SILENCE GIVES CONSENT

*Phillip C. Jessup**

Procedural details are seldom dramatic and sometimes dull, yet no lawyer ignores their importance. In international institutions they take on a special significance because procedures, whether judicial or parliamentary, vary widely from country to country. This often produces a situation where the enforcement of an unknown foreign rule may be considered a bit of trickery. *Robert's Rules* have had wide influence but have never been adopted *en bloc* by an international convention.[1]

During the twenty-fifth anniversary sessions of the United Nations General Assembly, there was an extensive debate in the Sixth (Legal) Committee on the role of the International Court of Justice. Speaker after speaker referred to some of the procedural difficulties of the Court. The reasons for existing Rules of Court—and their application in particular cases—are not always appreciated, but the "law's delays" are on record. Many of the speakers noted with appreciation the fact that the Court itself now has a Committee on the Revision of the Rules of Court, although it is not always realized that this study began several years ago and had reached an advanced stage of preparation even before the last elections to the Court in 1969.

These comments will not deal, however, with the International Court of Justice, but rather they will consider some procedural innovations in the political organs of the United Nations.

The Charter of the United Nations itself deals with various procedural questions. Article 18 provides that: "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."[2] While examples of such questions are given in the article, a familiar example which highlights the importance of article 18 is furnished by the question of the seating of the delegates of the People's Republic of China. The preliminary battle was fought over a resolution that the question be considered "important." Only a simple majority is necessary to carry a resolution denominating the substantive issue as an "important question." However, once labeled an "important question," a two-thirds majority is required on the substantive issue. Of course, if the question is not first designated

*Judge, International Court of Justice, 1961-70. United States Representative to UN General Assembly, 1943-52; Ambassador at Large 1949-53; Hamilton Fish Professor of International Law and Diplomacy, Columbia University, 1946-61.

[1]*See* Jessup, *Parliamentary Diplomacy*, 89 RECUEIL DES COURS 185 (1956).

[2]U.N. CHARTER art. 18, para. 2.

"important," as was the case in the seating of the delegates of the People's Republic of China, a simple majority is all that is necessary to carry a resolution on the substantive question. Similarly, a draft resolution may carry in one of the principal committees only to fail to attain the requisite majority in the plenary session. (The failure may result either from application of the two-thirds rule or from a decision by the head of the delegation to overrule the vote cast by the member of his delegation sitting in the committee.)

Other innovations in procedure are contained in the familiar provisions of article 27 of the Charter which provide:

> 1. Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.[3]

The necessity for securing the concurring votes of the five permanent members creates what is known as the right to veto. The procedural manipulations of this rule lead to the problem of the "double veto" which needs no reexamination here.[4] It should also be noted that if one wants to avoid casting a veto and is sure of the positions of other delegations, a resolution can be defeated by seven abstentions.[5]

Importance has been attached to the size and nature of the majority supporting resolutions of the General Assembly; it has been suggested that this has a bearing on the legal or legislative weight of the resolution.[6] Leaving that argument to one side, it may still be true that the influence and indeed the legal effect of a resolution of the General Assembly may be a function of the nature of the vote. If a resolution is adopted unanimously, it has special weight. If the vote includes substantial representation of all three "worlds," it is more persuasive than if adopted by the vote of those delegates who are associated with only one or another group of states. The present writer touched on this problem in his dissenting opinion in the *South West Africa* cases:

> Since, as I have explained, I believe the judicial task of the Court

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[3]U.N. CHARTER art. 27.

[4]For a discussion of the use of the veto power, see L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS (2d ed. 1949).

[5]U.N. CHARTER art. 27, para. 3.

[6]Southwest Africa Cases, [1966] I.C.J. 291 (Tanaka, J., dissenting).

> in interpreting Article 2 of the Mandate, is to be performed by applying appropriate objective standards—as, in other contexts, courts both international and national have done—it is not necessary for me to enter here into the meaning of a legal "norm" either as the term appears to have been used in the pleadings in this case, or with one or more of the connotations to be found in jurisprudential literature. This section of the opinion has shown that the standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community. This is not the same problem as proving the establishment of a rule of customary international law, and I have already explained that I do not accept Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law ("norm"). It is therefore not necessary to discuss here whether unanimity is essential to the existence of *communis opinio juris*. It has also been plainly stated herein that my conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law. But the accumulation of expressions of condemnation of apartheid as reproduced in the pleadings of Applicants in this case, especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard. Counsel for Respondent, in another connection, agreed that "the effect of obtaining the agreement of an organization like the United Nations would, for all practical purposes, be the same as obtaining the consent of all the members individually, and that would probably be of decisive practical value," for the United Nations "represents most of the civilized States of the world." (C.R. 65/15, p. 28.) It is equally true that obtaining the disagreement, the condemnation of the United Nations, is of decisive practical—and juridical—value in determining the applicable standard. This Court is bound to take account of such a consensus as providing the standard to be used in the interpretation of Article 2 of the Mandate.[7]

