DISSENTING OPINION BY M. ALVAREZ

[*Translation*]

I

On November 22nd, 1949, the General Assembly of the United Nations addressed to the International Court of Justice a highly important Request for an Advisory Opinion to which a satisfactory answer must be given : what is really involved is the question of the so-called "right of veto". The discussions which have arisen in the United Nations concerning the repeated exercise of this right are well known.

II

We have before us a case which involves the interpretation of the Charter of the United Nations ; it refers therefore to a new question of international law.

This case must not be decided in accordance with the precepts of traditional or classic international law, which were established on an *individualistic* basis and have hitherto prevailed, but rather in accordance with the *new international law*, which is now emerging.

There is no doubt that the Court must apply the existing law to the case which has been referred to it.

What is this law to-day ? Since the recent social upheaval which opened the greatest period in the history of humanity, profound changes have suddenly appeared in almost all spheres of activity, particularly in the international field. The psychology of peoples has undergone a great change ; a new universal international conscience is emerging, which calls for reforms in the life of peoples. This circumstance, in conjunction with the crisis which classic international law has been traversing for some time past, has opened the way to a new international law.

The Charter of the United Nations has created several organs, notably the General Assembly and the International Court of Justice. The former has adopted a number of resolutions on questions of great importance. Under Resolution 171 of the Third General Assembly of the United Nations, the Court was entrusted with a mission, which was not conferred—at any rate not in express terms—on the Permanent Court of International Justice, namely the *development* and consequently the *creation* of law.

The Preamble of the United Nations Charter indicates the new lines along which international life has to develop ; and world public opinion has directly or indirectly given its approval to certain principles framed by the statesmen of the Big Powers with a view to ensuring development on those lines.

In this way a new international law has rapidly begun to come into existence. It has its roots in the *régime of interdependence* which has been emerging since the middle of the XIXth century.

Formerly the rules of law were elaborated slowly, in accordance with well-established conventions or customs, or these rules were evolved, again as a slow process, by jurists. To-day, because of the social upheaval which we have just traversed, because of the remarkable dynamism in the life of peoples, because of the new international organization and the institutions and organs which this organization has created, and finally because of the aspirations of peoples and the exigencies of modern life, the elaboration of such new rules is rapid and sometimes even sudden ; this elaboration is effected by means which are different from those of former times, and in this process the factors which have just been mentioned exert their influence.

The common view that international law must be created solely by States is, therefore, not valid to-day—nor indeed has it ever been.

In truth, alongside of conventional law there is customary law, and above all the doctrines of jurists, who not only have the opportunity of establishing custom, but have formulated rules which have been respected by States.

In future, it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look, more than to anyone, for the creation of the new international law.

Consequently, whether in regard to old questions which assume new aspects, or in regard to entirely new questions, the Court has to give decisions, not in accordance with traditional international law—that would be an anomaly—but in accordance with the international law which is now emerging and which the Court itself is able to create.

It might be said that this law is merely *lex ferenda* and not an existing law at the present time ; but both these types of law coincide. In many cases, so far as the Court is concerned, the tasks of determining, establishing and applying the law go hand in hand.

What are the main characteristics of the new international law, and what should be the aims of the organs entrusted with its creation?

I shall confine myself for the moment to emphasizing the point that the new international law has not only a legal, but also a political, social, economic and even a psychological aspect.

Its point of departure is that, to-day, States are increasingly interdependent : and that consequently they do not form a simple community, as formerly, but rather a veritable international and organized society. This society in nowise abolishes the independence and the sovereignty of the States, nor their legal equality (Article 2 paragraph 1, of the Charter) ; but it limits

this sovereignty, and the rights which flow therefrom, in view of the general interests of this society.

In accordance with the Preamble to the Charter, the new organization—and consequently, the new law which flows therefrom—must have the following ends in view: to maintain peace, to consider the general interest, to safeguard fundamental human rights, to promote co-operation between States, to bring their interests into harmony, to promote economic, social, intellectual and humanitarian progress. The old individualistic law had none of these purposes; it took account only of the interests of the individual considered in isolation.

I will not dwell upon all the other characteristics of international law, but will confine myself to considering briefly the points which are related directly to the Request for an Advisory Opinion, namely:

A.—Limitation of the rights of States;
B.—The exercise of these rights;
C.—The abuse of right, which is intimately connected with the two foregoing points;
D.—The interpretation of treaties, in particular those which have created an international organization.

