Court *may* give an advisory opinion....").

II.

1. Since the Court has decided to give an opinion and is content to answer the question in the artificially narrow form in which it has been framed, I find myself obliged to avail myself of my right to extend the scope of the question and to express my opinion on the legal import of Article 4 of the Charter.

In the first place, I substantially concur in the arguments put forward in the dissenting opinion of M. Basdevant, Vice-President of the Court, and of Judges Winiarski, McNair and Read, and in that of Judge Zoričić. I would, however, in my opinion, emphasize the following ideas which I feel it my duty to formulate and, above all, analyse the practice of the Security

Council and General Assembly with regard to the admission of new Members.

2. In its opinion, the Court declares positively that the criteria prescribed in paragraph 1 of Article 4 of the Charter are subjected to the judgment of the Organization, i.e., of the Security Council and General Assembly. But, as I shall show later, a State which, in the judgment of the Organization, possesses all these qualifications is not *ipso facto* entitled to be admitted to membership in the United Nations. The political organs of the United Nations must still decide whether or not they wish to recommend and to admit it. Their decision is a discretionary one. Accordingly, these criteria are not exhaustive. This clearly appears from the text of Article 4 and from the preparatory work.

The authoritative texts of Article 4 of the Charter show some differences of wording. The English text, and the Russian text, which closely follows it, say that membership in the United Nations is open to States which have the qualifications required by Article 4. The French, Spanish and Chinese [1] texts better express the general principle of the constitution of the United Nations, a principle which is not purely and simply that of universality ("peuvent *devenir Membres des Nations unies....*") ("Podran *ser Miembros de las Naciones Unidas....*"). It is true that *all* (applicant) States may become Members of the United Nations (*"peuvent devenir Membres des Nations unies* tous *États...." candidats*) but only if they satisfy the criteria of Article 4 of the Charter. Certainly the five texts all express the same idea, namely, that the qualifications required by Article 4 are necessary in order to become a Member of the United Nations. But these texts by no means imply that the presence of these requisite qualifications necessarily leads to the admission of the applicant State to the United Nations.

3. The same conclusion emerges from an analysis of the report of the Rapporteur of Committee I/2 of the San Francisco Conference. According to this report (U.N.C.I.O., Vol. 7, p. 315), the admission of a new Member must be submitted for examination by the Organization. The Committee did not enumerate the elements to be considered in this examination. It only mentioned the main criteria. This means that the enumeration of criteria in Article 4 of the Charter is not exhaustive. In forming a judgment as to the desirability of admitting a new Member—that is to say, in exercising its discretionary powers with regard to such admission—the Organization may be guided by considerations "of any nature", i.e., not merely legal but also political considerations. This demonstrates the true legal meaning of paragraph 1 of Article 4 of the Charter.

[1] Kindly communicated by Judge Hsu Mo.

4. The affirmation that the qualifications required by Article 4 of the Charter are exhaustive in character, implies that Members of the United Nations taking part in the vote in the Security Council and General Assembly must be exclusively guided by considerations which can be "connected" with the five conditions enumerated in Article 4. But this is definitely contrary to the interpretation given by the Report of Committee I/2.

Again, this requirement does not to my mind appear to serve any purpose. A member of the United Nations, called upon to vote on the admission of a State, is legally entitled to vote according to its own appreciation of the situation. It is not obliged to give reasons for its vote ; it may vote without giving any reasons and such a vote is not subject to any control. What purpose then would be served by a censure of the reasons invoked by Member States in the Security Council or General Assembly ? The recommendation to the effect that the real reasons for a vote must be "connected" with the allegedly exhaustive criteria of Article 4 might result in hypocritical declarations being made by some Members of the United Nations Organization.

5. The Court, in its opinion, declares that it does not follow from the exhaustive character of paragraph 1 of Article 4 that "an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified". The opinion states that in this connexion no relevant political factor is excluded. This means that, in a concrete case, Members have a right of discretionary and political appreciation. But in that case, one is forced to the, in my view, inevitable conclusion that this right of discretionary appreciation is implicitly sanctioned by Article 4 of the Charter and that the enumeration of criteria in that Article is not exhaustive. Otherwise, this right of appreciation would have no basis.

