

THE CREDENTIALS APPROACH TO REPRESENTATION QUESTIONS IN THE U.N. GENERAL ASSEMBLY

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On November 12, 1974, the President of the General Assembly, Algerian representative Abdelaziz Bouteflika, ruled that the South African delegation to the General Assembly could not continue to participate in the work of the Twenty-Ninth Session of the Assembly because the delegation's credentials had not been accepted by the Assembly. "On the basis of the consistency with which the General Assembly has regularly refused to accept the credentials of the delegation of South Africa," Bouteflika said,

[O]ne may legitimately infer that the General Assembly would in the same way reject the credentials of any other delegation authorized by the Government of the Republic of South Africa to represent it, which is tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.¹

The President's ruling was challenged by the United States representative, but was upheld by the General Assembly with ninety-one votes for, twenty-two against and nineteen abstentions.²

The decision effectively barred South Africa from exercising any membership rights. This action was taken by the General Assembly,

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1. The text of the ruling is given in *Resolutions of Legal Interest Adopted by the General Assembly at its Sixth Special Session and Twenty-Ninth Regular Session*. The ruling is referred to, but not reproduced, in *Resolutions Adopted by the General Assembly at Its Twenty-Ninth Session*, 29 U.N. GAOR, Supp. (No. 31) 10-11, U.N. Doc. A/9631 (1974).

The Twenty-Fifth Session was the first at which South African credentials were not accepted. Prior to that time, the General Assembly had decided, at its Twentieth Session, "to take no action on the credentials submitted on behalf of the representatives of South Africa." 20 U.N. GAOR (1407th plen. mtg.) 10, 16, U.N. Doc. A/PV.1407 (1965). Regarding the distinction drawn by the General Assembly between "rejection" of credentials and taking "no action", see note 36 *infra*.

2. 29 U.N. GAOR (2281st plen.mtg.), U.N. Doc. A/PV.2281 (1974).

and therefore, applied solely to that organ.³ However, South Africa is not a permanent member of the Security Council, and since it elected not to place Southwest Africa under the United Nations trusteeship system, it is not represented as an administering power on the Trusteeship Council. All other organs in the United Nations derive their membership through election by the General Assembly. South Africa, which has not sent a delegation to the United Nations since the Assembly's Twenty-Ninth Session, is unlikely to be elected to any of these organs.⁴

The General Assembly's action was taken after approval and adoption of the first report of the Credentials Committee.⁵ The Committee accepted all the credentials submitted to it, "with the exception of the credentials of the representatives of South Africa."⁶

By taking this action, the Assembly went beyond any former action taken by it during previous sessions pertaining to the same question. The Hambro formula, first given expression by the eminent Norwegian jurist, Edvard Hambro, who presided over the General Assembly's Twenty-Fifth Session, had represented the boldest action taken by the Assembly before its Twenty-Ninth Session. Under that formula the South African delegation continued to participate in the

3. The action by the Twenty-Ninth Session of the General Assembly does not bind future assemblies which will examine credentials *de novo* each year. Rule 27 of the Assembly's Rules of Procedure requires that credentials of representatives be submitted to the Secretary-General "if possible not less than one week before the opening of the session." Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.12, at 6 (1974) [hereinafter cited as Rules of Procedure]. Hereinafter, all citations to *id.* shall be to the United Nations document number.

4. See Report of the Credentials Committee to the Seventh Special Session, 7 U.N. GAOR Special Session, S-VII Annexes (Agenda Item 3) 1-2, U.N. Doc. A/10228 (1975); and G.A. Res. 3367 (XXX), 30 U.N. GAOR, Supp. (No. 34) 2, U.N. Doc. A/10034 (1975).