Electric voting machines have accelerated voting procedures in the plenary sessions of the General Assembly. In addition, the United Nations has recently experienced an encouraging tendency to obtain a result or a conclusion without the need for a strictly formal vote. Sometimes the practice reflects the skill of a presiding officer building on the eagerness of the delegations to move along toward adjournment. For some time, the President of the General Assembly has utilized the principle that "silence gives consent," but only in rather obvious cases. For

[7]Southwest Africa Cases, [1966] I.C.J. 441 (Jessup, J., dissenting) (footnote omitted).

example, in the 1927th meeting of the General Assembly one non-controversial item was efficiently handled as follows:

> AGENDA ITEM 14.
> REPORT OF THE INTERNATIONAL COURT OF JUSTICE
> (A/8005)
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> *The PRESIDENT:* The next item relates to the report of the International Court of Justice for the period from 1 August 1969 to 31 July 1970. Document A/8005.
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> If no representative wishes to speak, I propose that the General Assembly take note of the report of the International Court of Justice.
>
> *It was so decided.*
>
> *The PRESIDENT:* We have thus concluded consideration of agenda item 14.[8]

Additional efforts to reform procedures in the General Assembly are continuing. Responding to Canada's proposed inclusion on the twenty-fifth session agenda of an item entitled "Rationalization of the Procedures and Organization of the General Assembly," the General Assembly created a Special Committee to study the problem.[9] The Security Council has adopted a traditionally Asian practice which, oddly enough, was also employed at Quaker meetings—action by "consensus." A similar practice is followed in NATO where unanimity is essential and it is futile to say a point is agreed upon if it is not. Such a consensus requires no vote; the chairman simply finds that it exists.

As early as 1946 the President of the Security Council used the consensus technique in dealing with a complaint by the Soviet Union against the presence of British troops in Greece. He spoke of the "sense of the Council" and later read a statement which had been prepared by the Soviet Union and the United States and announced that the Council considered the matter closed.[10] The Representative of the Soviet Union, as President of the Security Council, was apparently the first to use the term "consensus" in this connection. During a 1955 Security Council meeting to consider the Israeli complaints alleging attacks by Egyptian forces, he said it was the "consensus of opinion" of the Council that no new resolution was required since the matter was covered by previous resolutions.[11] More recently, it was by consensus that the Security Council took the historic step of implementing Article 28(2) of the Charter by finally arranging for so-called "periodic meetings."[12]

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[8] 25 U.N. GAOR, Annexes, Agenda Item No. 14, at 3-5, U.N. Doc. A/PV. 1927 (1970).

[9] G.A. Res. 2632, 25 U.N. GAOR, U.N. Doc. A/7992 (1970).

[10] 1 U.N. SCOR, 1st ser., No. 1, at 172 (1946).

[11] 10 U.N. SCOR, 698th meeting 25 (1955).

[12] 25 U.N. SCOR, Supp. U.N. Doc. S/9824 (1970); 25 U.N. SCOR, Supp. U.N. Doc. S/9825 (1970).

The Security Council's consideration of the problem of Namibia (formerly known as Southwest Africa) during 1970 illustrates the use of consensus in place of a formal vote. In January of 1970, Ambassador Jakobson of Finland, with the support of Burundi, Nepal, Sierra Leone, and Zambia, sponsored Security Council Resolution 276 which created an *Ad Hoc* Sub-Committee on Namibia.[13] Later referring to the report of the Sub-Committee, Ambassador Jakobson remarked that it had:

> put forward practical and substantive recommendations based on wide agreement among its members. . . . The use of such sub-committees may be worth considering in connection with other questions before the Security Council. It could well be one method by which the work of the Council could be made more effective.

The Sub-Committee recorded that:

> After consultations among all members of the Security Council, the President of the Security Council announced on 30 January 1970, that the *Ad Hoc* Sub-Committee, established under operative paragraph 6 of the above resolution, would be composed of all members of the Security Council.[14]

Thus, like all the main committees of the General Assembly, it was a committee of the whole.