I have already said that I accept the interpretation quoted above, given by the Report of Committee I/2. I hold, therefore, that the Charter allows every Member of the Organization the right to appreciate whether a particular State can be admitted to membership, such appreciation to be based on the presence or absence of the qualifications required by Article 4 of the Charter and on considerations of a political nature.

III.

I have sought to elucidate the general import of Article 4 of the Charter on the basis of an analysis of the text of this Article and of the preparatory work.

It still remains for me to consider the practice followed by the political organs of the United Nations with regard to the admission of new Members.

In the course of the discussions in the Security Council, at its 204th, 205th and 206th Meetings, as well as at meetings of the General Assembly and of its First Commission, both political and legal considerations have been put forward and a variety of arguments have been adduced to show that some particular State should or should not be admitted to membership in the United Nations.

It is not my intention to follow out all the legal arguments advanced in the course of these numerous meetings of which the records have been placed by the Secretary-General of the United Nations at the Court's disposal. I shall confine myself to considering a few of them, by way of example, in order to clarify my standpoint.

1. The delegate of the U.S.S.R. stated in the Security Council that two applicant States, Portugal and Eire, not having taken part in the second world war alongside the democratic countries, could not be admitted to membership in the United Nations. The Soviet delegate's argument was legally based on the criterion of "a peace-loving State" — or, in French "*État pacifique*" — (I would emphasize that the French word *pacifique* has a more passive sense, whereas the English word "peace-loving", as also the Russian, Spanish —*amantes de la paz*—and Chinese[1] equivalents possess a more active sense). Relying more particularly on the latter texts and declaring that the two States above mentioned had made no effort to combat the Nazi danger, the delegate for the U.S.S.R. was legally justified, at that moment, in maintaining his point of view which was that these States were not "peace-loving". The argument of the U.S.S.R. delegate regarding the value as a criterion of participation in the world war has met with the support of the eminent jurist of Panama M. Ricardo Alfaro. As regards the concrete question of the admission of Portugal, the attitude of the delegate of the U.S.S.R. was frequently shared by other States, such as Australia, India and the Philippines.

2. The same delegate, in refusing membership of the Organization to these States, added, as a supplementary argument, that they did not maintain diplomatic relations with the U.S.S.R. Was he legally entitled to do this? His argument was based on the legal precepts of the Charter. The latter, in paragraph 2 of Article 1, says that one of the purposes of the United Nations is to develop friendly relations among nations. The absence of diplomatic relations, i.e., normal bonds between States, due to a decision deliberately and obstinately taken by an applicant State, is surely inconsistent with the criteria stated in Article 4 of the Charter, particularly that which provides that an applicant

[1] Kindly communicated by Judge Hsu Mo.

State must be "willing" to carry out the principles and purposes of the Charter.

It may be noted that the other members of the Security Council (China, the U.S.A., the United Kingdom and others) also took into account—rightly or wrongly *in concreto*—the fact of the absence of diplomatic relations.

3. At the 92nd Meeting of the General Assembly on September 30th, 1947, the delegate of Afghanistan voted against the admission of Pakistan, on account, he declared, of a frontier dispute between these two States. Later, on October 20th, 1947, at the 96th Meeting, this delegate said that he no longer maintained his opposition, because the dispute was about to be settled through diplomatic channels. It would seem that such an argument is warranted, because the attitude of the State voting against admission may be justified by the precepts of Article 4 of the Charter. A similar attitude was adopted by the French delegate in the Security Council in the case of the admission of Siam.

