Monday, June 27, 1955, Afternoon Session

THE VETO AND THE SECURITY COUNCIL

PROF. LEO GROSS* (Fletcher School): The title of my talk, "The Veto and the Security Council," is somewhat "loaded." We all know very well that in the Charter of the United Nations there is no such thing as a "veto." The voting rules for the Security Council require an affirmative vote of seven members for decisions on procedural matters; for decisions on all other matters, that is on non-procedural or substantive matters, the Charter requires an affirmative vote of seven members including the concurring votes of the permanent members. It is inaccurate and even misleading to say that the Charter confers a veto right on the permanent members. For to say this would imply what is not the case—that a permanent member is bound to vote against a non-procedural proposal in order to defeat it. According to the Charter, a proposal is lost unless it receives affirmative votes of seven members including the concurrence of the permanent members. In brief, the Charter requires concurrence and not an adverse vote, a veto, of the permanent members. This clarification is essential for the following analysis. When I use the term "veto" I shall use it as a convenient short-title or symbol for the voting rule actually laid down in the Charter.

Having identified briefly the first part of the title, allow me to identify briefly the second part. The Security Council, a principal organ of the United Nations, is primarily responsible for the maintenance of international peace and security. From a formal point of view it acts as a corporate organ of an institution endowed with international legal personality. From a substantive point of view it is a standing diplomatic conference or an instrument for multilateral diplomacy embedded in a legal framework, the Charter. This framework is fairly elastic insofar as the content of political decisions is concerned which the Security Council is authorized to make. On the other hand, this framework is remarkably rigid in certain procedural matters. The flexibility regarding substance is more than compensated by a narrowly defined voting formula which is the

*Footnotes to Leo Gross's Speech will be found at end of article.

modus operandi of the Council. Acceptance of this voting formula was one of the principal political problems in drawing up the Charter and a condition of great power participation in the Organization.

It has become fairly common with governments as well as with writers to express disappointment at the way the Security Council has functioned, and to single out the Soviet Union and its use or abuse of the "veto" as the primary cause for the less than satisfactory results achieved so far. This sort of attitude relates directly to the expectations aroused by the creation of the United Nations. No doubt these expectations were high in some quarters. It may be suggested that insofar as this country is concerned these expectations were roused to a high point by speakers from Washington, so much so that it has become rather common to note that the Charter has been "oversold." It would seem therefore that the reaction to the first ten years of the United Nations is in direct proportion to the expectations formed at the time of its formation. It is doubtful whether the United Nations has really deserved some of the bitter criticism which has been directed at it.

Personally I did not entertain any high expectations when the United Nations was founded at San Francisco ten years ago. The reason for that, I think, is very simple. I had observed very carefully the work of the League of Nations, and in a sense I looked upon the United Nations as upon a second marriage—the triumph of hope over experience. The United Nations was not created according to an entirely new conception. It was based very largely on the League pattern without really being, contrary to very widespread opinion, an improvement over the League pattern. I pointed out at the time, in a paper in the American Journal,[1] that in many of its essentials the United Nations was a codification of the experience of the League of Nations, and that it represented less rather than more than what the Covenant was intended to be. Insofar as this country was concerned, the Charter of the United Nations incorporated all the important demands for safeguarding the sovereignty of the United States which figured so prominently in the reservations of Senator Henry Cabot Lodge and the Senate debate in 1919 in connection with the question of joining the League of Nations. I think it is very useful to remind ourselves that this need for safeguarding the sovereignty of the United States was very emphatically affirmed in the hearings which preceded the consent and advice of the Senate Committee on Foreign Relations and of the Senate itself to the ratification of the United

Nations Charter. It was stated at the time by John Foster Dulles that "actually, the document before you [the Senators] charts a path which we can pursue joyfully and without fear. Under it we remain the masters of our own destiny. The Charter does not subordinate us to any supergovernment. There is no right on the part of the United Nations Organization to intervene in our domestic affairs. There can be no use of force without our consent. If the joint adventure fails, we can withdraw."[2] And Senator Vandenberg was no less emphatic when he explained to his colleagues in the Senate, prior to the vote, that "the United States retains every basic attribute of its sovereignty. We cannot be called to participate in any sort of sanctions, military or otherwise, without our own free and untrammeled consent. We cannot be taken into the World Court except at our own free option. The ultimate disposition of enemy territory which we have captured in this war is dependent solely upon our own will so far as this Charter is concerned. Our domestic questions are eliminated from the new organization's jurisdiction. Our inter-American system and the Monroe Doctrine are unimpaired in their realities. Our right of withdrawal from the new organization is absolute, and is dependent solely upon our own discretion. In a word, Mr. President," concluded Senator Vandenberg, "the flag stays on the dome of the Capitol."[3]

