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means of producing settlements will rapidly disappear. On the other hand, the tender of a conditioned check has been criticized as a weapon used by the powerful debtor to overcome a weak creditor.⁵⁴

Even the author criticizing the conditioned check, however, admits that there is little danger of its improper use in most commercial transactions.⁵⁵ It is only within the class of cases where the debtor (insurance company, employer, or landlord) is in such a superior bargaining position that he is able to economically coerce the creditor into an unfair settlement. Unfortunately, this problem would not be obviated by the elimination of the tendered check but would require a more basic change in the law of accord and satisfaction, which would prevent the debtor from using this means to force an inequitable settlement on the creditor.⁵⁶

There appears to be no substantial reason to permit the check tendered upon full payment to be cashed without requiring that its condition be enforced. A court may permit the condition to be effective by utilizing any of the rationales submitted above. However, since section 1-207 has not yet been judicially construed we must await future court action to discover exactly what effect that section will have upon the law of accord and satisfaction.

HOWARD T. REBEN

THE DOUBLE VETO IN THE SECURITY COUNCIL: A NEW APPROACH

I. INTRODUCTION

Article 27, paragraph 3, of the United Nations Charter provides that the concurring votes of the five permanent members of the Security Council¹ are necessary in order to adopt a non-procedural matter. Therefore, if a permanent member votes in the negative, it in effect vetoes the resolution. The determination of whether a matter is procedural, and therefore not subject to the veto, is in itself a non-procedural matter and therefore subject to the veto. If a permanent member votes in the negative on this question, it establishes the non-procedural character of the matter. Thus, by exercising its double veto power, a permanent member of the Council can establish the non-procedural character of a matter and subsequently prevent its passage.

While the double veto was invoked relatively frequently during the first

54. Role of the Check in Accord and Satisfaction: Weapon of the Overreaching Debtor, 97 U. Pa. L. Rev. 99 (1949).

55. *Id.*

56. For example, the liberal application of the unconscionability concept, *see* Uniform Commercial Code § 2-302 (1962).

1. Under Article 23 of the U.N. Charter, the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Council.

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five years of the existence of the United Nations, it has been exercised only once in the past nineteen years, and has not been exercised at all since 1959. This development coincides with the shift of power away from, and reliance upon, the Security Council as the organ primarily responsible for the maintenance of international peace and security. When the Council has appeared ineffective in carrying out its responsibilities, the members of the United Nations have sought other means, such as the General Assembly pursuant to the Uniting for Peace Resolution,² and regional organizations such as the Organization of American States.

If the United Nations is to survive as a viable world organization, it must be able to adapt to the exigencies of the times. Recognizing that the double veto has hampered the effectiveness of the Security Council, the United States and other members of the Council have attempted to find a legal basis for restricting its use. To this end, General Assembly Resolution 267 (III) was proposed in order to remove specific matters from any reasonable doubt as to their procedural character and therefore from the purview of the double veto. It is the purpose of this exposition to explore the use of the double veto in the past, and to demonstrate how the search for a legal basis to restrict the use of the double veto has caused this power to fall into disuse in recent years.

II. ARTICLE 27 OF THE CHARTER AND THE DOUBLE VETO

The voting procedure in the Security Council is governed by Article 27 of the Charter, which provides:

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. . . .³

The Charter thus provides for two different voting procedures; an affirmative vote of any nine members on procedural matters, and an affirmative vote of nine members, including the concurring votes of the permanent members, on all non-procedural matters. Thus, only non-procedural matters are subject to the veto of a permanent member.

The Charter neither clearly defines nor enumerates those matters which are to be considered procedural or non-procedural. Therefore, since the Security

2. G.A. Res. 377A, 5 U.N. GAOR, Supp. 20, at 10-12, U.N. Doc. A/1775 (1950).

3. In 1963, Article 23 of the Charter was amended to increase the membership of the Council from eleven to fifteen. The number of permanent members, five, remained the same. Article 27 was also amended at that time. The voting requirement for all decisions on procedural matters was increased from an affirmative vote of seven members to a vote of nine members. Likewise, the voting requirement for all decisions on non-procedural matters was increased to an affirmative vote of nine, rather than seven, members, including the concurring votes of the five permanent members.

Council applies the terms of Article 27, it is competent to determine, and must determine, what is meant by the word "procedural".⁴ However, since the distinction between procedural and non-procedural matters has no fixed meaning, it has varied "according to the standpoint from which they are viewed".⁵

If there is a dispute among the members of the Council as to whether or not a matter is procedural, and therefore whether or not it is subject to the veto, this dispute can be resolved by a decision of the Council. In order to establish the procedural character of the matter, it is necessary to obtain on this preliminary question the affirmative votes of nine of the members, including the concurring votes of the five permanent members. The concurring votes of the permanent members are required because the decision as to whether or not the matter is procedural is a non-procedural question under Article 27, paragraph 3.⁶

Therefore, a permanent member can establish the non-procedural character of a matter by exercising its veto on the preliminary question. Once the non-procedural character of the matter is established, it is then subject to the veto power of the permanent members when the matter is voted upon. Hence, the permanent members have the power of the so-called double veto—once on the preliminary question, and once on the merits of the matter.

III. THE FOUR POWER DECLARATION

During the San Francisco Conference,⁷ there was much debate as to the interpretation of Article 27. As a consequence, a formal questionnaire was addressed to the four sponsoring powers—United States, Russia, Great Britain, and China—concerning the voting procedures under the article. In response, the four nations prepared a joint statement (to which France later acceded), the Four Power Declaration,⁸ designed to give an official interpretation of Article 27.

In attempting to distinguish procedural from non-procedural matters, the

4. The organ of the United Nations which is to apply a particular article of the Charter is competent to interpret that provision. See Kelsen, *The Law of the United Nations* 248 (1950).

5. *Id.* at 246-7. See also Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 Harv. L. Rev. 1087, 1100 (1946).

6. Kelsen states:

This interpretation follows from Article 27, paragraph 3, providing that decisions of the Security Council require a majority of seven affirmative votes including the concurring votes of the permanent members, is the *rule* and the provision of Article 27, paragraph 2, providing that decisions on procedural matters require a majority of seven members, the *exception*. *Id.* at 248-9 (emphasis added).

The conclusion that the question of whether or not a matter is procedural is to be determined by a non-procedural vote is also reached in paragraph 2 of Part II of the Four Power Declaration.

7. At the Dumbarton Oaks Conference (Sept.-Oct., 1944), the United States, Russia, Great Britain, and China drafted specific proposals for a charter for a new world organization. These states, in addition to France, called a founding conference in San Francisco which met from April 25 to June 26, 1945. It was at this San Francisco Conference that the ultimate governing treaty, the United Nations Charter, was adopted.

8. UNCIO Doc. 852, III/1/37(1); 11 UNCIO Docs., pp. 711-14 (1945).

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Declaration substituted for this distinction a different one.⁹ Under Part I, paragraph 1 of the Declaration, those decisions "which involve direct measures in connection with settlement of disputes, adjustment of situations likely to lead to disputes, determination of threats to the peace, removal of threats to the peace, and suppression of breaches of the peace," are governed by a non-procedural vote, while those decisions "which do not involve the taking of such measures" are governed by a procedural vote.¹⁰

Paragraphs 2 and 3 of Part I express several examples of those matters which are to be governed by a procedural vote. For example, the adoption or alteration of the Council's rules of procedure and the determination of the method of selecting its President are decisions to be governed by a procedural vote.

Paragraph 4 of Part I describes those matters that require the unanimous vote of the permanent members as those decisions which "may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under [Chapter VII of the Charter]." The first link in this possible chain of events is the decision of the Council to make an investigation. This is so, as paragraph 5 illustrates, for "in ordering an investigation, the Council has to consider whether the investigation . . . might not further aggravate the situation." If after the investigation the Council has determined that there is a threat to the peace, it would be obligated under the Charter to take further steps.

Since the Declaration sets up very general standards as to what is or is not procedural, the precise decision is still left to the judgment of the Council. The four powers were requested to determine whether the preliminary question as to whether the matter was procedural was a procedural decision or was subject to the veto as being a non-procedural matter. To this, in Part II of the Declaration, the four powers replied:

(1) In the opinion of the Delegations of the Sponsoring Governments, the Draft Charter itself contains an indication of the application of the voting procedures to the various functions of the Council. (2) In this case it will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply. Should, however, such a matter arise, the decision regarding the preliminary question as to whether or not such matter is procedural must be taken by a vote of seven [now nine] members of the Security Council, including the concurring votes of the permanent members.