5. G.A. Res. 3206, 29 U.N. GAOR, Supp. (No. 31) 2, U.N. Doc. A/9631 (1974). Every year the credentials of many delegations are neither received in time nor are they in the proper form. Rule 27 of the General Assembly's Rules of Procedure states that credentials should be "issued either by the Head of the State or Government or by the Minister for Foreign Affairs." In the initial years of the United Nations, the Credentials Committee of the General Assembly met twice to review the credentials as they were received. A report was presented to the General Assembly after each group had been reviewed. This practice was abandoned during the Eleventh Session, when the Credentials Committee started meeting only once, at the end of the session. This made the work of the Credentials Committee redundant because there was never time to act on the report apart from adopting it. At its Twenty-Ninth Session, however, the Credentials Committee was urged to meet early. It should be noted that the League also faced the problem of improper credentials and a subcommittee of the First Committee of the League Assembly was appointed to look into the matter. The report of the First Committee is in Documents of the 15th Ordinary Session of the League of Nations, 15 League Doc. A/47/1934/V (1934).

6. 29 U.N. GAOR, Annexes (Agenda Item 3) 2, U.N. Doc. A/9779 (1974).

working of the Assembly, although the rejection of its credentials was looked upon as "a very strong condemnation of South Africa," and "a warning to that Government as solemn as any such warning could be."⁷ The precedent set by the Hambro formula was followed by the General Assembly up through its Twenty-Eighth Session. However, that formula, neither in practice nor in theory, represented the limits of the General Assembly action on the question.

The forced cessation of the South African delegation's participation in the General Assembly went beyond the Hambro formula and has raised questions regarding the legality of the Assembly's action. This article will attempt to clarify some of the issues in this controversy and to bring into focus the fact that *representation* in the General Assembly, which hitherto has been treated as a question of *credentials*, is really quite a different matter. This article also takes the position that "rules" regarding representation, if any do indeed exist, involve political decisions by member states; and that under certain conditions, quite different from suspension, the General Assembly's Rules of Procedure provide for the expulsion of delegates—an action that could be tantamount to a forced cessation of participation.

I. THE DISTINCTION BETWEEN CREDENTIALS AND REPRESENTATION

The United Nations Charter and its Rules of Procedure, the chief instruments under which the General Assembly functions, refer broadly to two aspects of states' participation in that organ: membership and credentials. Chapter II of the Charter, comprising articles 3 through 6, defines the principles of membership, suspension, and expulsion of states. Chapter XIV of the Assembly's Rules of Procedure, comprising rules 134 through 138, deals with the admission of new members to the United Nations.⁸ The Charter is silent on matters of credentials and their requirements, which are elaborated in rules 27 through 29 of the Assembly's Rules of Procedure.⁹

The exigencies of international life have highlighted a third aspect of states' participation in United Nations organs and in other international organizations. This aspect, representation, has been overlooked or possibly ignored by both the Charter and the Rules of Procedure of the General Assembly.

The question of deciding which of two or more competing authorities will be treated as the authoritative and legitimate agent of the

7. 25 U.N. GAOR (1901st plen. mtg.) 25, U.N. Doc. A/PV.1901 (1970).

8. Rules of Procedure, *supra* note 3, at 30-31.

9. *Id.* at 6-7.

state in its international dealings is a problem that has arisen several times in the last thirty years for states and for international organizations alike. A parallel problem that has arisen occasionally occurs when only one claimant exists. The question then posed is whether that claimant can be considered as the agent of the state in international relations. It appears that both these situations, the single claimant and the multclaimant, derive their solution from similar principles.

When states are confronted with such questions, they make the necessary determinations of representativeness—constatations. Then, further decisions of whether or not to act are made on the basis of these determinations.¹⁰ Most of the standard texts on international law will note the well established rules required by law to aid states in their constatations and decisions.¹¹

Nevertheless, the United Nations Charter and the Assembly's Rules of Procedure make no provisions for the revolutionary change of the government of a state which is a fairly common occurrence in international life. One writer has stated that, "All governments owe their origin to a revolutionary event in a more or less distant past"¹² Although the Charter is silent on this contingency and, in this sense, has a "gap", it cannot ignore such developments. The United Nations, being not only an important part of the international diplomatic scene, but also being composed of sovereign equal member-states, and being an arena where legal and political battles are waged, should develop procedures and rules to deal with this "gap" within its constitutional framework.¹³

10. Professor Leo Gross has shed much light on such two-stage processes in the related area of membership in the United Nations. See, Gross, *Progress Towards Universality of Membership in the United Nations*, 50 AM. J. INT'L L. 791, 824 (1956).