After the Sub-Committee had elected the representative of Burundi as Chairman and the representatives of Finland and Nepal as Vice-Chairmen, the Sub-Committee determined that its meetings would be closed, and that decisions would be taken by consensus, with the opinions reflected in the report if differences arose. The vital point is that there was to be no publicity, as in the usual open meetings of the Security Council, and no vote, so that there was no possibility of a veto.

This procedural device of agreement by consensus was not unprecedented. At its 1506th meeting, the Security Council established a Committee of Experts, which met as a committee of the whole, to deal with the question of the representation of "micro-States." On the other hand, the Committee on Rhodesia[15] had limited membership until October 1, 1970, when it too became a committee of the whole. On July 31, 1968, the President of the Security Council announced that the composition of the Committee on Rhodesia would be Algeria, France, India, Paraguay, the Union of Soviet Socialist Republics, the United Kingdom, and

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[13]S.C. Res. 276 (1970), U.N. Doc. S/INF/25, at 1 (1970). The report of the Sub-Committee is in 25 U.N. SCOR, Supp. July-Sept. 1970, U.N. Doc. S/9863 (1970).

[14]25 U.N. SCOR, Supp. Jan.-Mar. 1970, U.N. Doc. S/9632 (1970).

[15]S.C. Res. 253, U.N. Doc. S/INF/23 Rev. 1, at 5 (1968).

the United States.[16] When India's term on the Council expired on December 31, 1968, the President consulted the members of the Council and then announced that Pakistan would replace India.[17] The terms of Algeria, Pakistan and Paraguay on the Security Council expired on December 31, 1969, and consultations were held on the reconstitution of the Committee; it appeared that there was some desire to enlarge the Committee. In April the President announced that until further decision and without prejudice to the position of those who favored an enlargement, the Committee would be composed of the seven named states. On September 30, 1970, the President of the Council informed the members in a note that as a result of further consultations the Committee would now be composed of all members of the Security Council. In his note the President of the Council remarked that some members "expressed certain reservations." But he was still able to state that the new composition "has now been agreed;" the "reservations will be stated for the record at the next meeting of the Committee which will be called in October."[18]

The question of chairmanship required discussion. If it were a committee of the whole, should the President of the Council be the Chairman of the committee? The presidency of the Security Council rotates every month according to the English alphabetical order of the names of the members. The Committee of Experts on the problem of "micro-States" decided to follow the practice of the Security Council with monthly rotation. As already noted, the Sub-Committee on Namibia elected its own Chairman and two Vice-Chairmen.[19] The Committee on Rhodesia, which had its variations in membership, also varied its practice regarding its chairman. At the outset, on the basis of informal consultations, it nominated its first two chairmen. After March 1969, it decided that its chairmanship would rotate every two months in the English alphabetical order. On May 21, 1970, however, it unanimously agreed to extend the tenure of the representative of Nepal for two months. Then in a note of September 30, 1970, the President of the Security Council informed the members that consultations revealed agreement "that the Chairmanship of the Committee should rotate every month in the English alphabetical order according to the Presidency of the Security Council."

Returning to the so-called Sub-Committee on Namibia, it persis-

[16]23 U.N. SCOR, Supp. July-Sept. 1968, at 71, U.N. Doc. S/8697 (1968).
[17]24 U.N. SCOR, Supp. Jan.-Mar. 1969, at 32, U.N. Doc. S/8697/Add. 1 (1969).
[18]25 U.N. SCOR, Supp. U.N. Doc. S/9951 (1970).
[19]See text p. 50 *supra*.

tently distinguished between itself, as a committee of the whole, and the Security Council as such:

> [W]hile recognizing that it is the prerogative of the Security Council to decide on any action with regard to Namibia, the *Ad Hoc* Sub-Committee considers that it could best serve the Council by drawing its attention to such proposals as would be likely to command sufficiently broad support to ensure effective implementation.[20]

It further decided that:

> [T]he report to the Council would contain any conclusions on which the *Ad Hoc* Sub-Committee has been able to reach agreement, at the same time as it would reflect the views expressed by members on questions where such unanimity had not been reached.[21]