Paragraph 1 of Part II seems to indicate that the four powers felt that Article 27, paragraph 3, dictated the answer to the query, *i.e.*, that a vote on the preliminary question was a vote "on all other matters," and therefore sub-

9. Kelsen, *supra* note 4, at 254.

10. For the complete text of the Four Power Declaration, see Appendix A.

ject to the veto. The four powers also seemed of the opinion, as expressed in paragraph 2 of Part II, that the preliminary question would not in the future be raised with respect to matters of great importance. However, this proved to be untrue in future Council debates. Nevertheless, when the preliminary question was to be raised, it was to be subject to the principle of unanimity.

The Four Power Declaration was not incorporated into the Charter. It merely expressed the opinion of the four sponsoring powers as to the interpretation of Article 27. While it is generally accepted that the Declaration has no binding effect upon the non-signatories, the four sponsoring powers and France have felt bound by its terms and it therefore has played an important role in ordering the procedure whenever the preliminary question has presented itself.

IV. THE PRACTICE OF THE SECURITY COUNCIL IN VOTING ON THE PRELIMINARY QUESTION

The members of the Security Council appear to have been inconsistent in their treatment of the complex issues involved in the application of the double veto. While at first the members were tolerant in allowing the use of the double veto, they later became very stringent as to those matters which would be subject to the power. The turning point was in 1949 when the General Assembly adopted Resolution 267 (III). This resolution, which was to play an extremely important role in determining the applicability of the double veto, enumerated those matters which the Assembly deemed to be procedural.

It is possible to glean from the Council debates a trend in Council practice with respect to the determination of the preliminary question over the period from 1946 to 1959. To gain the full importance of the trend, it is necessary to contrast those debates prior to the adoption of Resolution 267 (III), and those subsequent.

A. *Council Debates Prior to Adoption of General Assembly Resolution 267 (III)*

1. *The Spanish Question*

In accordance with Article 35 of the Charter,¹¹ Mr. Lange (Poland) brought to the Council's attention in 1946 the existence of a Fascist regime under Franco in Spain, charging that it continued to serve and maintain the purpose of the Axis and was a center of "Fascist infection and a springboard for war which once more may spread all over the world."¹² As a consequence, the Council passed a resolution appointing a sub-committee to examine the situation and to report to the Council.¹³

11. Article 35 provides that any member of the United Nations may bring any dispute or situation which endangers international peace and security to the attention of the Council.

12. 1 U.N. SCOR, 1st ser., No. 2, at 159 (1946).

13. 1 U.N. SCOR, 1st ser., No. 2, at 244 (1946).

At a subsequent meeting, Australia introduced a draft resolution,¹⁴ the operative section of which would have kept the Spanish situation under continuous observation by the Council "in order that it will be at all times ready to take such measures as may become necessary to maintain international peace and security." Among other things, the resolution also contained the statement that the sub-committee had concluded that the situation in Spain, if continued, "merely" would be likely to endanger the maintenance of international peace and security. It is with respect to this resolution that the Council first discussed the application of the double veto.

The vote on the resolution was nine in favor and two against (U.S.S.R., Poland). The President of the Council, Mr. Najera (Mexico), declared the resolution adopted, notwithstanding the negative vote of a permanent member, on the ground that it was mainly concerned with the retention of the Spanish Question on the agenda, and was therefore procedural.¹⁵ However, Mr. Gromyko (U.S.S.R.) suggested that the resolution contained substantive matter. The conclusion that the situation in Spain was one that was "merely" likely to endanger international peace and security failed to take into consideration the gravity of the situation and underrated the consequences to which the existence of the Fascist regime might lead.¹⁶ Since that conclusion had never been adopted by the Council, the Australian resolution contained this substantive matter to be voted upon. Therefore, Mr. Gromyko objected to the President's ruling on the ground that the resolution contained substantive matter and stated that it was consequently not adopted because of his negative vote.¹⁷

After Mr. Gromyko asked for a vote to determine whether or not the resolution was procedural, the President called for a vote of those "who are in favor of the ruling that this is a question of procedure."¹⁸ The vote on the preliminary question was eight in favor, two against (U.S.S.R., France), and one abstention (Poland), whereupon the President ruled that since it was necessary for the five permanent members to concur in the affirmative as to the procedural nature of the resolution, the fact that two permanent members voted against it rendered the resolution one of substance.¹⁹

Several matters should be noted concerning this debate. First, the preliminary question was raised after the vote on the draft resolution and after the President had declared the resolution passed as a procedural matter. Second, while the Four Power Declaration was not incorporated by the President into his interpretation, Russia invoked the Declaration with the remark that "all the permanent members of the Security Council, as is known, are bound by the

14. *Id.* at 401.

15. *Id.* at 414.

16. *Id.* at 405.

17. *Id.* at 413.

18. *Id.* at 421.

19. *Id.*

declaration of the four powers at San Francisco."²⁰ No exception was taken to this by the other sponsoring powers, although two non-permanent members, Australia and the Netherlands, protested its application.²¹ Finally, there was no objection made by any of the members of the Council that Russia had acted in bad faith in stating that part of the Australian resolution was non-procedural and in subsequently invoking the double veto. There can be little doubt in this instance that Russia's view was correct. The degree to which the situation in Spain was likely to endanger the maintenance of international peace and security is clearly a substantive matter. There is further credence added to this view by the fact that another permanent member, France, concurred with Russia in the conclusion that the resolution did contain non-procedural matter.

The Spanish Question was the first instance wherein a permanent member invoked the double veto. The power was clearly correctly applied here, and set the precedent for future debates that the vote on the preliminary question was to be governed by the principle of unanimity of the permanent members.

2. *The Greek Question*

In 1947, border incidents between Greece and her northern neighbors, Yugoslavia, Albania, and Bulgaria, were brought to the attention of the Security Council. However, the Council was unable to take any affirmative action due to the exercise of the veto by Russia. In the hope that the General Assembly could find a solution where the Council had been unable to do so, the United States introduced a draft resolution requesting the Assembly, pursuant to Article 12 of the Charter,²² to consider the dispute "and to make any recommendations with regard to that dispute which it deems appropriate under the circumstances."²³ This, the United States felt, would allow the Council to exert some influence towards stabilizing the situation pending any recommendations by the Assembly.²⁴

Mr. Gromyko (U.S.S.R.), the President of the Council at that time, ruled that a vote should be taken first on the preliminary question as to whether or not the American resolution was procedural before the actual vote on the resolution itself.²⁵ However, Mr. Johnson (U.S.A.) objected, stating that the resolution was clearly procedural since it "relates to the internal procedure of the United Nations and to relations between its various organs."²⁶ Mr. Gromyko disagreed with this view on the ground that the resolution was non-procedural

20. *Id.* at 424.

21. *Id.* at 422, 424-25.

22. Article 12, paragraph 1, provides:

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

23. U.N. Doc. S/552 (1947).

24. 2 U.N. SCOR 2369 (1947).

25. *Id.* at 2390.

26. *Id.* at 2390-91

when its implications were taken into account, *i.e.*, it called for a recommendation by the General Assembly on the merits of the case. In order to make a recommendation, the Assembly first would have to investigate the situation in determining whether or not there was a threat to international peace and security. Such an investigation of the merits was clearly a matter of substance and would be subject to the veto if attempted by the Council.²⁷

However, Mr. Gromyko, as President, called for a vote on his ruling that the preliminary question had to be decided before the draft resolution would be voted upon. He was overruled on this procedural vote, the consensus being that there might be no need for a vote on the preliminary question if no permanent member voted against the original resolution. Thereupon, the American resolution was put to a vote and Russia voted in the negative. Mr. Gromyko then ruled that the resolution was rejected because of the negative vote of a permanent member.²⁸ This ruling was challenged by Mr. Johnson (U.S.A.) on the ground that the resolution was procedural. The preliminary question as to whether or not the resolution was procedural therefore was put to the vote of the Council. Once again Mr. Gromyko voted in the negative, whereupon he ruled that the proposal to consider the American resolution to be of a procedural character was rejected since a permanent member had voted against it.²⁹ Therefore, the American resolution was to be considered one of substance, and failed to carry because of the prior negative vote of Russia.

The United States protested Mr. Gromyko's ruling, stating that it frustrated the will of the Council. However, Mr. Johnson further stated that "there is no doubt that under the existing agreements and under the Charter the President has been within his technical rights in deciding that this matter was, from his point of view, not a question of procedure."³⁰ Subsequently, the United States introduced a different draft resolution which merely removed the Greek Question from the agenda of the Council so that the General Assembly could discuss it.³¹ While Russia voted against the resolution, Mr. Gromyko ruled that it passed since it was of a procedural character.