11. See generally, I L. OPPENHEIM, INTERNATIONAL LAW 125-52 (8th ed. 1966); Mugerwa, *Subjects of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 266-90 (especially 283-84) (M. Sorensen ed. 1968) [hereinafter cited as Mugerwa].

12. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 149 (1963) [hereinafter cited as HIGGINS].

13. This statement may dismay those scholars who have found themselves uncomfortable with the "effectivity" concept and corresponding interpretations of the Charter. Without delving into the merits of that concept and the corresponding "Charter-as-a-multilateral-treaty" versus the "Charter-as-a-constituent instrument" controversy, it is suggested that the United Nations can function as a viable organization as long as it does not invite neglect by lagging too far behind "world opinion". The composition of the United Nations must reflect the realities of the international arena, and it is in this light that the suggestion of developing procedures to deal adequately with representation questions must be viewed. The 1975 Vienna "Convention on the Representation of States in Their Relations with International Organizations of a Universal Character" does not deal with the questions of representation which have been raised in this paper and which have frequently arisen in the practice of international organizations. For the text of the Convention, see 69 AM. J. INT'L L. 730 (1975).

The Chinese question, which was raised at the General Assembly's Fifth Session in 1950, exposed this shortcoming within the constitutional framework of the United Nations.¹⁴ Cuban and British proposals were submitted which acknowledged the existence of this lacuna and suggested criteria which might be adopted when questions regarding representation were raised.¹⁵

An amendment of the Charter would be an ideal way to close the "gap", but, given the existing political configuration within the United Nations and the veto power over amendments possessed by the permanent members of the Security Council under articles 108 and 109(2) of the Charter, such an event is unlikely to occur.¹⁶ Alternatively, the gap could be closed presumably through an appropriate addition to the Assembly's Rules of Procedure.

In practice, however, a third solution has been utilized. Existing rules have been stretched to cover situations for which they were not designed. The Assembly's rules pertaining to credentials, which are rules 27 through 29 of the Rules of Procedure, have been used to deal with questions of representation arising from revolutionary changes of government or from other challenges. In other words, the General Assembly's Rules of Procedure on credentials questions have been stretched to apply to questions relating to representation as well.

Nkambo Mugerwa correctly has observed that,

[w]hen representation of a member state is in issue and more than one authority claims the right to represent it, the problem is treated as a matter of credentials under the rules of procedure of the various organs of the United Nations.¹⁷

14. The question was raised earlier in the Security Council when the Indian delegate drew attention to a "lacuna" in the law of the United Nations and proposed amendments to the Council's Provisional Rules of Procedure because "[n]one of the rules indicates what is to be done when any question arises as to which is the recognized Government of any particular State." For the proposals, see 5 U.N. SCOR, Supp. (Jan.-May 1950) 2-3, U.N. Doc. S/1447 (1950). After referring the matter to a committee of experts, the Council concluded that the question of representation in United Nations organs should be studied by the General Assembly. 5 U.N. SCOR 468th mtg.) 9-11 (1950).

15. The Cuban Draft Resolution is contained in 5 U.N. GAOR, Annexes (Agenda Item 61) 5, U.N. Doc. A/1308 (1950). The United Kingdom draft resolutions are contained in *id.* at 6, U.D. Doc. A/AC.38/L.21 (1950) and *id.* at 8, U.N. Doc. A/AC.38/L.21/Rev. 1 (1950).

16. The only amendments to the Charter in the thirty-year history of the United Nations have been those increasing the memberships of the Security Council and the Economic and Social Council in order to make them geographically representative. Appropriate changes in related articles, such as those dealing with voting rules, rotation of the Council memberships, and article 109(3) have also been effected.