III

A.—*Limitation of the rights of States.* According to classic international law, the sovereignty of States, and the rights which flowed therefrom, were absolute. Consequently, any State could exercise its rights without limit, or rather, the sole limits were the rights of other States (coalition of rights), and only rarely the general interest. In addition, each State was perfectly free to exercise its rights, and even to abuse them, without having to justify its conduct to anybody.

To-day the situation has changed; the notion of absolute sovereignty has had its day. The general interest, the interests of international society, must constitute the limits of the rights of States and make it possible to determine whether there has been an *abuse* of these rights.

It would be meaningless to speak of solidarity, interdependence, co-operation, the general interest, human happiness, etc., if States could continue to exercise all their rights freely and without restriction. If these concepts are to have any meaning, these rights must be subject to the limitations which I have just outlined.

This limitation was recommended by the last General Assembly of the United Nations in respect of a particular matter: in one of its resolutions, the *Ad Hoc* Political Committee of the Assembly recommended that all nations should, in the use of their rights of sovereignty, join in mutual agreement to limit the individual exercise of those rights in respect of the control of atomic energy,

to the extent required for the promotion of world security and peace.

IV

B.—*Exercise of the rights of States.* The question whether, in given circumstances, a State is or is not bound to exercise its rights, and in what way it must exercise them, depends upon the policy of that State, and policy is influenced by public opinion. But in no case may the exercise of these rights degenerate into a misuse of right.

A State may remain within the limits of its right—for instance, a right of passage—and yet may abuse this right if it takes advantage of the passage to obtain information on the natural resources, strategic bases, fortifications, etc., of the State through which the passage takes place.

C.—*Abuse of right.* This concept is relatively recent in private law, but it is already generally accepted. Even before the first World War, some publicists had asked that it should be extended to international law. Because of the new conditions that have arisen in the life of peoples, it is necessary to-day to find a place for this concept, and the International Court of Justice must take its share in this evolution.

What are the organs that will define the limits of the rights of States and determine whether there has been abuse or not ? In the past, no such organ had existed, because the question did not arise. To-day, there are three very important organs, each of which has power to act in its particular sphere—the Security Council, the General Assembly of the United Nations and the International Court of Justice. There are also the other organs of the United Nations: the Economic and Social Council, the Trusteeship Council, etc., in their respective spheres of jurisdiction.

V

D.—*Interpretation of treaties, in particular those creating an international organization.* First of all, it must be made perfectly clear that the Court has competence to interpret the Charter of the United Nations like any other instrument, without any limitations whatever.

It has been contended that the Court was not competent to interpret this treaty. That is not correct. Moreover, the Court has already taken an opportunity of asserting its competence in this respect (I.C.J. Reports 1947-1948, p. 61).

Legal texts can be interpreted by anyone ; but when such an interpretation is made by an authorized organ, such as the General Assembly of the United Nations or the International Court of Justice, it presents a great practical value and creates precedents.

Because of the progressive tendencies of international life, it is necessary to-day to interpret treaties, as well as laws, in a different manner than was customary when international life showed few changes. This interpretation must be made in such a way as to ensure that institutions and rules of law shall continue to be in harmony with the new conditions in the life of the peoples.

There are two considerations which support this assertion. First, we observe that national courts, in their interpretation of private law, seek to adapt it to the exigencies of contemporary life, with the result that they have modified the law, sometimes swiftly and profoundly, even in countries where law is codified to such an extent that it is necessary to-day to take into consideration not only legal texts, but also case-law. It is the same, *a fortiori*, in the interpretation of international matter, because international life is much more dynamic than national life.

Again, because of this very dynamism, the political aspect of questions is tending to have precedence over the juridical aspect. We have a very important concrete illustration of this tendency. According to traditional international law, the state of war still exists between the Allies and Germany, since no peace treaty has yet been signed with the latter State. But this situation is considered unacceptable, and efforts are being made to bring it to an end.

It is therefore necessary to establish a theory, a technique of interpretation. This process will reveal great differences between the old system and the new one which will have to be applied henceforward.

The old system possessed the following characteristics :

A.—No distinction was made between treaties : the same rules of interpretation were applied in all cases.

B.—Those who interpreted the treaties were slaves, so to speak, of the wording. When the wording was clear, it had to be applied literally, without taking into account the possible consequences.

