DISSENTING OPINION OF JUDGES BASDEVANT, WINIARSKI, SIR ARNOLD McNAIR AND READ.

1. We regret that, while we concur in the opinion of the majority of the members of the Court as to the legal character of the first question, as to the power of the Court to answer it and the desirability of doing so, and as to the competence of the Court to give any interpretation of the Charter thereby involved, we are unable to concur in the answer given by the majority to either question, and we wish to state our reasons for not doing so.

2. The request made to the Court for an advisory opinion is as follows :

> "Is 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, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article ? In particular, can such a Member, while it recognizes 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 ?"

There are two questions and we shall begin by examining the first.

3. In our opinion, it is impossible to regard the first question as one which relates solely to the statements or the arguments which a Member of the United Nations may make or put forward in the Security Council or in the General Assembly when those organs are considering a request for admission, and not to the reasons on which that Member bases its vote. The Court is asked whether a Member is "juridically entitled to make its consent to the admission" dependent on conditions not provided for by paragraph 1 of Article 4. Its consent to admission is expressed by its vote. It is therefore the vote that is in question, as is confirmed by the expression "subject its affirmative vote" used in the second question, which is complementary to the first. But it would be a strange interpretation which gave a Member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote. Such a result would not conduce to that frank exchange

of views which is an essential condition of the healthy functioning of an international organization. It is true that it is not possible to fathom the hidden reasons for a vote and there exists no legal machinery for rectifying a vote which may be cast contrary to the Charter in the Security Council or the General Assembly. But that does not mean that there are no rules of law governing Members of the United Nations in voting in either of these organs; an example is to be found in paragraph 1 of Article 4 prohibiting the admission of a new Member which does not fulfil the qualifications specified therein. This distinction, which it has been attempted to introduce between the actual vote and the discussion preceding it, cannot be accepted; it would be inconsistent with the actual terms of the question submitted to the Court, and its recognition would involve the risk of undermining that respect for good faith which must govern the discharge of the obligations contained in the Charter (Article 2, paragraph 2).

4. The question submitted to us is whether, apart from the qualifications expressly specified in paragraph 1 of Article 4, a Member of the United Nations is at liberty to choose the reasons on which it may base its vote or which it may invoke in the Security Council or the General Assembly in the course of the proceedings relating to an application for admission, or whether, on the other hand, that Member is forbidden to rely on considerations which are foreign to the qualifications specified in paragraph 1 of Article 4. The question has been put to us in terms of the conduct of a member of the United Nations in the Security Council or in the General Assembly; the Member is envisaged in its capacity as a member of these organs, that is to say, in the discharge of its duty to contribute to the making of a recommendation by the Security Council or of a decision by the General Assembly on that recommendation. The freedom of that Member in this respect cannot be either more or less than that of the organ as a member of which he is called upon to give his vote. Accordingly, in order to answer the question put with regard to the conduct of a member, we are compelled to begin by deciding what the answer should be in relation to the organ, be it the Security Council or the General Assembly.

5. The reason why the question stated has been submitted to the Court is that the relevant provisions did not seem to be clear enough to provide a simple and unambiguous answer to the question. Such, at any rate, was the view of the General Assembly and we share it. Accordingly, in our opinion, we are confronted with a question of interpretation and therefore we must apply the rules generally recognized in regard to the interpretation of treaties.

6. The relevant article of the Charter is No. 4, which is as follows:

"1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

Although the terms of the question as put to the Court by the General Assembly are confined to mentioning the first paragraph of this Article, its second paragraph is equally relevant, because it deals with the discussion and the voting in the Security Council and the General Assembly when examining a request for admission, and because it is the second paragraph which fixes the respective spheres of the Security Council and the General Assembly in this matter.

Moreover, it is a rule of interpretation which was well recognized and constantly applied by the Permanent Court of International Justice that a treaty provision should be read in its entirety.

Again, it must be placed in its legal context as supplied by the other provisions of the Charter and the principles of international law.