The Sub-Committee produced a draft resolution co-sponsored by its chairman, the two vice-chairmen and the delegates of Sierra Leone and Zambia. This resolution dealt generally with relations between South Africa and Namibia. It also reaffirmed resolutions 264 (1969)[22] and 276 (1970)[23] whereby, *inter alia,* it recognized the decision of the General Assembly to terminate the mandate for South West Africa and that the presence of South African authority in Namibia was illegal and invalid. The sponsors recognized that their draft resolution did not satisfy everyone, but they believed it could be helpful. Other members acquiesced. The Soviet representative voiced some objections in the Sub-Committee and in the formal session mildly remarked that the draft resolution cannot "be regarded as entirely satisfactory."[24] The Soviet representative also said that he would support the resolution since the representatives of the Afro-Asian countries who were members of the Security Council considered it capable of contributing to a degree to the solution of the problem of Namibia.[25]

On July 29, 1970, the President of the Security Council, Ambassador Sevilla-Sacasa of Nicaragua, put the draft resolution to a vote which was taken by a show of hands.[26] It was adopted with France and the United Kingdom abstaining. Presumably the abstaining States wished to have their positions recorded publicly, otherwise the President might have announced adoption by "consensus."

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[20]25 U.N. SCOR, Supp. July-Sept. 1970, at 5, U.N. Doc. S/9863 (1970).
[21]*Id.*
[22]S.C. Res. 264, U.N. Doc. S/INF/24, Rev. 1, at 1 (1969).
[23]S.C. Res. 276, U.N. Doc. S/INF/25, (1970).
[24]25 U.N. SCOR, 1550th meeting 13 (1970).
[25]*Id.* at 14.
[26]*Id.* at 16.

At the same session of the Security Council, Ambassador Jakobson of Finland proposed a second draft resolution advocating a step which the *Ad Hoc* Sub-Committee had mentioned—a request to the International Court of Justice to give an advisory opinion on "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)." When this draft resolution was submitted to the Council for its vote at the same session, the representative of France requested a separate vote on the phrase "notwithstanding Security Council resolution 276 (1970)."[27] On this proposal there was again a vote by show of hands and the phrase was adopted by a vote of 11-0, with France, Poland, the Soviet Union and the United Kingdom abstaining. In the following vote on the resolution as a whole, France switched its vote to the affirmative so that it was carried 12-0-3.[28]

Thus, the Security Council smoothly adopted two resolutions relative to Namibia without any public evidence of strain or major disagreement. Yet in the *Ad Hoc* Sub-Committee (of the whole) there was free expression of reservations. These reservations are reproduced textually,[29] as are the verbatim records of the Security Council, although the detailed records of the discussions of the Sub-Committee are restricted documents not publicly distributed. The French representative explained why France was not satisfied with the approach of the Security Council to the solution of this problem.[30] Poland expressed reservations which it had voiced in the course of the Sub-Committee discussions.[31] The Syrian delegation noted that as agreement in the Sub-Committee was based on compromise, they would not oppose it.[32] The representative of the United Kingdom recalled the general position of his delegation in connection with aspects of the South West African question, but merely entered a "general reservation" to the report and did not vote against either of the resolutions.[33] The Soviet delegation expressed its reservations at some length including the usual attacks on the United States, the United Kingdom, the Federal Republic of Germany and other Western powers.[34] In making specific observations, it

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[27] *Id.*

[28] The resolution as adopted is S.C. Res. 284, U.N. Doc. S/INF/25, at 4 (1970). This was the first time in the 25-year life of the United Nations that the Security Council had exercised its right to request an advisory opinion from the Court.

[29] Some of these reservations are printed in 25 U.N. SCOR Annex IV, U.N. Doc. S/9863 (1970).

[30] 25 U.N. SCOR, 1550th meeting 17-18 (1970).

[31] *Id.* at 14.

[32] *Id.* at 10.

[33] *Id.* at 18-19.

[34] *Id.* at 12-13.

did not "on the whole object to the adoption of this draft report to the Security Council."[35]

The procedures described here are not wholly novel, even in the experience of the United Nations. They do point to the advantage of informal private discussions and consultations conducted by a chairman in contrast to the public debate where violent words and exaggerations are the order of the day. While they do not signal the end of the veto in the Security Council, they do suggest that, at least in some matters, progress can be made by adjustment and compromise. The President of the General Assembly plays an important role by helping groups or subcommittees hammer out texts which can be submitted to a plenary session with some hope of adoption. The elaborate documents approved at the close of the General Assembly's commemorative session on October 24, 1970, are excellent examples—particularly The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[36]

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[35] *Id.* at 13.

[36] G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970), 65 A.J.I.L. 243 (1971). For a discussion of the Declaration *see* Rusk, *The 25th U.N. General Assembly and the Use of Force*, 2 GA. J. OF INT'L & COMP. L. 19 (Supp. 1, 1972).