C.—When a text was not clear, recourse was had to the *travaux préparatoires*.

D.—The interpretation of a given text, notably of a treaty, was, so to speak, immutable. No change could be made, even if the matter considered had undergone modifications.

The new system of interpretation must present other characteristics :

(A) Distinctions must be made between different kinds of treaties. A bilateral treaty concerning an ordinary question, such as extradi-

tion, cannot be interpreted in the same way as a political treaty. Three categories of treaties must be specially recognized: peace treaties, in particular those affecting world peace; treaties creating principles of international law; and treaties creating an international organization, notably the world organization. All these possess both a political and a psychological character.

Peace treaties are dictated by material force; and those creating principles of international law, or international organizations, are created by the majority of the participating States, for the new signatories can only accept what has already been done. Consequently, these three categories of treaties are not to be interpreted literally, but primarily having regard to their purposes.

(B) The text must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life.

When the wording of a text seems clear, that is not sufficient reason for following it literally, without taking into account the consequences of its application. Multilateral treaties are not drafted with the help of a dictionary, and their wording is often the result of a compromise which influences the terms used in the text.

In the case of the Polish Postal Service in Danzig, the Permanent Court of International Justice (P.C.I.J., Series B, No. 11, p. 39) decided that the words of a treaty must be interpreted according to their normal meaning, unless the interpretation would thus lead to unreasonable or absurd consequences.

It is necessary to add that to-day the same method must be observed when the provisions of a clause appear to run counter to the purposes of the institution concerned or to the new conditions of international life.

There is a decisive argument applicable to this question. It has long been held that treaties contained, implicitly, the clause *rebus sic stantibus*, according to which, when the fundamental conditions in which a treaty was made have become modified, the treaty ceases to have effect. The correctness of this clause is so manifest that it has recently been carried over from international to private law.

For the same reason, it must be recognized that even the clear provisions of a treaty must not be given effect, or must receive appropriate interpretation, when, as a result of modifications in international life, their application would lead to manifest injustice or to results contrary to the aims of the institution. For, otherwise, marked discrepancies would result between the written text and the reality; and that would be inadmissible.

But there is more: it is possible, by way of interpretation, to attribute to an institution rights which it does not possess according to the provisions by which it was created, provided that these rights are in harmony with the nature and objects of the said institution. Thus, for instance, in its Advisory Opinion of April 11th, 1949, on the Reparation for Injuries suffered by the United Nations, the International Court of Justice declared that, having in view the nature and objects of that institution, it was entitled to claim damages suffered not only by itself but by its agents in the performance of their duties. This Court has therefore attributed to the United Nations a right which was not expressly conferred on that Organization by the Charter and which, according to traditional international law, appertains solely to States. The Court, in so doing, created a right and, as I have already shown, it was entitled to do so.

A fortiori, the Court has the power to limit rights, or to give them an effect other than that prescribed by the literal text where the circumstances mentioned above make it necessary to do so.

(C) It will be necessary in future—unless in exceptional cases—when interpreting treaties, even those which are obscure, and especially those relating to international organizations, to exclude the consideration of the *travaux préparatoires*, which was formerly usual. The value of these documents has indeed progressively diminished, for different reasons: (*a*) they contain opinions of all kinds; moreover, States, and even committees, have at times put forward some idea and have later abandoned it in favour of another; (*b*) when States decide to sign a treaty, their decision is not influenced by the *travaux préparatoires*, with which, in many cases, they are unacquainted; (*c*) the increasing dynamism of international life makes it essential that the texts should continue to be in harmony with the new conditions of social life.

It is therefore necessary, when interpreting treaties—in particular, the Charter of the United Nations—to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoires*. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.

(D) The interpretation of treaties must not remain immutable; it will have to be modified if important changes take place in the matter to which it relates.

It results from the foregoing considerations, that it is possible, by way of interpretation, to effect more or less important changes in treaties, including the Charter of the United Nations. That causes surprise to those who believe that this document is unchangeable, but such modifications are the natural consequence of the

dynamism of international life. We have to choose between the maintenance of texts as immutable, even if they lead to unreasonable consequences, and the modification of these texts, if that becomes necessary. There cannot be any doubt as to the choice.