7. The first conclusion that emerges from a reading of Article 4 in its entirety is that the Charter does not follow the model of the multilateral treaties which create international unions and frequently contain an accession clause by virtue of which a declaration of accession made by a third State involves automatically the acquisition of membership of the union by that State. On the contrary, the Charter, following the example of the Covenant of the League of Nations and having due regard to the fact that it is designed to create a political international organization, has adopted a different and more complex system, namely, the system of admission. Assuming that a request is made by a State desiring to be admitted, the system involves a decision by the General Assembly whereby admission "will be effected"; this decision is taken upon a recommendation made by the Security Council; that recommendation cannot be made, and that decision cannot be taken, unless certain qualifications specified in paragraph 1 of Article 4 are possessed by the applicant State.

8. The essential feature of this system is the decision of the General Assembly whereby the admission "will be effected". The provisions of paragraph 2 of Article 4, which fix the respective powers of the General Assembly and the Security Council in this matter, do not treat the admission of new Members as a mere matter of the routine application of rules of admission. It would only be possible to attribute such a meaning to this Article if it had adopted a system of accession and not of admission; and if accession had been the system adopted it would have been better to have placed the Secretary-General in control of the procedure. This

Article does not create a system of accession, but the entirely different system of admission. In the working of this system the Charter requires the intervention of the two principal political organs of the United Nations, one for the purpose of making a recommendation and then the other for the purpose of effecting the admission. It is impossible by means of interpretation to regard these organs as mere pieces of procedural machinery like the Committee for Admissions established by the Security Council. In the system adopted by the Charter, admission is effected by the decision of the General Assembly, which can only act upon a recommendation of the Security Council, and after both these organs are satisfied that the applicant State possesses the qualifications required by paragraph 1 of Article 4.

9. The resolutions which embody either a recommendation or a decision in regard to admission are decisions of a political character ; they emanate from political organs ; by general consent they involve the examination of political factors, with a view to deciding whether the applicant State possesses the qualifications prescribed by paragraph 1 of Article 4 ; they produce a political effect by changing the condition of the applicant State in making it a Member of the United Nations. Upon the Security Council, whose duty it is to make the recommendation, there rests by the provisions of Article 24 of the Charter "primary responsibility for the maintenance of international peace and security"—a purpose inscribed in Article 1 of the Charter as the first of the Purposes of the United Nations. The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance.

The main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations. That is the position of a member of the Security Council or of the General Assembly who raises an objection based upon reasons other than the lack of one of the qualifications expressly required by paragraph 1 of Article 4.

That does not mean that no legal restriction is placed upon this liberty. We do not claim that a political organ and those who contribute to the formation of its decisions are emancipated from all duty to respect the law. The Security Council, the General Assembly and the Members who contribute by their votes to the decisions of these bodies are clearly bound to respect paragraph 1 of Article 4, and, in consequence, bound not to admit a State which fails to possess the conditions required in this paragraph.

But is there any other legal restriction upon the freedom which in principle these organs enjoy in the choice of the reasons for their decisions, that is to say, upon the liberty which in principle a State

enjoys in choosing the reasons for its decisions, and in this case, for its vote ? Is there in this case a restriction consisting in a prohibition to oppose an application for admission on grounds foreign to the qualifications required by paragraph 1 of Article 4 ?

10. We must therefore decide whether there exists such a restriction upon the principle of law stated above.

There is a rule of interpretation frequently applied by the Permanent Court of International Justice, when confronted with a rule or principle of law, to the effect that no restriction upon this rule or principle can be presumed unless it has been clearly established, and that in case of doubt it is the rule or principle of law which must prevail. In the present case, before acknowledging the existence of any restriction upon the principle of the widest examination of requests for admission by the Security Council, the General Assembly and their members, it is necessary to show that such a restriction has been established beyond a doubt.

Can it therefore be said that the application of this principle is subject to a clearly established restriction precluding the putting forward, in the course of the examination of requests for admission, of considerations not expressly specified in paragraph 1 of Article 4 ?

11. There is no treaty provision which establishes such a restriction.

The effect of paragraph 1 of Article 4—the only relevant text in this connexion—is that certain qualifications therein enumerated are required for admission, and that these qualifications are essential ; but there is no express and direct statement that these qualifications are sufficient and that once they are fulfilled admission must of necessity follow.

Not only does the paragraph not say this, but it does not even imply any such restriction ; indeed quite the contrary is the case.