I suppose that the Charter was explained in similar words to the Supreme Soviets when the Supreme Soviets consented to the ratification of the United Nations Charter by the Soviet Union. In other words, what I am trying to get at is that the Charter was adopted by the two dominant powers, and presumably by the rest of the members of the United Nations, with a perfectly clear realization that it was going to be an organization of sovereign states and that all of them, and certainly the Great Powers, the permanent members of the Security Council, would remain masters of their destiny. In this I see one of the roots of the veto: That is, that it protects the national sovereignty, the right, certainly of the permanent members of the Security Council, to remain masters of their destiny.

The second root of the veto is, I think, to be found in the corporate character which the Charter confers upon this primary organ for the maintenance of peace and security. In order to make this corporate action possible, which was not possible in the League, the permanent members make sure that no United Nations action can be taken without their consent. This, I think, is a second root of the veto and, as Professor J. L.

Brierly has pointed out, "The veto is the price that the United Nations has paid in order to obtain an organ which should have power to decide and act in a corporate capacity, and it is already clear that the price has been a high one."[4]

This idea that the Security Council should be able to act in a corporate capacity is based of course upon the experience of the League, where the Council of the League did not have this capacity, where on the contrary the members derived certain obligations directly from the Covenant, and the Council could no more than co-ordinate their spontaneous action. So, in order to obtain a more perfect, a more centralized type of organization, it was necessary to surround it with certain guarantees, certain reservations that it would not be abused. And I think the requirement of unanimity among the Big Five is such a guarantee.

I would like to analyze now the voting rule for the Security Council, Article 27 of the Charter. This article lays down two or three rules. One is that each member has a single vote, one vote. The other is that matters of procedural character shall be decided by the vote of any seven members. But all other matters require the affirmative vote of seven members including the concurring votes of the permanent members. In the case of procedures for the pacific settlement of disputes, the members which are parties to the dispute are supposed to abstain from voting.

Now, the question arises, what does it mean: An Affirmative vote of seven members including the concurring votes of the permanent members of the Security Council? Four texts, the French, the Spanish, the Russian, and the Chinese texts, make it very clear that the vote of all the permanent members is required. The English version of course is quite compatible with that meaning, that the vote of all the permanent members is required: that is, that this voting rule should be read as equivalent to "all the five permanent members." However, other writers, and I think probably members of the Security Council in the Korean action, read this rule as if it were formulated "all the permanent members present and voting." I shall come back to that in a moment and see whether this interpretation is one that makes sense. In the practice of the Security Council it has come to be accepted that abstention is not a fatal defect. In other words, if you take Article 27, Paragraph 3, literally, abstention is not a fulfillment of that requirement because it is not an affirmative and concurring vote. However, the members of the Security Council and the General Assembly

itself have so far never regarded this abstention as having the effect of defeating a resolution or proposal before the Security Council. Another question which I should like to discuss a little later on is the question whether or not absence from the Security Council can be assimilated to abstention; in other words, whether absence would have the same legal effect as abstention of a permanent member.

There is one point with which I would like to begin and that is the question of the quorum of the Security Council when it is to take decisions. The Charter does not mention the quorum at all nor will you find any rules concerning the quorum in the rules of procedures of the Security Council, which are still provisional after ten years. Does this mean that there is no quorum requirement at all for the Security Council? Or does it mean that all eleven members constitute a quorum? The practice of the Security Council indicates that the Council, at least up to 1950, took the view that the quorum consists of those members whose vote is necessary for a resolution. In the Iranian case, for instance, in 1946, the Council adopted a procedural resolution in the absence of the Soviet Union.[5] In a later case, the Indonesian case, the Council in 1948 adopted a substantive, non-procedural resolution in the absence of the Ukrainian Soviet Socialist Republic, which was a non-permanent member of the Security Council.[6] In the Iranian case the British representative, Sir Alexander Cadogan, suggested that a quorum could be inferred from the voting rule which requires that any actual resolution or decision shall be carried by a certain vote:[7] a majority of any seven members for procedural decisions and a qualified majority of seven for non procedural decisions. I think that he pointed out the direction in which a search for a quorum must be made. And you will find in some international organizations certain models for this sort of approach: the Covenant itself, for instance, in Article 16, Paragraph 4, had an implied quorum requirement; and the Rio Treaty of Reciprocal Assistance of 1947 in Article 19 provides that in order to constitute a quorum it shall be necessary that the number of states represented should be at least equal to the number of votes necessary for the taking of the decision. If you apply this rule to the Security Council, it would appear that in order to take a procedural decision the presence of at least seven members is necessary, and that in order to adopt substantive, non-procedural decisions you must have the five permanent members plus at least two non-permanent members. If that is correct, then the Security Council from January, 1950