4. I would also cite by way of example the arguments put forward in the Security Council which do not seem to me to accord with the general principles of the Charter. I hold that a Member of the United Nations is not justified in basing his opposition to the admission of a particular State on arguments which relate to matters falling essentially within the domestic jurisdiction of the applicant State. The United Nations Organization has been created by the original Member States which differ in extent, population, armed strength, political institutions, social conditions, etc. The clause in paragraph 7 of Article 2 of the Charter (domestic jurisdiction) in principle excludes questions appertaining to the domestic jurisdiction of a State from the jurisdiction of the Organization itself. This rule must, I hold, also be applied in connexion with the admission of new Members. In support of my view, I may refer to the attitude adopted by many delegations, including that of the U.S.A., at the San Francisco Conference, not only in Committee I/1, which dealt with the purposes and principles of the Charter, but also in Committee II/3 which studied economic and social questions and questions concerning fundamental human rights.

5. The admission of Austria and Transjordan encountered objections on the part of several States—the U.S.S.R., Australia, Canada, India, Pakistan and others. The question was raised whether, at the time of their application, these States were really independent States. The expression of such "doubts" is not contrary to Article 4 of the Charter, for that is a consideration which would merely lead to a postponement of the vote.

6. Finally, I come to the question of the vote which has —wrongly, I think—been described as a "conditional vote". A vote may be affirmative or negative ; or a Member may also abstain from voting. But a "conditional vote" is meaningless in law. Obviously, as has already been said, the question put by the General Assembly refers not to the "vote" but to the reasons for it.

The concrete case envisaged by the question put to the Court is the admission of five ex-enemy States which was discussed by the Security Council. The delegates of the majority of Members of the Council wished to admit two ex-enemy States (Italy and Finland) and were unwilling to admit three others (Bulgaria, Hungary and Roumania). The U.S.S.R. delegate in the Security Council postponed his affirmative vote in favour of Italy and Finland because he was not sure of the admission of the three others to membership. Was this delegate legally justified in so doing ? The majority of the delegates in the Security Council, in interpreting Article 4, held that that Article did not warrant such a proceeding and even forbade it. It would not seem that there is anything to justify such an interpretation. No doubt, the application of each State must be considered separately on its own merits. But it is possible to imagine several applicant States being admitted together and such a vote is by no means precluded by Article 4 of the Charter.

Such a proceeding is especially warranted when it is a question of admitting States whose applications are presented in identical circumstances ; for instance, in a case where several newly created States succeed to a State which has ceased to exist.

In the particular case, the applications for admission to the United Nations of the five ex-enemy States were considered to be worthy of support, after the conclusion of the Peace Treaties of Paris of 1947, not only by the participants in the Conference of Potsdam of 1945 but also by all parties to these peace treaties. All these applications should have been treated in the same manner, that is to say, that all these applicant States should have been admitted simultaneously. As I have stated above (under No. 4), there was no warrant for an unjustified discrimination between the five candidates on the ground of their domestic régime. In this specific, concrete, and even unique case—having regard to the Potsdam Agreement and to the above-mentioned peace treaties—the suggestion made by the delegate of the Soviet Union was not contrary to Article 4 of the Charter, and could not be regarded as illegal. As I have stated, a block vote is not forbidden by the Charter and accordingly it is legal ; it is a legitimate proceeding. Accordingly, there is no need for me to consider whether the clause approved at Potsdam and repeated in the Peace Treaties of 1947 is inconsistent with Article 103 of the Charter.

IV

It follows that the right of appreciation, sanctioned by Article 4 of the Charter, may be exercised by Members of the United Nations in various circumstances in connexion with the admission of new Members. It goes without saying that, in utilizing this right of appreciation in respect of an applicant State, each Member of the Organization must be guided by legal and political considerations which accord with the Purposes and Principles of the United Nations and that it must exercise its right in all good faith.

Accordingly, I give the following reply to the question (that is to say to two parts of the question) put by the General Assembly :

A Member of the United Nations, which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is entitled to declare, during the discussion and before the vote, that it takes into account in voting : (1) the legal criteria prescribed in paragraph 1 of the said Article, and (2) the political considerations consistent with the Purposes and Principles of the United Nations.

(*Signed*) S. KRYLOV.