The language of Article 4—"Membership is open", "*Peuvent devenir Membres*", "admission will be effected", "*se fait*"—is permissive in tone, not obligatory. So far as we understand, the Chinese, Russian and Spanish texts contain nothing which contradicts this view. Paragraph 1 of Article 4 enacts that States which fulfil the conditions therein enumerated possess the qualifications required for admission ; this enumeration is exhaustive in the sense that no other condition is required by the Charter ; this provision, which prohibits the admission of a State not fulfilling these conditions, fully carries out the intentions of the drafters of the Charter and is entitled to complete legal effect. But this provision contains no evidence of any definite intention to deprive the Security Council or the General Assembly or their members of the legal right possessed by them of giving effect to other considerations.

Indeed, so far from depriving them of this power, Article 4 lends support to its existence.

12. This view accords with the intentions of the framers of the Charter.

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. This is exactly what was done with respect to paragraph 2 of Article 4.

13. Before dealing with this point we may begin by stating that while the Minutes of the San Francisco Conference show clearly the importance attached to the qualifications for admission therein set out and also to the respective rôles of the General Assembly and the Security Council in regard to admission, and while they make it clear that the above-mentioned qualifications are regarded as essential, they contain no indication of any intention to regard them as sufficient to impose upon the Organization a legal obligation to admit the State which possesses them.

14. Without describing in detail the drafting of Article 4, we shall mention the following points:

The Dumbarton Oaks Proposals (Chapter III, Membership, and Chapter V, General Assembly) contained the two following sentences:

> "Membership of the Organization should be open to all peace-loving States."
>
> "The General Assembly should be empowered to admit new Members to the Organization upon recommendation of the Security Council."

(It will be remembered that these were proposals and not draft articles.)

At San Francisco, the first of these sentences was dealt with by Committee 2 of Commission I, and finally emerged as paragraph 1 of Article 4 of the Charter. The Minutes of this Committee are to be found in Volume VII of the Conference Records. On page 306 will be found the report of the Rapporteur of Committee I/2 submitting the text of paragraph 1 of Article 4 in substantially the form adopted. After dealing with the rejection of the proposal in favour of universal membership, it referred to the "two principal tendencies .... manifested in the discussion", one 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", while the other view was 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".

> "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." (Vol. VII, p. 308).

It will be noted that this passage calls upon the Organization, that is to say, the Security Council and the General Assembly, to conduct the most extensive investigation. No doubt it might be argued that the final sentence quoted relates solely to the investigation which the Organization must make regarding the qualifications specified in paragraph 1 of Article 4. This interpretation is in no way self-evident ; it is purely conjectural and is inconsistent with the French text of this report, which states the duty of the Organization to be "*de se former un jugement sur l'opportunité de l'admission d'un membre nouveau*". Judgment upon the expediency of an admission is not a mere declaration that the conditions specified in paragraph 1 of Article 4 are satisfied ; it goes much further than that.

A little further on (p. 309), the same report, commenting upon the future paragraph 1 of Article 4, in a sentence the significance of which is reinforced by the fact that this sentence was substituted for an earlier and less precise text (p. 290), declares that "the text adopted sets forth more clearly than the Dumbarton Oaks Proposals those qualifications for membership which the delegates deem fundamental, and provides a more definite guide to the General Assembly and Security Council on the admission of new members". The statement that the qualifications required by paragraph 1 of Article 4 are considered as fundamental in no way excludes, but, on the contrary, implies, the possibility of further requirements, upon grounds which are different and more discretionary.

The second sentence of the Dumbarton Oaks Proposals quoted above was dealt with at San Francisco by Committee 1 of Commission II (General Assembly), whose proceedings are recorded in Volume VIII of the Records of that Conference. The report of the Rapporteur of this Committee, as approved by the Committee on May 28th, 1945, contains the following paragraph (VIII, p. 451) :

> "The Committee recommends that new members be admitted by the General Assembly upon recommendation of the Security

Council. (See attached Annex, Item 2.) In supporting the acceptance of this principle, several delegates emphasized 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.*" (The italics are ours.)

Annex, Item 2, Vol. VIII (p. 456), is as follows :

"The General Assembly may admit new Members to the Organization upon the recommendation of the Security Council."

Language more discretionary, more permissive, than "may admit", "*a le pouvoir d'admettre*", it would be difficult to find.