until August, 1950 lacked the proper quorum for the adoption of non-procedural decisions.

This may sound rather strange, but the Charter itself, without using the term "implied quorum," contains in at least one or two other articles an implied quorum. You will find this implied quorum in the articles dealing with amendments to the Charter of the United Nations. Rule 68 of the Rules of Procedure of the General Assembly declares that "a majority of the Members of the General Assembly shall constitute a quorum." But Articles 108 and 109, which deal with amendments and the holding of a general conference to review the Charter, require a two-thirds majority of the members of the United Nations. Here it is not the same text as in Article 18. Article 18 speaks of a majority, two-thirds majority or a simple majority, of the "members present and voting," but Article 108 and Article 109 speak of the "members of the General Assembly" or the "members of the United Nations." So, if my interpretation is correct, there is what you might call an aggravation of the voting requirement in connection with amendments to the Charter, and I think it is quite a substantial aggravation.

The point has been made by Professor McDougal that the interpretation which I propose is a literal, a textual interpretation which is not as good as his interpretation. He calls it the major-purpose interpretation or interpretation for survival.[8] It may seem a little bit naive to believe that our survival can depend upon an interpretation of the Charter. However, I would like to go a little into what results you obtain if you do adopt this major-purpose interpretation in the general context of interpretation of treaties, because after all the Charter of the United Nations is a treaty, although from a substantive point of view it is also the constitution of the United Nations.

Professor McDougal and Mr. Gardner in their argument advance several propositions which I think bear examination. One of these, of course, is untenable, and that is that prior to 1950 there was any precedent for the Security Council to have ever adopted substantive decisions in the absence of a permanent member. Reference is made to the Iranian case, but in the Iranian case no substantive decision was adopted. I think this is simply an error.[9] Another proposition is thatthe resolutions adopted by the Security Council in the Korean affair in June and July of 1950 are themselves authentic interpretations of the Charter.

I would like, however, to begin now with the first proposition, namely, that it is possible to identify absence with absten tion. The first point which I would like to make is that in the records of the Security Council there is no evidence that the Council as a corporate body, as an organ of the United Nations, equated absence with abstention. Some individual members of the Security Council did express a view to that effect, but I have not found in the records any resolution purporting to state the view of the Security Council as a corporate body. Furthermore, the record itself indicates that in the summation of the vote, the President of the Council always noted that one member of the Security Council was absent. He never said that the one absent member was a permanent member of the Security Council. On the other hand, the President in summing up the vote never said that that one member who was absent had merely abstained from voting. In other words, what you find in the records, and that is rather important, is that some members are listed as having voted for a resolution, some are listed as having voted against the resolution, some as abstaining, some as not voting, and some as not present. It is interesting that in the Indonesian case, where the Ukrainian Soviet Socialist Republic was absent from the meeting of December 24, 1948, the President did declare that the absent member, a non-permanent member, was abstaining from the vote, or would be carried, at any rate, as abstaining.[10] Professor Jessup sat for the United States on the Security Council on that occasion and maybe he will want to add something to what I have said.