Several matters should be noted with respect to this debate. First, while the members determined that the preliminary question should be raised only after the vote on the particular draft resolution, this did not prove to be the case in later debates. Second, Russia again invoked Part II of the Declaration to substantiate its position that the vote on the preliminary question was to be governed by the principle of unanimity. However, Mr. Johnson's statement that Mr. Gromyko was within his technical rights in viewing this as a substantive resolution cannot be held to mean that the United States concurred as to the all-persuasiveness of Part II. Mr. Johnson left this open to further debate.

27. *Id.* at 2391.

28. *Id.* at 2400.

29. *Id.* at 2401.

30. *Id.*

31. U.N. Doc. S/555 (1947).

Once again several of the non-permanent members asserted that they were not bound by the Four Power Declaration, and questioned its applicability, with Mr. Lange (Poland) suggesting that Article 27(3) controlled the situation, thus rendering the Declaration irrelevant. Finally, precedent was established that the removal of a matter from the agenda of the Council so that the Assembly might consider it was a procedural matter, while the request for a recommendation from the Assembly would render it substantive.

3. *The Czechoslovak Question*

In March, 1948, the Secretary-General received a letter from the permanent representative of Czechoslovakia to the United Nations stating that the legal government of that country had "been undermined and openly placed in jeopardy on February 22, 1948, through force by a Communist minority," and that "the coup by the Communist minority by force was effectuated successfully only because of official participation of representatives of the Union of Soviet Socialist Republics and because of the threat of the use of military force of [Russia]."³² Thus, Russia was accused of directly intervening in the carrying out of the *putsch* "through threats to the constitutional government, promises of assistance to the forces of revolt, and direct acts by officials of the government of the U.S.S.R."³³ in contravention of Article 2, paragraph 4 of the Charter.³⁴

After the agenda was adopted,³⁵ Chile introduced a draft resolution to appoint a sub-committee "to receive or to hear such evidence, statements and testimonies, and to report to the Security Council at the earliest possible time."³⁶ Mr. Gromyko (U.S.S.R.) considered the resolution to be non-procedural because it concerned the substance of the question, *i.e.*, it called for an investigation of the situation on the merits. He therefore called for a vote on the preliminary question before the vote on the Chilean draft resolution. However, Mr. Austin (U.S.A.) disagreed, citing both the text of the Charter and the Four Power Declaration as authority that the resolution was procedural. Article 29 of the Charter,³⁷ Mr. Austin pointed out, permitted the Council to establish any subsidiary organs necessary for the performance of its functions,

32. U.N. Doc. S/696 (1948).

33. 3 U.N. SCOR, No. 51, at 263 (1948).

34. Article 2, paragraph 4, provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .

35. Mr. Gromyko (U.S.S.R.) had objected to the inclusion of the Czechoslovak Question on the agenda on the ground that it would involve interference by the Council in the internal affairs of Czechoslovakia contrary to Article 2, paragraph 7 of the Charter. 3 U.N. SCOR, No. 43, at 90 (1948). However, a majority of the Council felt that the conduct alleged to have been committed by Russia was in contravention of Article 2, paragraph 4, and since the situation was likely to endanger international peace and security, the situation was properly before the Council.

36. 3 U.N. SCOR, No. 56, at 2 (1948).

37. Article 29 provides that the "Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

and was under the heading "Procedure." Additionally, Part I, paragraph 2, of the Four Power Declaration, specifically provided that "the Council will, by a vote of any seven [now nine] of its members . . . establish such bodies or agencies as it may deem necessary for the performance of its functions."³⁸

Considering the main function of the sub-committee to be investigatory, Mr. Gromyko based his argument that the resolution was non-procedural upon Part I, paragraphs 4 and 5 of the Declaration. The Declaration there provides that a matter is non-procedural when a decision by the Council might initiate a chain of events resulting in enforcement action under Chapter VII; and an investigation is the first link in the chain.³⁹

There ensued a debate on the validity and applicability of the Four Power Declaration. General McNaughton (Canada) felt that the Declaration was irrelevant since the matter was governed by Article 29. He further stated that the Declaration was rendered invalid by the Russian violation of Part I, paragraph 8—that no permanent member would use the "veto power wilfully to obstruct the operation of the Council." He concluded by stating that under Article 103 of the Charter, the terms of the Charter would prevail over any contrary obligations assumed under the Declaration.⁴⁰

Mr. Gromyko retorted that the Declaration was merely an interpretation of the Charter and was not a separate agreement under which the powers assumed additional obligations. Therefore it would be unjustifiable to set the obligations assumed under the Charter and the Declaration against one another under Article 103.⁴¹

Mr. Austin (U.S.A.) altered the position taken by the United States in the Greek Question with respect to the Declaration. Quoting from a statement by Mr. Dulles, Mr. Austin stated that the Declaration was merely the statement of a general attitude, and not an agreement binding in perpetuity. The Declaration, he stated, was based upon certain assumptions which had proven incorrect, *i.e.*, that no permanent member would wilfully obstruct the operation of the Council by the use of the veto, that action under Chapter VI to investigate would initiate a chain of events leading to enforcement action under Chapter VII, and that it was unlikely that there would arise any matters of great importance on which the decision would have to be made whether it is procedural or not. Since none of these three assumptions had been borne out by the events, Mr. Austin felt that the parties were therefore free to explore

38. 3 U.N. SCOR, No. 63, at 20 (1948). Paragraphs 2 and 3 of the Declaration set out examples of certain matters which are to be considered procedural. It should be remembered that the required number has been increased to nine.

39. 3 U.N. SCOR, No. 63, at 21-2 (1948).

40. 3 U.N. SCOR, No. 71, at 39-40 (1948). Article 103 of the Charter provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

41. 3 U.N. SCOR, No. 71, at 42 (1948).

new voting procedures. However, the United States would adhere to the Declaration until such time as a new procedure were put in force.⁴²

Thereupon, the President of the Council, Mr. Parodi (France) felt compelled to put the preliminary question to a vote before the vote on the Chilean resolution. After Mr. Gromyko had voted in the negative to the question of whether the resolution was procedural, the President stated that he was bound by the Four Power Declaration in interpreting the vote. Relying upon Part I, paragraphs 4 and 5, the President ruled that the creation of an investigatory sub-committee could possibly aggravate the situation and have major political consequences, and therefore was non-procedural in nature. As a result, Russia's negative vote on the preliminary question rendered the Chilean resolution one of substance.⁴³

Russia subsequently was castigated by several of the members of the Council for establishing the non-procedural character of the resolution by the use of the veto. Mr. El Khouri (Syria) stated that the permanent members should prudently use their discretion when applying the veto. Otherwise, a permanent member could say that any procedural matter is substantive, cast its vote against the majority, and render the Council ineffective.⁴⁴ Sir Cadogan (U.K.) accused Russia of pushing the Declaration to an extreme, and Mr. Austin (U.S.A.) declared that the United States was not prepared to admit to the use of the double veto to transform the character of any matter treated by the Charter as procedural into a substantive matter.⁴⁵

As a result of these objections, the President decided to put to a vote his interpretation of the vote on the preliminary question under Rule 30 of the Council rules of procedure, which provides:

If a representative raises a point of order, the President shall immediately state his ruling. If it is challenged, the President shall submit his ruling to the Security Council for immediate decision and it shall stand unless overruled.⁴⁶

Mr. Gromyko vigorously objected to putting the ruling to a vote. He stated that "no vote which the Security Council can now take . . . on the President's ruling, can weaken or annul the presidential ruling. Otherwise, the question as to whether the Chilean resolution was substantive or procedural would be reduced to a point of order."⁴⁷ After it was decided that the President's ruling would stand unless overruled by a vote of any seven members, the President called the vote on the following proposition: "Will those who object to my

42. 3 U.N. SCOR, No. 73, at 6 (1948).

43. *Id.* at 19-21.

44. 3 U.N. SCOR, No. 63, at 22-3 (1948).

45. 3 U.N. SCOR, No. 73, at 22-3 (1948).

46. Rule 30, Provisional Rules of Procedure, U.N. Doc. S/96/Rev. 4 (1946).

47. 3 U.N. SCOR, No. 73, at 24 (1948).

interpretation raise their hands?"⁴⁸ Since only six members voted to reject the President's interpretation, the interpretation stood.⁴⁹

The draft resolution introduced by Chile was finally put to a vote, and Russia voted against it. Therefore the President ruled the resolution not adopted.