If the International Court of Justice were able by its judgments and advisory opinions to establish a doctrine of the limitation of the rights of States and a doctrine of the misuse of rights, and in addition a new doctrine concerning the interpretation of treaties, it would be rendering important services to international law and to the cause of peace.

VI

In view of the foregoing considerations, I am unable to adhere to the Court's Opinion, seeing that it makes no distinction between the reasons for which the Security Council may fail to recommend the admission of a State as a Member of the United Nations, and because it holds that it must consider only whether the Security Council has or has not made a recommendation. Moreover, the Court believes that the General Assembly has not to take any particular steps as regards the Council if the latter has not made a recommendation. Thus the Assembly would have only a somewhat passive role.

I hold that the role of the General Assembly in the admission of new Members is an active role, for it is the Assembly which effects the admission.

According to paragraph 2 of Article 4 of the Charter, the Assembly effects the admission of States which fulfil the conditions laid down in that article, but it is necessary that the Security Council should have recommended the State requesting admission.

Two situations may arise :

A.—The State seeking admission has failed to obtain the requisite number of votes in the Security Council. In that case, its admission cannot be recommended to the General Assembly. The resulting situation resembles that which occurs in regard to the election of Members of the International Court of Justice : in order that a judge may be elected, he must have obtained the requisite majority both in the Security Council and in the General Assembly ; if he does not secure the required majority in the Council, he cannot be elected.

B.—The State seeking admission has obtained the requisite number of votes in the Council, but one of the permanent Members has opposed the recommendation, in other words, has made use of the *veto*. This is the case which we must specially consider. I think that the General Assembly may appraise the veto.

The right of veto has been provided by paragraph 3 of Article 27 of the Charter of the United Nations. But, if we examine the provisions of Chapters V, VI, VII and VIII to which it refers, we see

that when this right was created the only objects in view were matters concerning the maintenance of peace and international security. Article 24 states that the Members of the United Nations Organization confer on the Security Council a primary responsibility for the maintenance of international peace and security. The article thus establishes something closely resembling the former "European Directorate" created after the Napoleonic wars, but with a universal scope. The creation of such a body is certainly fitting and justifiable, having regard to the primary role played by the Great Powers in case of conflict. It is entirely natural that the Security Council should be unable to adopt decisions in matters so grave as those of peace and security against the opposition of a Great Power, for the latter would then be obliged to take part, contrary to its will, in the proposed measures, and that would be a very dangerous situation.

But the exercise of this right of veto must be kept within proper limits. The literal text of Article 27, which established this right, is clear, if taken in isolation ; but it is no longer clear if we have regard to the nature and objects of the United Nations Organization.

To decide that the right of veto may be freely exercised in every case in which the Security Council may take action would mean deciding that the will of a single Great Power could frustrate the will of all the other Members of that Council and of the General Assembly, even in matters other than the maintenance of peace and security ; and that would reduce the U.N.O. to impotence.

Even if it is admitted that the right of veto may be exercised freely by the permanent Members of the Security Council in regard to the recommendation of new Members, the General Assembly may still determine whether or not this right has been *abused* and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Council.

It has been argued that the Security Council is alone competent to appraise the use made by one of its permanent Members of the right of veto, and that this is shown by the practice which has become established. I cannot agree with that opinion either : the General Assembly is entitled not only to ask the Council for what reason it has failed to recommend a State seeking admission, but also to determine whether or not this right of veto has been abused.

According to Articles 10 and 11 of the Charter, the General Assembly may make recommendations to the Security Council ; *a fortiori* it may make observations to that Council whenever it sees fit. It is not necessary that the Assembly should have been endowed with such a right in express terms, for it is a necessary consequence of its powers.

The above solution is consistent both with the spirit of the Charter of the United Nations and with the requirements of common sense.

It is consistent with the spirit of the Charter by the terms of which the U.N.O. has a universal role, with the consequence that all members of the international community which fulfil the conditions laid down in Article 4 should be admitted to the United Nations ; these States have a *right* to be admitted.

The solution is also consistent with the requirements of common sense because, if it were admitted that the right of veto could be freely exercised, the result might be—as has just been pointed out—that a State whose request for admission had been approved by all the Members of the Security Council except one and by all the Members of the General Assembly would nevertheless be unable to obtain admission to the United Nations because of the opposition of a single country ; a single vote would thus be able to frustrate the votes of all the other Members of the United Nations ; and that would be an absurdity.

(*Signed*) ALVAREZ.