Some resolutions were then adopted in June and July, 1950 by a vote which does not correspond to the voting requirement in Article 27, Paragraph 3, because one permanent member was not present, did not participate in the vote, and of course did not abstain. Now, by dint of what reasoning is a member which is not present and which is so listed in the official records, to be regarded as present and abstaining? I have construed abstention as being a tacit consent and therefore note a vitiating factor in the proceedings of the Security Council.[11] But is it possible to maintain this construction for a member which is absent but, far from abstaining, makes his dissent very clearly known to the members of the Security Council? I cannot help but agree with Professor Julius Stone in his book Legal Control of International Conflicts when he says that "the mere fact that non-concurrence is manifest in an obstructionist abstenteeism from the Council rather than an obstructionist negative vote seems immaterial."[12]

It is interesting in this connection to recall the Advisory Opinion of the International Court of Justice in the Second Admission case of March 3, 1950. In this case the Court was called upon to determine the question whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it. It was suggested to the Court, inter alia, that the General Assembly could treat the absence of a Security Council recommendation as equivalent to an "unfavorable recommendation" upon which the Assembly could base a decision to admit a State to membership. The Court rejected this argument emphatically and held "it is impossible to admit that the General Assembly has the power to attribute to a vote of the Security Council the character of a recommendation when the Council itself considers that no such recommendation has been made."

I am not suggesting that there is a perfect analogy between the holding of the Court and the point here under consideration. I do suggest, however, that it is not possible to identify simply one thing with another, absence with abstention, and to attribute to the Soviet position a meaning which the latter expressly repudiated. Caution seems all the more necessary in view of the fact already underscored, namely, that the Security Council itself has not gone on record as making such an identification.

The second point to which I want to turn now is whether or not those recommendations or resolutions of the Council in June and July, 1950 amounted to an authentic interpretation of the Charter, in particular of the voting requirement in Article 27, Paragraph 3. That is affirmed by Professor McDougal and Dr. Gardner in their article in the Yale Law Journal when they said that these decisions, including the resolutions on Korea, taken in the absence of a permanent member "are themselves authentic interpretations of the Charter by a body authorized to make such interpretations."[13] And reference is made by the authors to the well-known statement of Committee IV/2 of the San Francisco Conference, to which Professor Eagleton referred this morning, where the Committee said it was inevitable that each organ will interpret such parts of the Charter as are applicable to its particular function and it was not necessary to include any particular principle to that effect in the Charter. However, what is omitted in the McDougal-Gardner argument is the final paragraph of that statement on interpretation, in which the Committee declared that "it is to be understood, of course, that if an interpretation made by any organ of the organization or by a committee of jurists is not generally

acceptable it will be without binding force. In such circumstances or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment."[14] Now, this is precisely the point which I was trying to make and I think this is the distinction between absence and abstention. Abstention is accepted by all the members, or at least by the members concerned, whereas the equation of absence with abstention is not generally supported by the members and in this case is actively opposed by a permanent member of the Security Council. Consequently I do not think that it is possible to regard the resolutions themselves as an authentic interpretation of the voting requirement.

Now, as to the major-purpose interpretation. It is a rather fascinating approach and I would have liked to speak at greater length on this than I can today. However, I would like to say that major-purpose interpretations of course are quite proper and in some cases they are even required by the instrument concerned. For instance, you are all familiar with the Headquarters Agreement between the United Nations and the United States of June 26, 1947. In Section 27 of this Headquarters Agreement it is said: "This Agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfill its purposes."[15] Here you have a direction to the interpreter to interpret this instrument in accordance with the purposes of the United Nations.[16] Now, the major purpose, for instance, for the interpretation of the United Nations Charter may be to take collective action or collective measures, but it may also be, as I said at the very outset, to safeguard the independence and the right of every permanent member of the Security Council to be master of its destiny. There are many other international treaties which have a reference to a major purpose,[17] but in the practice of the International Court of Justice, which I accept as a guide in this matter, the major-purpose interpretation or the principle of effectiveness, as it is sometimes called, is really a principle subordinate to the principle of the interpretation based upon the actual text of the instrument. In an interesting article in the British Yearbook of International Law[18] Sir Gerald Fitzmaurice identifies the major principles of interpretation relied upon by the International Court of Justice and its predecessor. The first principle is the principle of actuality,

that is, the principle that treaties are to be interpreted primarily on the basis of their actual text. The second major principle is that of the natural meaning. And only subordinate to those two major principles is the principle called effectiveness. It is really a very risky, a very dangerous, principle, because it is a principle which tends very often to disregard the actual text itself and the intention of the parties as expressed in the treaty. I cannot accept a major-purpose interpretation which disregards the text itself. I think the text is to prevail over whatever deductions or inferences one cares to make concerning the objectives of an instrument. And I think that the Court itself in the question of the human rights provisions in the Peace Treaties with Bulgaria, Rumania, and Hungary expressed this thought very clearly when it said that the principle of interpretation "often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit."[19]