It is interesting to note that for the first time Russia was accused of blatantly and irresponsibly using the veto power, with respect to the preliminary question, to impede the Council. This almost culminated in the overruling of the President's interpretation of the results of the vote on the preliminary question. The President had technically avoided putting his ruling to a vote by calling for a vote on his "interpretation."⁵⁰ Therefore, because of that and the fact that his interpretation was not overruled, it cannot be determined from this case whether Russia had a well-founded fear that a simple majority of seven would be sufficient to affirm the procedural nature of a draft resolution even in the face of a negative vote by a permanent member. Moreover, it is unclear whether the vote actually took place under Rule 30 since the President called for a vote on his interpretation, and not on his ruling.

On the other hand, there can be no doubt as to the important role played by Part I of the Four Power Declaration. In determining whether the forming of a sub-committee with investigatory powers was a procedural matter, the President of the Council relied totally upon paragraphs 4 and 5 of Part I of the Declaration. With this reliance upon the Declaration, the President was bound in his interpretation of the vote on the preliminary question to rule that the resolution was one of substance. However, it should be noted that the President of the Council at that time was a representative of a permanent member and therefore felt bound in interpreting the vote to adhere to the terms of the Declaration. Nevertheless, the importance of the Declaration in determining whether or not a matter was procedural was firmly established in this case.

B. *General Assembly Resolution 267 (III)*

As demonstrated by these debates in the Spanish, Greek, and Czechoslovak cases, the double veto was exercised relatively frequently in the early years of the United Nations. While Russia was at times severely criticized for its use of the double veto, no member could at that time find a legal basis to prevent the exercise of that power. However, many members of the Council

48. *Id.* at 26.

49. It should be noted that of the permanent members, only China voted to reject the President's ruling. The United States, Great Britain, and France abstained, and Russia voted against rejecting the ruling. Subsequently, Russia accused China of violating the Four Power Declaration by voting against the ruling. Mr. Hsu (China) replied that the Chilean resolution was clearly procedural and therefore the ruling was erroneous.

50. See Gross, *The Double Veto and the Four Power Statement on Voting in The Security Council*, 67 *Harv. L. Rev.* 251, 275 (1953).

were becoming increasingly irritated with Russia's use of the double veto, with the result being that they began to search for a legal basis by which they could restrict this power.

Prompted by the United States, the General Assembly, under the authority of Article 10 of the Charter,⁵¹ enumerated all questions of a procedural nature in Resolution 267 (III),⁵² entitled "The Problem of Voting in the Security Council." The Annex to the resolution listed 35 categories of decisions which the General Assembly *deemed* procedural,⁵³ with all other decisions being non-procedural. Furthermore, the Assembly recommended that the members of the Security Council "conduct their business accordingly." With respect to the implementation of these proposals, this recommendation

would apply to the positions which the members of the Security Council take on the question whether or not any of these items is procedural in case this question is raised; to the manner in which any member of the Security Council, when acting as President, interprets the result of a vote on such a question; and finally, to the manner in which the members of the Security Council vote if the ruling made by the President is challenged.⁵⁴

Thus, the purpose of Resolution 267 (III) was to remove the listed 35 categories of questions from the application of the double veto. It was the intention of the sponsors of the resolution that there would be no reasonable doubt as to the procedural character of the enumerated matters.

However, this resolution is just what it purports to be—merely a recommendation to the members of the Council. As such, it has no binding effect upon the Council members, and they are still the final arbiters in determining what matters are procedural. The resolution was given some political and moral weight by American reliance upon it in later debates. Also, the fact that it was agreed upon by a majority of the members of the General Assembly gives the resolution a degree of legal weight. Yet, it would be contrary to the terms of the Charter for the resolution to be anything but a recommendation. General acceptance seems very unlikely since the Soviet bloc has expressed grave reservations about the inclusion of several matters as being procedural. Nevertheless, Resolution 267 (III) was to play an important role in future debates in determining whether or not a matter was procedural.

51. Article 10 provides:

The General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

52. G.A. Res. 267 (III), 3 U.N. GAOR 2, at 7-10, U.N. Doc. A/900 (1949).

53. For the text of Resolution 267 (III), see Appendix B.

54. 3 U.N. GAOR, Supp. 10, at 39, U.N. Doc. A/578 (1948).

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C. Council Debates Subsequent to Adoption of General Assembly Resolution 267 (III)

1. *The Formosa Question*

In August, 1950, there was brought to the attention of the Security Council a complaint of an armed invasion of Formosa from the Central People's Government of the People's Republic of China. The complaint alleged that the presence of the United States' 7th Fleet in the strait between Formosa and the mainland of China constituted a "direct armed aggression on the territory of China."⁵⁵

The representative of Ecuador introduced a draft resolution to defer consideration of the matter and to invite a representative of the People's Republic of China to the Council meetings, pursuant to Rule 39 of the Council's rules of procedure, to provide the Council with information or to assist it in the consideration of the matter.⁵⁶

The President of the Council, Sir Jebb (U.K.), called for a vote on the draft resolution, and it was carried by a seven to three vote, with one abstention. Two permanent members, the United States and China, voted in the negative. Notwithstanding these negative votes by permanent members, the President declared the resolution adopted.⁵⁷

Mr. Tsiang (China) vehemently objected to the adoption of the resolution in face of his negative vote. He stated that the question of inviting a second representative from the same country touched upon the right of representation in the Council, and as such was a substantive matter subject to his veto power.⁵⁸ He therefore called for a vote on the preliminary question to determine whether or not the resolution was procedural. Several members of the Council objected to this. Mr. Chauvel (France), while not intending to limit the application of the Four Power Declaration, nevertheless stated that the resolution was clearly not one of substance.⁵⁹ Mr. Malik (U.S.S.R.) accused Mr. Tsiang of attempting to use the veto power "without the least admissible basis."⁶⁰

While having opposed and voted against the resolution, Mr. Gross (U.S.A.) nevertheless felt that the resolution clearly involved a procedural question by the terms of the Charter, the Four Power Declaration, and General Assembly Resolution 267 (III). Under Rule 39 of the Council's rules of procedure, the Council can invite any "persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence."⁶¹ These rules were adopted pursuant to

55. U.N. Doc. S/1715 (1950).

56. U.N. Doc. S/1836 (1950).

57. 5 U.N. SCOR, 506th Meeting 5 (1950).

58. 5 U.N. SCOR, 505th Meeting 18-19 (1950).

59. 5 U.N. SCOR, 506th Meeting 8 (1950).

60. *Id.* at 10.

61. Rule 39, Provisional Rules of Procedure, U.N. Doc. S/96/Rev. 4 (1946).

Article 30 of the Charter,⁶² which is under the heading "Procedure," thus evidencing the procedural character of the resolution. Additionally, Part I, paragraph 2, of the Declaration explicitly provided that decisions to adopt rules of procedure shall be procedural questions. Finally, Mr. Gross placed great reliance upon the fact that General Assembly Resolution 267 (III) specifically provided that a "[r]equest to members of the Secretariat or to other persons for information or for other assistance" under Rule 39 was a procedural matter.⁶³ When Resolution 267 (III) was adopted, Mr. Gross stated, it was assumed that the Council members would comply with its terms. Therefore, the United States would so comply and give it the weight to which it was entitled.⁶⁴ Mr. Gross then stated what he believed to be the purpose of Resolution 267 (III):

The United States believes that the words contained in the General Assembly resolution 'that the members of the Security Council conduct their business accordingly' were intended as a recommendation to the individual members of the Council to prevent any effort of a permanent member by use of the double veto to exercise a veto on a matter about which there is no reasonable doubt that it falls within one of the thirty-five categories of decisions which are listed in the General Assembly resolution. . . . *It is the policy of the United States to restrict the use of the veto by extending, whenever possible, by example, by precedent or by agreement, the area of Security Council action in which the veto is not applicable.*⁶⁵

Thus, there could be no reasonable doubt as to the procedural nature of the resolution since it fell within one of the thirty-five categories listed in Resolution 267 (III). The applicability of the veto power has been restricted to those matters falling outside of the Resolution.

Pursuant to China's wishes, the President called for a vote as to whether the Ecuadorean resolution was procedural. Only China voted in the negative. Thereupon, the President ruled that the resolution was procedural notwithstanding China's negative vote on the preliminary question.⁶⁶ Citing Part II, paragraph 2, of the Four Power Declaration, Mr. Tsiang objected to the President's ruling on the ground that his negative vote rendered the resolution substantive. To this, the President replied:

I think that if such a situation as this is allowed to stand, a very grave precedent will have been created which may well impede the whole functioning of the United Nations in the future. I do not believe, therefore, that in the general interests of all of us it should be allowed to stand, and I consequently rule as President that, notwithstanding the objection of our Chinese colleague, the vote which

62. Article 30 of the Charter provides that the "Security Council shall adopt its own rules of procedure. . . ."

63. 5 U.N. SCOR, 506th Meeting 13 (1950).