The Summary Report of the 15th Meeting of the same Committee, held on June 18th, 1945, contains the following passage (Vol. VIII, p. 487) :

"*Admission of New Members.*

The Committee considered the following texts of Chapter V, Section B, paragraph 2, of the Dumbarton Oaks Proposals, which were under consideration by the Co-ordination Committee :

'The admission of any State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

'L'admission de tout État comme membre des Nations unies est prononcée par l'Assemblée générale sur la recommandation du Conseil de Sécurité.'

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 texts.*" (The italics are ours.)

The Second Report of the Rapporteur of Committee II/1, which was circulated to the Members for their approval on June 19th, 1945, contains the following passage (Vol. VIII, p. 495) :

"*Admission of New Members* (Chapter V, Section B, paragraph 2, of the Dumbarton Oaks Proposals).

The Committee considered a revision of the text of this paragraph which was under consideration by the Co-ordination Committee in order to determine whether the power of the Assembly to admit new Members on recommendation of the Security Council was in no way weakened by the proposed text.

The Committee was advised that the new text *did not in the view of the Advisory Committee of Jurists, weaken the right of the Assembly to accept or reject* a recommendation for the admission of a new member....

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." (Italics ours.)

These passages show that the text thus worked out which ultimately became paragraph 2 of Article 4, was regarded as conferring very wide powers upon the General Assembly.

Finally, M. Delgado, the Rapporteur of Commission I, said, both in his Report to the Conference (Vol. VI, p. 248) and in his speech at the plenary session on the 25th June : "New Members will be admitted only if they are recognized as peace-loving, accept the obligations contained in the Charter, and, upon scrutiny by the Organization, are adjudged able and ready to carry out those obligations." (Vol. I, p. 615.)

He thus stated very clearly that the qualifications specified in paragraph 1 of Article 4 are essential qualifications. Had he considered them also as sufficient, he would not have failed to say so.

15. Nor can the significance of the word "recommendation", in paragraph 2 of Article 4, be overlooked. It is the function of the Security Council to reject an applicant or to recommend its admission. On the one hand, this fact indicates the discretionary nature of this function of the Security Council, while, on the other hand, the freedom of the General Assembly either to accept the recommendation and admit the applicant or to reject the application indicates that the function of the General Assembly in this matter is also discretionary.

16. So far as particularly concerns the freedom of a Member of the United Nations to put forward, in the course of the examination of an application for admission, this or that consideration foreign to the qualifications specified by paragraph 1 of Article 4, we may add that the General Assembly and the Security Council possess, by virtue of Articles 21 and 30 of the Charter, the right to regulate their own procedure. We can find nothing else which could restrict the freedom of discussion and, consequently, subject to the general control exercised by each organ, a Member enjoys the right of expressing its views in the course of the debates.

17. In our opinion it follows from these considerations that a Member of the United Nations remains legally entitled, either in the Security Council or in the General Assembly, during the discussion upon the admission of a new Member, to put forward considerations foreign to the qualifications specified in paragraph 1 of Article 4, and, assuming these qualifications to be fulfilled, to base its vote upon such considerations.

18. In our opinion, while the Charter makes the qualifications specified in paragraph 1 of Article 4 essential, it does not make them sufficient. If it had regarded them as sufficient, it would not have failed to say so. The point was one of too great importance to be left in obscurity.

It is easy to understand why the authors of the Charter, after having rejected the principle of universality, should deem it

undesirable to exclude the consideration of the very diverse political factors which the question of admission can in certain cases involve. When one considers the variety in the political conditions of the States which were not original Members of the United Nations —some ex-enemy, some ex-neutral, one permanently neutral by treaty, some with empires and some without, some unitary and some consisting of federal or other unions of States—and when one considers the political repercussions attending the union of existing States, or the emergence of new States and their entry into the United Nations—perhaps, the framers of the Charter, after having decided in this connexion to entrust a special mission to the Security Council, were wise in their generation in taking the view (as we submit they did) that it was impossible to do more than to prescribe certain preliminary and essential qualifications for membership and to leave the question of admission to the good faith and the good sense of the Security Council and the General Assembly, and particularly the former by reason of the special responsibilities laid upon it. For the authors of the Charter had to look beyond the year 1945 and endeavour to provide for events which the future had in store. A little reflection upon the changes in the map of the world during the short period which has elapsed since June 1945 suggests to us that they were prescient and prudent in the plan wich they adopted.