It seems to me, therefore, that in this case it is not possible to rely on the major-purpose interpretation in order to invalidate what I feel is a fairly clear or perhaps even a very clear text and meaning of the voting rules in the Charter. I would like to refer here again to Julius Stone who commented upon this major-purpose interpretation, saying, "It is scarcely possible to reduce the debate concerning absence to a conflict between literal interpretation and interpretation by major purpose as McDougal and Gardner seek to do. For it is not self-evident, (except wishfully speaking) whether (from the standpoint of the Great Powers) 'collective security' or preservation of their freedom of action was the 'major' purpose. The conflict is rather between literal interpretation plus one 'major purpose' and another 'major purpose' simpliciter."[20]

In order to appreciate the consequences of the major-purpose interpretation of the voting rules in the Security Council for the future, reference may be made to the following statement by McDougal and Gardner: "Nothing in this principle (of unanimity) suggests so restricted an interpretation of the voting provisions of the Charter as to make it impossible for the United Nations to take measures concerning the future of international peace and security without the complete agreement of the five major powers." It is further urged by these authors that the resolutions of June 25 and 27 "did not violate the principle of unanimity, unless that principle is thought to mean that one major power can prevent other powers from using

their forces in a course of action to which they have agreed."[21] This argument seems to disregard the theory underlying the Charter according to which it is not the Members but the Security Council which decides whether to take action. It is not the question whether one power can prevent another from taking action; the question rather is whether the Security Council can decide to take enforcement action under Article 42 or to call upon this or that minor or major power under Article 48 to take action without the concurring votes of the five permanent members. It thus appears to be inherent in the logic of the major-purpose interpretation to contend that such decisions can and perhaps indeed should be taken without the concurring votes of the permanent members and even in the face of a "veto' by one of them. The adoption of the Uniting for Peace Resolution after the votes of June/July, 1950 and the rationale behind it clearly indicate that such a far-reaching construction of the conditions for Security Council action is not countenanced by the Members of the United Nations. Moreover, if it were valid for decisions on enforcement action, would it not, a fortiori, be also valid for other decisions of the Security Council relating to the "major purpose" of the United Nations, such as the decisions to recommend admission to membership and appointment of the Secretary-General?

Now so much about the veto itself, or rather the principle of the affirmative and concurring votes in the Security Council. It is rather interesting to observe, incidentally, that the action in Korea has been subjected not merely to critique by lawyers but it has also been criticized or examined very carefully by students of politics such as Arnold Wolfers, Niemeyer, Johnson, and others.[22] It is rather interesting that they conclude from their own premises that it is dangerous in the extreme to present the action in Korea as a collective security action. Rather, they argue, it should be regarded simply as an action taken by the United States and other members of the United Nations in defense of their national interests. And it is also very interesting to find in a Staff Study of the Senate Foreign Relations Committee the following statement concerning the action in Korea: "There is no question that the military action prevented the conquest of all of Korea by an act of aggression. It is a question, however, whether the action has assisted the efforts of the organization to settle the Korean political problem which still remains unsolved. It is also a question whether the limitations on military action in Korea, adopted in part at least out of consideration for policies of participants in the United Nations

campaign, adversely affected the pursuit of our own policy."[23] Thus from a variety of approaches there is some doubt as to the wisdom or the import of the action in Korea.

One may well ask what the alternatives are in case the Security Council is prevented from functioning constitutionally, which may happen for a variety of reasons because the Charter is almost unreasonably restrictive and rigid. One alternative might be that if the Council is paralyzed by lack of a quorum the powers of the Security Council devolve upon the General Assembly. And I think it is no secret that if the Russian representative had turned up on June 25 in the Security Council the United States Government was ready to go to the General Assembly; and as a matter of fact the decision to take military action in Korea was taken ahead of the June 27 resolution, a fact which I do not wish to criticize. There was what you might call an overwhelming military necessity. One could think of still other alternatives. There is one, for instance, suggested by Professor Stone in terms of the residual powers of the member states.[24] In this view, if the Security Council is paralyzed and cannot take any action, the members may act as if they had never renounced the use of force according to their own unilateral decisions. The difficulty with this suggestion is that the members have renounced the use of force and threat of war unconditionally in Article 2, Paragraph 4.