64. 5 U.N. SCOR, 507th Meeting 8 (1950).

65. *Id.* at 9-10 (emphasis added).

66. *Id.* at 5-6.

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the Council took this morning on the Ecuadorean resolution is procedural.⁶⁷

Raising a point of order, Mr. Tsiang accused the President of acting *ultra vires* and requested an advisory opinion by the International Court of Justice. Considering this to be a challenge to his ruling, the President, pursuant to Rule 30, called for a vote of those in favor of overruling his decision.⁶⁸ There were no votes either in favor or against overruling his decision, and no abstentions. China did not vote, for it chose not to participate "in a vote which in itself is illegal."⁶⁹ The President therefore ruled that his decision stood.

The debates on the Formosa Question are significant for several reasons. For the first time the President had ruled that a resolution was procedural notwithstanding the negative vote of a permanent member on the preliminary question. It was established that where there is no doubt as to the procedural character of a resolution, the Council would not tolerate the transformation of the resolution into one of substance by the use of the double veto, at least where both Russia and the United States agreed. However, there was no precedent set as to what would be the standard in determining whether or not the resolution was procedural. Russia continued to rely upon the Four Power Declaration for the standard while the United States, although citing the Declaration, relied to a greater degree upon Resolution 267 (III) for the standard. The United States laid the groundwork for reliance upon the Resolution in future debates and lent it a great deal of moral and political support. In so doing, the United States admitted that it was American policy to restrict the use of the veto by establishing the procedural character of a variety of matters either by example, precedent, or agreement.

There was precedent established in these debates for the proposition that a presidential ruling on the results of a vote on the preliminary question is subject to challenge by members of the Council. However, the case cannot serve as precedent for the proposition that a simple majority of seven members could, pursuant to a vote under Rule 30, establish the procedural character of a matter in the face of a negative vote by a permanent member on the preliminary question. First, there was no vote in favor of or against overruling the President's ruling with respect to the vote on the preliminary question.⁷⁰ Second, Mr. Tsiang phrased his objection as a point of order and therefore could not question the use of Rule 30 in that situation, for he made it a procedural question by so phrasing his objection.⁷¹ Nevertheless, the possibility of the overruling of a presidential ruling on the results of a vote on the preliminary question would be a factor in future Council debates.

67. *Id.* at 5.

68. *Id.* at 7.

69. *Id.* at 8.

70. Gross, *supra* note 50, at 275.

71. *Id.*

2. *The Laos Question*

In September, 1959, the Secretary-General of the United Nations received a telegram from the Minister of Foreign Affairs of Laos alleging an armed invasion by troops from the Democratic Republic of Viet-Nam. In the face of this "flagrant aggression," Laos requested the assistance of the United Nations, in particular that an emergency force be dispatched "to halt the aggression and prevent it from spreading."⁷² The President of the Council, Mr. Ortona (Italy) urgently convened the Council at the request of the Secretary-General for consideration of this situation.⁷³

After the agenda was adopted,⁷⁴ the United States, together with the United Kingdom and France, introduced a draft resolution calling for the appointment of a "subcommittee to examine the statements made before the Security Council concerning Laos, to receive further statements and documents and to conduct such inquiries as it may determine necessary and to report to the Security Council as soon as possible."⁷⁵ Mr. Lodge (U.S.A.), who introduced the resolution, stated that the resolution fell squarely within the provisions of Article 29 of the Charter⁷⁶ under the heading "Procedure." The creation of a subsidiary organ was necessary for the performance of the Council's functions and it would "provide for the continuation of the Council's consideration of this subject." The resolution was therefore procedural in character.⁷⁷

Mr. Sobolev (U.S.S.R.), characterizing the primary function of the subcommittee as being investigatory, replied that this resolution was non-procedural because it related to the substance of the question and might have far-reaching consequences.⁷⁸ The subcommittee, Mr. Sobolev alleged, was given a "carte blanche" to take any action it wished. Its inquiries into the accusations of aggression by a sovereign state could have great political consequences.⁷⁹ To substantiate his position that this was a substantive matter,

72. U.N. Doc. S/4212 (1959).

73. The agenda item was entitled, "Report by Secretary-General on the letter received from the Minister for Foreign Affairs of the Royal Government of Laos, transmitted by note from the Permanent Mission of Laos to the United Nations, 4 September 1959." U.N. Doc. S/4213 (1959).

74. The Soviet representative, Mr. Sobolev, objected to the inclusion of the matter on the agenda on the ground that because of certain procedural inconsistencies, the matter was not properly before the Council. Nevertheless, the agenda was adopted and the Council proceeded to discuss the matter. U.N. Doc. S/Agenda/847 (1959).

For the debates concerning the question of whether or not the Council was properly seized of the matter, see 14 U.N. SCOR 847th Meeting 2-8 (1959). See also, Gross, *The Question of Laos and the Double Veto in the Security Council*, 54 Am. J. Int'l Law 118, 119-122 (1960). Gross stated that "[i]nstead of giving procedural advice in response to a request for indication of the appropriate procedure, the Security Council addressed itself to the substance of the Laotian note of September 4, 1959, as if this note had been addressed to it with a request for action." *Id.* at 120.

75. U.N. Doc. S/4214 (1959).

76. For the text of Article 29, see *supra* note 37.

77. 14 U.N. SCOR 847th Meeting 11 (1959).

78. 14 U.N. SCOR 848th Meeting 8 (1959).

79. *Id.* at 10.

Mr. Sobolev again relied upon the Four Power Declaration, in particular Part I, paragraphs 4 and 5. An investigation might initiate a chain of events requiring the Council to take enforcement action under Chapter VII of the Charter.⁸⁰

In compliance with the demands of Mr. Sobolev, the President of the Council called for a vote on the preliminary question to determine whether the resolution was procedural. Only Russia voted against the proposal that the resolution be considered procedural.⁸¹ Consequently, the President ruled that the resolution should be considered procedural.

It is the interpretation of the Chair, shared by the overwhelming majority of the members, that the draft resolution falls clearly under Article 29 of the Charter. . . . Since this Article appears under the heading of "Procedure," this cannot mean anything but that all matters included in it are of a procedural nature. The Charter itself declares, consequently, that this is a procedural question and must be voted accordingly under Article 27, paragraph 2.⁸²

Mr. Sobolev angrily protested that the President's interpretation of the vote was illegal. "It is at variance with the Charter, it is at variance with the Four-Power Declaration to which France subscribed, and it is at variance with the practice of the Security Council."⁸³

In reply, Sir Dixon (U.K.) stated that the United Kingdom stood by the Declaration, but only where it applies to a particular case, and this was not one of them.⁸⁴ Part II, paragraph 2, of the Declaration, he stated, was applicable only when the Charter gave no guidance and there was resulting reasonable doubt as to whether the matter was procedural. In this case, Article 29 gave a clear indication that the appointing of a subcommittee is procedural.⁸⁵

The President of the Council, in defense of his ruling, stated that he based his decision on the precedent set by the debates on the Formosa Question.⁸⁶ He further added that the function of the subcommittee was not to conduct investigations or make recommendations, but rather to simply "collect information and present the facts in order to clarify the present situation and to enable the Council itself to make decisions."⁸⁷

A vote was then taken on the draft resolution. Once again only Russia voted against its adoption and the President declared it adopted.⁸⁸ Mr. Sobolev vigorously disagreed with the presidential ruling, stating that the whole pro-

80. *Id.* at 11.

81. *Id.* at 12.

82. *Id.* at 13.

83. *Id.* at 13-14.

84. *Id.* at 15.

85. *Id.* at 18-19.

86. *Id.* at 21.

87. *Id.* at 22.