19. When a Member of the United Nations imports into the examination of an application for admission a consideration which is foreign to the qualifications of paragraph 1 of Article 4, what he does is not the same thing as it would be if the Charter made such a consideration a qualification additional to those already required. That would involve amending the Charter, and there can be no question of that. The Member is merely introducing into the discussion, as he has a right to do, a political factor which he considers of importance and on which he is entitled to rely but which the other Members are equally entitled to consider and decide whether to accept or reject, without being legally bound to attach any weight to it ; whereas on the other hand they would be legally bound to give effect to an objection based on the duly established lack of one of the qualifications specified in paragraph 1 of Article 4.

20. While the Members of the United Nations have thus the right and the duty to take into account all the political considerations which are in their opinion relevant to a decision whether or not to admit an applicant for membership or to postpone its admission, it must be remembered that there is an overriding legal obligation resting upon every Member of the United Nations to act in good faith (an obligation which moreover is enjoined by paragraph 2 of Article 2 of the Charter) and with a view to carrying out the

Purposes and Principles of the United Nations, while at the same time the members of the Security Council, in whatever capacity they may be there, are participating in the action of an organ which in the discharge of its primary responsibility for the maintenance of international peace and security is acting on behalf of all the Members of the United Nations.

That does not mean the freedom thus entrusted to the Members of the United Nations is unlimited or that their discretion is arbitrary.

21. For these reasons, our view is that the first question should be answered as follows :

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 which possesses the qualifications specified in paragraph 1 of that Article, is participating in a political decision and is therefore legally entitled to make its consent to the admission dependent on any political considerations which seem to it to be relevant. In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.

22. Having now replied to the first question, we shall proceed to the second, which is as follows :

> "In particular, can such a Member, while it recognizes 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 ?"

The practice of the General Assembly and of the Security Council in regard to the admission of new Members recognizes an affirmative vote, a negative vote, or an abstention, but not a vote subject to a condition ; so the second question put must be understood as asking the Court to decide whether a Member of the Organization is legally entitled, while admitting that the qualifications prescribed in Article 4, paragraph 1, are fulfilled by the applicant State, to vote against its admission unless the Member is assured that other States will be admitted to membership in the United Nations contemporaneously with that State.

This question is put in general terms, and without making any distinction according to the importance possessed by the vote of any particular Member in the attainment of the majority required in the Security Council or in the General Assembly.

23. If it is agreed (as we have already submitted) that a Member of the United Nations is legally entitled to refuse to vote in favour

of admission by reason of considerations foreign to the qualifications expressly laid down in Article 4, paragraph 1, this interpretation applies equally to the second question.

A consideration based on the desire that the admission of the State should involve the contemporaneous admission of other States is clearly foreign to the process of ascertaining that the first State possesses the qualifications laid down in Article 4, paragraph 1; it is a political consideration. If a Member of the United Nations is legally entitled to make its refusal to admit depend on political considerations, that is exactly what the Member would be doing in this case.

24. If the request for an opinion involved the Court in approving or disapproving the desire thus expressed by a Member of the United Nations to procure the admission of other States at the same time as the applicant State, it would only be possible to assess this political consideration from a political point of view. But such an assessment is not within the province of the Court. An opinion on this subject would not be an opinion on a legal question within the meaning of Article 96 of the Charter and Article 65 of the Statute. It is one thing to ask the Court whether a Member is legally entitled to rely on political considerations in voting upon the admission of new Members; that is a legal question and we have answered it. It is quite another thing to ask the Court to assess the validity of any particular political consideration upon which a Member relies; that is a political question and must not be answered.

25. Nevertheless, as we have said, a Member of the United Nations does not enjoy unlimited freedom in the choice of the political considerations that may induce it to refuse or postpone its vote in favour of the admission of a State to membership in the United Nations. It must use this power in good faith, in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter. But no concrete case has been submitted to the Court which calls into question the fulfilment of the duty to keep within these limits; so the Court need not consider what it would have to do if a concrete case of this kind were submitted to it.

(*Signed*) J. BASDEVANT.
(,,) WINIARSKI.
(,,) ARNOLD D. MCNAIR.
(,,) JOHN E. READ.