Of course, the official alternative, as is well known, is the Uniting for Peace Resolution of 1950, which provides not for the transfer of powers but for the transfer of the subject-matter from the Security Council to the General Assembly. So far the Uniting for Peace Resolution has been rather a disappointment. It was a complete failure, I submit, insofar as the ear-marking of military forces was concerned. I do not think that any member, or at least any significant member, ear-marked any of his armed forces for the United Nations. And as to the rest, it is rather undesirable to have to rely on those blocs of votes one has to gather, and perhaps to have to enter into bargains with the holders of disposable votes in order to collect the needed majority vote in favor of a non-binding Assembly resolution. However, that may be where we stand today.

I wanted to say a few words about the so-called "double veto." The "double veto' is an aggravation of the non-existent "veto," that is, an aggravation of the principle of unanimity in the Security Council. It arises directly from the San Francisco Conference where the Four Sponsoring Powers were asked to give certain answers to certain questions. One of the questions

was: "In case a decision has to be taken as to whether a certain point is a procedural matter, is that preliminary question to be considered in itself as a procedural matter or is the veto applicable to such preliminary questions?"[25] Of course, the Four Powers, and France associated herself with them, did not answer any of the other questions specifically but they replied to this question. They said that in the opinion of the delegations the draft Charter itself contained an indication of the application of the voting procedure to the various functions of the Council. They went on to say that it would be unlikely that any doubt would arise in the future. Should, however, "such a matter arise," they continued, "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."[26] What this statement in substance says is that if there is any doubt which of the two votes applies, the simple vote of seven or the qualified vote of seven, that in itself is a non-procedural question. Thus a permanent member may raise the preliminary question whether a proposal under consideration is procedural; and by his non-concurrence in a majority vote he may force the Council to treat the proposal as a non-procedural matter. This is the first "veto." If the Council members persist and ask for a vote on the proposal, the same permanent member by his non-concurrence in a majority vote is able to prevent its adoption. This then is the "double" veto. This double veto has not been used very often in the Security Council. In fact, I went over the records very carefully and I did not find more than about half a dozen cases, and in only about three or four of those cases was there any major debate about the "double veto." It has, however, caught the imagination of delegates and people outside the United Nations and has become a major point of controversy.

What is the attitude of Security Council members with reference to this double veto? Insofar as the Council as a corporate organ is concerned, it never took a position on this question. Insofar as the non-permanent members are concerned, their position has been that it certainly is not binding on them. Of the permanent members, the Soviet Union argues that it is binding absolutely on the permanent members; France and the United Kingdom also expressed themselves in favor of the binding character of the statement; China has adopted an ambiguous position on occasion but invoked it with great force in 1950 in connection with the Formosa question. The United

States position has been somewhat flexible, I would say. I do not think this Government ever declared it was not binding but perhaps it never said clearly that it was binding. It was a statement of general attitude, said Mr. Dulles in the first committee of the General Assembly in 1947, but it was not an agreement binding in perpetuity, which of course it is not.[27] But, at any rate, we never really repudiated it, so it is probably fair to say that insofar as the five permanent members are concerned, they do regard the statement as binding in the sense that it offers a guide for the application of the double veto itself. In other words, it contains an indication as to which matters are procedural or substantive.

The double veto was used in several cases after prolonged debate, and in all cases the Soviet Union prevailed with direct or indirect support of one or more of the Great Powers, including the United States on at least one occasion. But in one case, the Formosa question, the Chinese Communists' complaint of armed invasion of Taiwan, proceedings took place in the Security Council on September 29, 1950 which were rather unusual in the annals of the Security Council, which certainly had its share of unusual meetings. In that case, where the British representative presided, the Council voted on a resolution submitted by Ecuador inviting the Central People's Government of the People's Republic of China to come to New York and to attend the meeting of the Security Council in connection with its complaint. That resolution was based upon the rules of procedures of the Security Council which provide, in Rule 39, that the Security Council may invite members of the Secretariat and other persons to supply it with information or to give them assistance. The Chinese Nationalist representative considered that a preliminary determination as to the nature of the vote was absolutely essential, and he invoked the Four Power Statement of San Francisco. The President rules this request out of order and suggested that the preliminary question be raised after the vote on the invitation itself. This had happened before; there was nothing unusual about it. The vote on the invitation was seven in favor, three against. The three votes against were cast by China, Cuba, and the United States. The President of the Council summed up the results of the vote by saying that the resolution was adopted. The Chinese representative disagreed. He claimed that because of the lack of his concurrence in the vote, the resolution had not been adopted. The discussion which followed gave an opportunity to different members to express their point of views on the double veto and Ambassador