88. *Id.*

cedure was illegal and therefore the resolution was illegal and not binding.⁸⁹ Yet he did not challenge the ruling. This was consistent with the position taken by Russia in past debates that if the president's interpretation of the vote could be challenged, the preliminary question would be reduced to a point of order. However, he did warn that "[w]e are witnessing a first step towards a revision of the Charter, a revision in practice and in fact."⁹⁰

Mr. Lodge concluded that the United States was in full agreement with the results. He cited Part I, paragraph 2, of the Declaration, for the proposition that it was a procedural matter for the Council to "establish such bodies or agencies as it may deem necessary for the performance of its functions," and warned Russia that the "double veto cannot be used to make substantive a matter declared by the Four-power statement to be procedural."⁹¹ Additionally, he stated that General Assembly Resolution 267 (III) specifically provided that decisions to establish subsidiary organs are procedural in nature. "It is both illogical and contrary to the fundamental intention of the Charter," he added, "that the Security Council should be prevented by a double veto from obtaining assistance from subsidiary organs which it deems necessary for the performance of its functions."⁹²

It is interesting to note that the resolution discussed in the Laos Question was quite similar to that involved in the Czechoslovak Question.⁹³ However, the resolution in the Laos situation granted investigatory powers to the subcommittee to a greater extent than the resolution in the Czechoslovak situation. Under the former resolution, the subcommittee could "conduct such inquiries as it may determine necessary," while in the latter, the subcommittee was not granted such latitude in its functions. Yet, in the Czechoslovak case Russia successfully exercised the double veto, while in the Laos case the members of the Council would not permit Russia to so exercise that power. The only relevant new development during the time between the two debates was the passage of General Assembly Resolution 267 (III). Therefore it can be concluded that because of the additional authority of Resolution 267 (III), this case can serve as precedent for the proposition that the appointment of a subcommittee, even if it has investigatory functions, is a procedural matter.

This case may also serve as precedent for a presidential ruling that a matter is procedural notwithstanding the negative vote of a permanent member on the preliminary question where an overwhelming majority agree to the procedural character of the matter. The action of the Council appears to be totally inconsistent with the action taken during the Czechoslovakian debates. Yet Russia did not challenge the result. It appears that the existence

89. *Id.* at 23.

90. *Id.*

91. *Id.* at 25.

92. *Id.* at 26.

93. For the text of the resolution discussed in the Czechoslovak Question, *see* text at *supra* note 36.

of Resolution 267 (III), which provides that the appointment of a subcommittee is a procedural matter, may have played the determinative role in this new development. As Russia warned, the consequences may well be that the voting procedure in the Council has been seriously altered.

V. PRESENT VALIDITY AND APPLICABILITY OF THE DOUBLE VETO

A. *Requirement of Reasonable Doubt In Order to Invoke the Preliminary Question*

As demonstrated by the debates in the Council, from the Spanish Question through the Laos Question, the members of the Council have vigorously attempted to grapple with the controversial issue of on what issues a Council member can raise the preliminary question. In the earlier debates it appears that the members concurred in, or at least condescended to, the extreme view seemingly espoused by the Russians that the preliminary question could be raised with respect to any resolution. At the basis of this proposition was the Russian statement that "representatives of all States who are permanent members of the Security Council cannot fail to agree that if any permanent member of the Security Council objects to *any* particular proposal being regarded as procedural, no positive decision can be made."⁹⁴ This is a highly tenuous position, however, for the internal functioning of the Council would be totally impeded if this were the case. Additionally, if this truly was the Russian position, it is remarkable how few times they have exercised this supposed power.

The practice accepted by the Council and inherent in the Charter is that the preliminary question may be raised only where there is reasonable doubt as to the matter under consideration, *i.e.*, there must be reasonable doubt as to whether the matter is procedural as opposed to a mere difference of opinion. This is the thrust of the development after the Spanish case; the Council members, in interpreting the Charter, imposed upon their conduct the reasonable doubt test. As evidence by the Formosa Question, the Members of the Council now will not tolerate the exercise of the double veto with respect to a matter clearly procedural.

But the Council members clearly were not satisfied with the reasonable doubt test as such, for its application was uncertain in the difficult situation where by the terms of the Charter and the Four Power Declaration a matter was clearly procedural, but when the terms of the resolution were taken in context, they appeared to be non-procedural in nature. Such was the case in both the Czechoslovak and Laos Questions. In both cases, the purpose of the resolution was to establish a subcommittee, a procedural matter under the Charter and Declaration. Yet, when the functions and the ramifications of the subcommittees were considered, the matter took on a non-procedural char-

94. 1 U.N. SCOR, 2d ser., No. 5, at 30 (1946) (emphasis added).

acter. While in the Czechoslovak case Russia was permitted to exercise the double veto, in the Laos case the resolution was characterized as undoubtedly procedural and therefore not subject to the double veto. The only distinguishing factor was the existence of General Assembly Resolution 267 (III) at the time of the Laos Question and the reliance placed upon it in deciding the issue.

In effect what the Council members have done, over Russia's objection, is expand the reasonable doubt test by holding that not only must there be reasonable doubt before the preliminary question can be raised, but there can be no reasonable doubt as to the procedural nature of the matters enumerated in Resolution 267 (III). This is particularly helpful where, as in the Czechoslovak and Laos cases, the implications of the resolution evidence situations of a non-procedural character, rendering the reasonable doubt test difficult to apply. That there be no reasonable doubt as to the procedural nature of matters enumerated in the resolution appears to be the result desired by the United States when it sponsored the resolution and relied upon it in Council debates.

As to matters not enumerated in Resolution 267 (III), it appears that the broad tests defined in the Four Power Declaration must be applied in order to determine whether or not a matter is procedural. However, Council practice subsequent to the Czechoslovak Question has established that even in applying these general tests, there must be a reasonable doubt as to the procedural character of the matter before a permanent member will be permitted to exercise the double veto.

B. *The Preliminary Question and Presidential Rulings Under Rule 30*

Since neither the Charter nor the Council's rules of procedure require that the President make a ruling on the result of a vote, normally, he merely declares the result or interprets the vote. But, when a representative raises a point of order, the President is required, under Rule 30 of the Council's rules of procedure, to state his ruling. Although it is generally held that a point of order only relates to the conduct of the business of the Council, and not to a ruling on the result of a vote, the practice of the Council seems to indicate that the method of voting and the interpretation of the results of the vote are to be regarded as a proper subject for a point of order and resulting presidential ruling.

There has been vigorous opposition to this practice. Under Rule 30, the presidential ruling stands unless it is overruled by a procedural vote which is not subject to the principle of unanimity of the permanent members. This has the effect, as Russia stated in the Czechoslovak debates, of reducing the preliminary question to a point of order contrary to the Charter and the Declaration.

Although a presidential ruling on the results of a vote on the preliminary question has never been overruled, in the Czechoslovak Question, six votes were amassed in favor of overruling the presidential ruling, only one short of

the seven votes necessary. Thus precedent was set that the ruling could be challenged and voted upon. It is therefore not inconceivable that a ruling could be overruled in the future.

The commentators have been vigorous in their condemnation of the use of Rule 30 to overrule a presidential ruling as an attempt to exorcise the double veto from the Charter. As previously mentioned, the double veto is firmly rooted in the terms of Article 27 of the Charter. Juridically speaking, it is quite elementary that rules of procedure cannot supercede the law of the Charter.⁹⁵ It is therefore contrary to general principles of international law, the argument goes, to allow a presidential ruling on the results of a vote on the preliminary question to be overruled by a procedural vote.

The Council appears to be faced with a dilemma in answering the difficult problem of whether a presidential ruling on the results of the vote on the preliminary question is final, or whether it can be overruled. Both the Russians and the commentators hold that presidential ruling is conclusive. But if this proposition was adhered to, then there would be no way to challenge a ruling which appears to be erroneous. Certainly, the Council members should not have to blindly accept an erroneous ruling. On the other hand, if every presidential ruling were subject to challenge, then surely the preliminary question would be reduced to a point of order.

The new council practice seems to accept neither of these extreme views, but indicates that a presidential ruling may be challenged only where there is reasonable doubt as to the procedural character of the matter under consideration. Thus, where the President rules a resolution substantive after the vote on the preliminary question, this ruling can be challenged only if there is reasonable doubt as to the procedural nature of the resolution. In effect what the non-permanent members have done is to implement Resolution 267 (III) by enforcing its terms as to the procedural character of the enumerated matters through the exercise of Rule 30. If this practice is followed in the future, the Council members will be permitted to challenge an allegedly erroneous presidential ruling, and at the same time there will be a check on reducing the preliminary question to a point of order. This is the result the members of the Council seem to be striving for.

C. Presidential Ruling that Resolution is Procedural Notwithstanding Negative Vote of a Permanent Member on the Preliminary Question

The present validity and applicability of the double veto has been further altered by the presidential rulings in the Formosa and Laos Questions that the resolution was procedural notwithstanding the negative vote of a permanent member on the preliminary question. As previously mentioned, in the Formosa case China had challenged the President's ruling, but no member voted to

95. Gross, *supra* note 50, at 276.

overrule it. On the other hand, in the Laos case, Russia, consistent with its position taken in the past that a presidential ruling was not subject to a vote under Rule 30,⁹⁶ chose not to challenge it, and the ruling stood.