Ernest Gross, who sat for the United States in the Security Council on that occasion, said that "The Charter of the United Nations and the Four Power Declaration of San Francisco and the precedents of the Security Council themselves seem to us solidly to support the conclusion that a motion of this kind is procedural."[28] On the same occasion he also referred to a General Assembly resolution of April 14, 1949 in which the General Assembly made several recommendations to the Council as to voting, and where the invitation to participate or to attend meetings of the Council was listed among the decisions to be governed by a procedural vote. But the Chinese representative persisted, in spite of the fact that the United States, which also objected, did not invoke the double veto because it did not consider this to be a "double veto-able" question. And then rather unusual things occurred in the Security Council. The President asked the Council to vote on the question whether the Council regards the vote taken that morning on the Ecuadorean resolution as procedural. A vote was taken accordingly, and then the President said the proposal was adopted. There were nine votes in favor, one against, and one abstention.[29] The one against, of course, was the Chinese vote. There was no proposal before the Council, really, on which to take a vote. The President had simply asked the Council to confirm the vote already taken. The Chinese representative again referred to his vote as a veto, but the President claimed that "notwithstanding the vote of our Chinese colleague, the vote which the Council took this morning on the Ecuadorian resolution is procedural."[30] Now, at this point I think the Chinese representative made a mistake. He raised a point of order and argued that the ruling of the President was ultra vires. He also proposed that the matter be referred to the International Court of Justice for an advisory opinion.[31] The President at this point considered that Mr. Tsiang was challenging his ruling, and he submitted his ruling to the vote under Rule 30 of the provisional rules of procedure, which declares that if a point of order is challenged "the President shall submit his ruling to the Security Council for immediate decision, and it shall stand unless overruled." The President submitted accordingly his ruling to the vote in the Security Council. The vote on this ruling was, I think, unique in the sense that no member really voted—none of them voted against, none in favor, and of course no one abstained. The President then interpreted this remarkable vote saying that his ruling stood.[32] The Chinese representative of course persisted in his view that this was an illegal

proceeding, but the Communist Chinese representative was invited all the same and actually attended meetings of the Security Council.

Some writers have claimed that this proceeding in the Formosa case indicates that the double veto has been effectively placed under the control of a simple majority in the Security Council. I am not sure that the conclusion is correct. I would rather, in fact, doubt that that is the correct interpretation of what happened, although I do admit that what happened was utterly confusing. In this case, as in the case of the veto itself, it is generally overlooked that the double veto and the Four Power Statement itself from which it is derived contain very substantial, very solid, advantage. It is primarily by virtue of that statement by the Four Powers in San Francisco that certain decisions of the Security Council have been considered as governed by procedural vote which without the strength of the statement might not be so considered. This applied particularly to that part of it which provides that no member of the Council can alone prevent the consideration and discussion of a dispute before the Security Council. At San Francisco the Soviet Union did not wish to accept this. The Soviets argued that consideration and discussion is the beginning of a chain of events which may lead to the application of sanctions. However, under strong pressure they agreed to waive their opposition. It is arguable that if the statement were abrogated it might not be possible to say that discussion and consideration are not subject to a qualified vote. Furthermore, certain decisions which concern the procedure in the Security Council are also governed by a procedural vote but not all of them are necessarily procedural in character. My argument here is that the statement itself really offers advantages and no drawbacks. The advantages are that it designates certain matters which are to be governed by a procedural vote without saying that they are procedural matters. Moreover, the double veto can be juridically based not upon the statement but upon the voting rule in the Charter, because Article 27, Paragraph 2, declares that while procedural matters shall be decided by a procedural vote all other questions—obviously that would include the question whether or not a matter is procedural—are to be decided by a substantive, by a qualified vote in any case.[33] It is very difficult to be precise as to when there is a case for properly applying this procedure of the double veto. Of course one can say that it is applicable only in reasonably dubious cases. The problem would be simplified if the Security Council would agree to consider the

statement as a useful guide for its own work, and if no effort were made in the future to consider such votes to be subject to interpretation by presidential rulings. Such presidential rulings could upset not merely the double veto but all the voting rules in the Security Council. If that came about they would abolish the necessary protection the members wanted to derive from the voting rules which they put into the Charter.

Footnotes to Leo Gross's Speech

1. "The Charter of the United Nations and the Lodge Reservations," 41 American Journal of International Law (1947), pp. 531-554.
2. The Charter of the United Nations, Hearings before the Committee on Foreign Relations, United States Senate, 79th Congress, 1st session, 1945, p. 641.
3. Congressional Record, 79th Congress, 1st session, July 23, 1945, No. 147, Vol. 91, p. 8089.
4. The Law of Nations, 4th ed. (1949), p. 104.
5. Repertoire of the Practice of the Security Council 1945-1951, Doc. ST/PSCA/1, 6 August 1954, pp. 175-176, Cases 190-192.
6. Security Council, Official Records (3rd year), no. 134, p. 30 ff.
7. Ibid. (1st year), no. 2, p. 251.
8. Myres S. McDougal and Richard N. Gardner, "The Veto and the Charter; An Interpretation for Survival," 60 Yale L.J. (1951), pp. 258-292.
9. Leo Gross, "Voting in the Security Council: Abstention From Voting and Absence from Meetings," 60 Yale L.J. (1951), pp. 229-235; Julius Stone, Legal Controls of International Conflict, 1954, p. 209.
10. Security Council, Official Records (3rd year), no. 134, p. 30 ff.
11. See Gross, loc. cit., p. 224 ff, 253. At the 197th meeting on August 27, 1947, the representative of the United States stated with reference to abstention: "In the opinion of the United States delegation, the Council has developed, during the past year, one practice in regard to the voting of the permanent members which appears to be of real importance. I refer to the practice of abstention by a permanent member in order to permit the will of the majority of the Council to prevail." Repertoire of the Practice of the Security Council 1946-1951, United Nations Doc. ST/PSCA/1, p. 174, Case 184 (emphasis supplied). McDougal and Gardner, loc. cit., p. 284, oppose the view that abstention is "a manifestation of consent in disguise."
12. At p. 212.
13. McDougal and Gardner, loc. cit., at p. 281.
14. UNCIO Documents, Vol. XIII, pp. 709-710.
15. Review of the United Nations Charter, A Collection of Documents, Senate Doc. 87, 83d Congress, 2d session, p. 206 (emphasis supplied; also in 61 Stat. 3416, or T.I.A.S.1676.
16. It is rather interesting, incidentally, that in authorizing the President to bring into effect this Headquarters Agreement, the Joint Resolution of the Congress of August 4, 1947 provides in Section 6 that "nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the Headquarters district and its immediate vicinity." Public Law 357, 80th Congress, 1st session' 61 Stat. 756, 767. I am quoting this for one purpose, and that is that it made it rather dubious what the major purpose is. In other words, if an instrument directs you to interpret it in the light of a major purpose, there may be difference of opinion as to what the major purpose is.
17. See, for instance, Article 7 of the North Atlantic Treaty of April 4, 1949; Article 10 of the Rio Treaty of 1947; Article 102 of the Bogota Charter of 1948; and Article VI of the ANZUS Treaty of September 1, 1951.

18. G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," 28 British Yearbook of International Law (1951), pp. 1-28, at p. 9.
19. I.C.J. Reports, p. 229 (1950).
20. Loc. cit., at p. 212, note 48.
21. Loc. cit., at p. 287.
22. Arnold Wolfers, "Collective Security and the War in Korea," 43 Yale Review (1954), pp. 481-496; Howard C. Johnson and Gerhart Niemeyer, "The Validity of an Ideal Collective Security," 8 International Organization (1954), pp. 19-35, at p. 33.
23. Pacific Settlement of Disputes in the United Nations. Staff Study No. 5. Sub-Committee on the United Nations Charter, 83d Congress, 2d session. Committee Print, October 17, 1954, p. 20.
24. Stone, loc. cit., at p. 234 ff.
25. Doc. 855, UNCIO Documents, Vol. 11, p. 699.
26. Doc. 852, UNCIO Documents, Vol. 11, p. 710.
27. Mr. Dulles' declaration was restated by Mr. Austin in 1948, Security Council, Official Records (3d year), no. 73, p. 5 f. and amplified, Id., p. 29.
28. Security Council, Official Records (5th year), no. 48, p. 12 f.
29. Security Council, Official Records (5th year), no. 49, p. 5.
30. Id.
31. Id., p. 5 f.
32. Id., p. 7 f.
33. This proposition is elaborated in my article "The Double Veto and the Four-Power Statement on Voting in the Security Council," 67 Harvard L.R. (1953), pp. 251-280, at p. 277.