The President, in ruling the resolution procedural in the Laos case, acted totally contrary to the terms of the Charter and the Four Power Declaration according to the commentators and the Russians. When he put the preliminary question to a vote, he was acting squarely within the scope of Article 27, paragraph 3, *i.e.*, he was calling a vote on a non-procedural matter. Therefore he was not at liberty to announce after the vote that the resolution was procedural, but was bound by the Charter to declare the resolution substantive because of Russia's negative vote.⁹⁷ Thus, declaring a resolution procedural notwithstanding the negative vote of a permanent member on the preliminary question could have as important a consequence as the overruling of a presidential ruling under Rule 30.

One commentator has suggested that "[w]hat the Laos case demonstrated is the persistent attempt of Members of the United Nations to substitute rule by the majority for the rule of law" of the Charter.⁹⁸ Another commentator has suggested that the Charter dictates that the President rule a resolution substantive when a permanent member votes in the negative on the preliminary question, even if there is no doubt whatsoever as to the procedural character of the resolution.⁹⁹

The formalistic criticism of these commentators is an over-reaction to the important new development in the Laos case. The President there stated that he had been compelled to make that ruling because the majority of the members had felt that the resolution was clearly procedural within the terms of the Charter, the Declaration and Resolution 267 (III). Thus there could be no reasonable doubt as to the procedural nature of the resolution, particularly since Resolution 267 (III) characterized it as being procedural. Therefore no permanent member could, by voting in the negative on the preliminary question, transform it into a non-procedural matter.

There is a check to prevent the President from indiscriminately ruling a matter procedural in the face of a negative vote on the preliminary question. The members of the Council, it appears, will support this result only where there is no reasonable doubt as to the procedural nature of the matter. If they feel that the ruling is erroneous, they can subject the ruling to a vote under Rule 30. In essence, this new development has the same effect as the overruling of a presidential ruling under Rule 30; it allows the members of the Council to determine by a procedural vote whether or not there is a reasonable doubt

96. While this is the reason they gave for not challenging the ruling, they may have been prompted by the fear that there were probably insufficient votes to overrule the ruling.

97. Gross, *supra* note 74, at 127.

98. *Id.* at 131. See generally, Rudzinski, *The So-Called Double Veto*, 45 Am. J. Int'l L. 443 (1951).

99. See Kellogg, *The Laos Question: Double What Veto?*, 45 Va. L. Rev. 1352 (1959).

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as to the procedural nature of a matter, thus making the Council a more democratic body. This procedure, like the exercise of Rule 30 to overrule a presidential ruling, was and will be looked to by the non-permanent members to enforce the dictates of Resolution 267 (III) that there can be no reasonable doubt as to the procedural nature of the enumerated matters.

VI. CONCLUSIONS

The United States at first was a fervent supporter of the double veto and the Four Power Declaration. While criticizing Russia for its use of the double veto, the United States nevertheless indicated that Russia may have been within its legal rights in exercising that power. But it was soon realized that strict compliance to the terms of the Declaration hampered the effectiveness of the Council, and the United States began to seek a legal alternative to the Declaration as the determinative factor in resolving the preliminary question. This was evidenced by the American efforts in the General Assembly to pass a resolution enumerating those matters which should be considered procedural—Resolution 267 (III). After the United States had announced to the Council that the assumptions upon which the Declaration had been based no longer existed, and that therefore they would look elsewhere for a voting procedure, great reliance began to be placed upon Resolution 267 (III) as determinative of what was procedural. It was hoped that the resolution would remove the enumerated thirty-five categories from any doubt as to their procedural character and therefore from the purview of the double veto. Obviously, the United States realized that the resolution was merely a recommendation by the Assembly as to what was to be deemed procedural. But a General Assembly resolution is voted upon by all of the members of the organization and therefore carries a high degree of moral and political, as well as legal, weight.

Coincident with this development was the active attempt by the non-permanent members of the Council to make that organ a more democratic body to be governed by majority rule rather than the unanimity principle. The non-permanent members have never favored the veto power since the inception of the United Nations. In particular, they have established that they will not tolerate the use of the double veto to transform a procedural matter into a non-procedural matter. They too have begun to place a great deal of reliance upon Resolution 267 (III) as the legal basis in the determination of whether or not a matter is procedural. The non-permanent members therefore look to Rule 30 as the vehicle to overrule any presidential ruling with respect to a vote on the preliminary question which they feel is contrary to the terms of the resolution. Additionally, the non-permanent members have supported a presidential ruling that a resolution is procedural notwithstanding the negative vote of a permanent member on the preliminary question where the President has the support of a majority of the members.¹⁰⁰ These developments take on

100. This, in all likelihood, would probably occur only where the President represents

added importance when the new make-up of the Council is considered. Presently there are ten non-permanent and five permanent members of the Council. On a procedural question, the affirmative votes of any nine members is necessary to carry the matter. Therefore, the non-permanent members can, by themselves, overrule a presidential ruling under Rule 30 even if all of the permanent members disagree with them. With this possibility in mind, it appears that Resolution 267 (III) will play an increasingly more important role in determining what is procedural, for the non-permanent members seem to be perfectly willing to enforce its terms.

It has been suggested by the commentators and the Russian delegates that the effect of these developments is contrary to the law of the Charter in that the terms of the Charter have been amended¹⁰¹ by the substitution of rule by majority for the principle of unanimity. While the voting provisions of Article 27 of the Charter have been left intact, it cannot be doubted that in effect their scope has been limited by the practice of the members of the Council. Certainly General Assembly Resolution 267 (III) and the procedures developed to implement it have made inroads into the area where the veto was previously properly exercisable. What has been witnessed is not an amendment to the Charter, however, but an interpretation of the document which more readily meets the necessities of international politics.

Any formalistic approach to this development would be unduly restrictive to the evolution of this international organization. The United Nations is a political body and is governed by the political necessities of the times. The organs of the United Nations are competent to interpret the Charter, and their practice has established that an interpretation different from what was originally anticipated, must be given to Article 27 in order to allow the Organization to continue to function effectively. It does not suffice to say that the Organization must develop only within the black letter of the law of the Charter as once interpreted. Such an approach is unrealistic, for the Charter is a living organism like our Constitution. General Assembly Resolution 267 (III) was an attempt to find a legal basis within the framework of the Charter to resolve the difficult problem of the double veto. The United Nations can survive only if the Charter is thus allowed to evolve with the practice of the members as dictated by the political developments of the times, but only within the legal framework established at the San Francisco Conference.

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a non-permanent member. Otherwise, he might feel bound to follow Part II, paragraph 2, of the Declaration.

101. Chapter XVIII of the Charter prescribes the method that must be followed in amending the Charter.

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APPENDIX A

VOTING PROCEDURE IN THE SECURITY COUNCIL

Statement of the Delegations to the San Francisco Conference of the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the Republic of China, with which the Delegation of France associated itself. UNCIO Doc. 852, III/1/37(1); 11 UNICO Documents, pp. 711-4. (1945)

I

1. The Yalta voting formula recognizes that the Security Council, in discharging its responsibilities for the maintenance of international peace and security, will have two broad groups of functions. Under Chapter VIII, the Council will have to make decisions which involve its taking direct measures in connection with settlement of disputes, adjustment of situations likely to lead to disputes, determination of threats to the peace, removal of threats to the peace, and suppression of breaches of the peace. It will also have to make decisions which do not involve the taking of such measures. The Yalta formula provides that the second of these two groups of decisions will be governed by a procedural vote—that is, the vote of any seven members. The first group of decisions will be governed by a qualified vote—that is, the vote of seven members, including the concurring votes of the five permanent members, subject to the proviso that in decisions under Section A and a part of Section C of Chapter VIII parties to a dispute shall abstain from voting.

2. For example, under the Yalta formula a procedural vote will govern the decisions made under the entire Section D of Chapter VI [Articles 28-32 of the Charter]. This means that the Council will, by a vote of any seven of its members, adopt or alter its rules of procedure; determine the method of selecting its President; organize itself in such a way as to be able to function continuously; select the times and places of its regular and special meetings; establish such bodies or agencies as it may deem necessary for the performance of its functions; invite a member of the Organization not represented on the Council to participate in its discussions when that Member's interests are specially affected; and invite any state when it is a party to a dispute being considered by the Council to participate in the discussion relating to that dispute.

3. Further, no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention under paragraph 2, Section A, Chapter VIII [Article 35 of the Charter]. Nor can parties to such dispute be prevented by these means from being heard by the Council. Likewise, the requirement for unanimity of the permanent members cannot prevent any member of the Council from reminding the members of the Organization of their general obligations assumed under the Character as regards peaceful settlement of international disputes.

4. Beyond this point, decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might in the end, require the Council under its responsibilities to invoke measures of enforcement under Section B, Chapter VIII [Chapter VII of the Charter]. This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon states to settle their differences, or makes recommendations to the parties. It is to such decisions

and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute.

5. To illustrate: in ordering an investigation, the Council has to consider whether the investigation—which may involve calling for reports, hearing witnesses, dispatching a commission of inquiry, or other means—might not further aggravate the situation. After investigation, the Council must determine whether the continuance of the situation or dispute would be likely to endanger international peace and security. If it so determines, the Council would be under obligation to take further steps. Similarly, the decision to make recommendations, even when all parties request it to do so, or to call upon parties to a dispute to fulfill their obligations under the Charter, might be the first step on a course of action from which the security Council could withdraw only at the risk of failing to discharge its responsibilities.

6. In appraising the significance of the vote required to take such decisions or actions, it is useful to make comparison with the requirements of the League Covenant with reference to decisions of the League Council. Substantive decisions of the League of Nations Council could be taken only by the unanimous vote of all its members, whether permanent or not, with the exception of parties to a dispute under Article XV of the League Covenant. Under Article XI, under which most of the disputes brought before the League were dealt with and decisions to make investigations taken, the unanimity rule was invariably interpreted to include even the votes of the parties to a dispute.

7. The Yalta voting formula substitutes for the rule of complete unanimity of the League Council a system of qualified majority voting in the Security Council. Under this system non-permanent members of the Security Council individually would have no "veto". As regards the permanent members, there is no question under the Yalta formula of investing them with a new right, namely, the right to veto, a right which the permanent members of the League Council always had. The formula proposed for the taking of action in the Security Council by a majority of seven would make the operation of the Council less subject to obstruction than was the case under the League of Nations rule of complete unanimity.

8. It should also be remembered that under the Yalta formula the five major powers could not act by themselves, since even under the unanimity requirement any decisions of the Council would have to include the concurring votes of at least two of the non-permanent members. In other words, it would be possible for five non-permanent members as a group to exercise a "veto". It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their "veto" power wilfully to obstruct the operation of the Council.

9. In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members.

10. For all these reasons, the four sponsoring Governments agreed on the Yalta formula and have presented it to this Conference as essential if an international organization is to be created through which all peace-loving nations

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can effectively discharge their common responsibilities for the maintenance of international peace and security.

II

In the light of the considerations set forth in Part I of this statement, it is clear what the answers to the questions submitted by the Subcommittee should be, with the exception of Question 19. The answer to that question is as follows:

1. In the opinion of the Delegations of the Sponsoring Governments, the Draft Charter itself contains an indication of the application of the voting procedures to the various functions of the Council.

2. In this case, it will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply. Should, however, such a matter arise, the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members.

APPENDIX B

THE PROBLEM OF VOTING IN THE SECURITY COUNCIL

G.A. Res. 267 (III), 3 U.N. GAOR 2, at 7-10, U.N. Doc. A/900 (1949)

The General Assembly,

Having considered the report of its Interim Committee on the problem of voting in the Security Council, and

Exercising the authority conferred upon it by Article 10 of the Charter to discuss any question within the scope of the Charter or relating to the functions of any organ of the United Nations and to make recommendations to the Members of the United Nations and to the Security Council thereon.

1. Recommends to the members of the Security Council that, without prejudice to any other decisions which the Security Council may deem procedural, the decisions set forth in the attached Annex be deemed procedural and that the members of the Security Council conduct their business accordingly.

2. Recommends to the permanent members of the Security Council that they seek agreement among themselves upon what possible decisions by the Security Council they might forbear to exercise their veto, when seven affirmative votes have already been cast in the Council, giving favourable consideration to the list of such decisions contained in conclusion 2 of part IV of the report of the Interim Committee;

3. Recommends to the permanent members of the Security Council, in order to avoid impairment of the usefulness and prestige of the Council through excessive use of the veto:

(a) To consult together wherever feasible upon important decisions to be taken by the Security Council;

(b) To consult together wherever feasible before a vote is taken if their unanimity is essential to effective action by the Security Council;

(c) If there is not unanimity, to exercise the veto only when they consider the question of vital importance, taking into account the interest of the United

Nations as a whole, and to state upon what ground they consider this condition to be present;

4. Recommends to the Members of the United Nations that in agreements conferring functions on the Security Council such conditions of voting within that body be provided as would to the greatest extent feasible exclude the application of the rule of unanimity of the permanent members.

ANNEX

Decisions deemed procedural

Decisions to postpone consideration of or voting on a recommendation of a State for membership until the next occasion for the consideration of applications.

Submission to the General Assembly of any questions relating to the maintenance of international peace and security.

Request to the General Assembly that the General Assembly make a recommendation on a dispute or situation in respect of which the Security Council is exercising the functions assigned to it in the Charter.

Consent to notification by the Secretary-General to the General Assembly or to Members of the United Nations of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council.

Consent to notification by the Secretary-General to the General Assembly or to Members of the United Nations of any matters relative to the maintenance of international peace and security with which the Security Council ceases to deal.

Request to the Secretary-General for the convocation of a special session of the General Assembly.

Approval of credentials of representatives of members of the Security Council.

Approval of annual reports to the General Assembly.

Submission and approval of special reports to the General Assembly.

Organization of the Security Council in such manner as to enable it to function continuously.

Arrangement of the holding of periodic meetings.

Holding of meetings at places other than the seat of the United Nations.

Establishment of such subsidiary organs as the Security Council deems necessary for the performance of its functions.

Steps incidental to the establishment of a subsidiary organ: appointment of members, terms of reference, interpretation of terms of reference, reference of questions for study, approval of rules of procedure. However, the approval of the terms of reference of such subsidiary organs should require the unanimity of the permanent members if the subsidiary organ were given authority to take steps which, if taken by the Security Council, would be subject to the veto, or if the conferring of such authority would constitute a non-procedural decision.

Adoption of rules of procedure: Decisions to adopt rules of procedure and decisions in application of the provisional rules of procedure, not contained elsewhere in the list:

- (1) Overruling of ruling of the President on a point of order (rule 30).
- (2) Order of principal motions and draft resolutions (rule 32).
- (3) To suspend the meeting; to adjourn the meeting; to adjourn the

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meeting to a certain day or hour; to postpone discussion of the question to a certain day or indefinitely (rule 33).

(4) Order in which amendments to motions or draft resolutions are to be voted upon (rule 36).

(5) Request to members of the Secretariat or to other persons for information or for other assistance (rule 39).

(6) Publication of documents in any language other than the official languages (rule 47).

(7) To hold a meeting in private (rule 48).

(8) To determine what records shall be kept of a private meeting (rule 51).

(9) To approve important corrections to the records (rule 52).

(10) To grant access to the records of private meetings to authorized representatives of other Members of the United Nations (rule 56).

(11) To determine which records and documents shall be made available to other Members of the United Nations, which shall be made public, and which shall remain confidential (rule 57).

Adoption of the method of selecting the President.

Participation without vote of Members of the United Nations not members of the Security Council in the discussion of any question brought before the Security Council whenever the Security Council considers that the interests of those Members are specially affected.

Invitation to a Member of the United Nations which is not a member of the Security Council or to any State which is not a Member of the United Nations to participate without vote in the discussion relating to a dispute to which it is a party.

Enunciation of conditions for such participation of a State which is not a Member of the United Nations.

Decision whether a State not a Member of the United Nations has accepted the conditions deemed just by the Security Council for participation under Article 32 of the Charter.

Approval of credentials of representatives of States invited under Articles 31 and 32 of the Charter and rule 39 of the provisional rules of procedure.

Decision to remind Members of their obligations under the Charter.

Establishment of procedures for the hearing of disputes or situations.

Request for information on the progress of the results of resort to peaceful means of settlement.

Deletion of a question from the list of questions of which the Security Council is seized.

Decision to consider and discuss a dispute or a situation brought before the Security Council (adoption of the agenda).

Decision whether a State not a Member of the United Nations has accepted, for the purposes of the dispute which it desires to bring to the attention of the Security Council, the obligations of pacific settlement provided in the Charter.

Invitation to a Member of the United Nations not a member of the Security Council to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Approval of rules of procedure and organization of the Military Staff Committee.

Request for assistance from the Economic and Social Council.

Decision to avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the Trusteeship System

relating to political, economic, social and educational matters in the strategic areas.

Decision to dispense, on grounds of security, with the assistance of the Trusteeship Council.

Request of the Security Council for the appointment of a joint conference for the purpose of choosing one name for each vacant seat in the International Court of Justice.

Fixation of a period within which those members of the International Court of Justice who have already been elected shall proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

Fixation of the date of the election to fill vacancies in the International Court of Justice.