17. Mugerwa, *supra* note 11, at 283. This development has had a noteworthy effect on the composition of the Credentials Committee. Since 1950, the year the Chinese case

Yet, the distinction between credentials and representation is real and must not be ignored. Rosalyn Higgins cautions us to “distinguish between disputes over credentials which are really disputes over formality, and those disputes which go farther. . . .”¹⁸ However, she notes that “in practice this distinction has been hard to maintain.”¹⁹

Member states have not been oblivious to the distinction between credentials and representation. British representative, Sir Pierson Dixon, shrewdly drew this distinction to his country’s advantage when he told the Second Emergency Special Session of the General Assembly:

My Government recognizes the Government of the People’s Republic of China as the Government of China, and my delegation feels that we should place it on record that we voted in favour of the adoption of the Credentials Committee’s report [accepting the Nationalist Chinese credentials] solely on the grounds that the credentials concerned, considered as a document, were in order. *We reserve our position on the right of the Chinese Nationalist authorities to issue a document appointing representatives in the name of China.*²⁰

The Cubans, in a clear and forthright letter to the Secretary-General, stated that the “distinction between credentials and representation is an undeniable legal and political reality.”²¹

To summarize, credentials are normally considered as documents that emanate from a legitimate government for the purpose of clarifying the status of a given delegate. On the other hand, representation is concerned with the question of whether a governmental authority will be considered generally as the international agent of the state and, for the present discussion, as the representative of that state in the General Assembly. The chain of legal connection has three links that go from the state through the government to the delegate. That is, the government represents the member state and also appoints the delegate.

The 1950 Cuban memorandum on representation correctly stated that the General Assembly’s Rules of Procedure “are based on the presumption that in each Member State represented on the organ there exists a definite government competent to appoint representatives and

appeared on the scene, both the United States and Soviet Union have been on every Credentials Committee except one appointed at the General Assembly’s Sixth Session. During the first four sessions they were represented only on the Fourth Session.

18. HIGGINS, *supra* note 12, at 151.

19. *Id.*

20. GAOR, 2nd Emergency Special Session, 571 Plenary Meeting, p. 81, para. 261 (emphasis added).

21. 5 U.N. GAOR, Annexes (Agenda Item 61) 3, U.N. Doc. A/1308 (1950).

issues their credentials.’’²² Under this presumption, the second step in the legal connection chain mentioned above is usually taken for granted. This was also Kelsen’s opinion; he said, “[a]pproval of the credentials of a representative by the General Assembly . . . necessarily implies that the General Assembly . . . considers the government which issued the credentials as the legitimate government of the Member State to be represented in the Assembly.’’²³

It may be mentioned that in the only case of this type encountered by the League Assembly, the Credentials Committee was allowed to handle the question. The Italian invasion of Abyssinia raised the question of “whether the head of the [Abyssinian] state from whom the credentials under examination emanate was exercising his legal title effectively enough to make those credentials perfectly in order. . . .’’²⁴

Thus, the Credentials Committee of the League Assembly treated the question as one of representation and, like Kelsen, examined the authority which stood behind the credentials.²⁵

United Nations experience in this area has been significantly wider than that of the League, and the credentials of several delegations have been challenged over its thirty-odd years. While “Member States [have] changed their legal position from one session to another,” and have even adopted conflicting positions “in one and the same meeting of the Credentials Committee or the General Assembly,’’²⁶ it remains true that most United Nations member states have looked beyond the facade of credentials to the legitimacy of the authority issuing them. For example, at the Assembly’s Twelfth Session, the Dutch delegate found that the Hungarian delegation could not

22. *Id.*

23. H. KELSEN, *THE LAW OF THE UNITED NATIONS* 947 n.4 (1964).

24. Assembly Documents for the 17th Session, 17 League Doc. A/41 (1936), reprinted in *DOCUMENTS ON INTERNATIONAL AFFAIRS* 545 (S. Heald ed. 1935). The committee found the Abyssinian credentials “sufficient to permit that delegation to sit at the present session.” *Id.* See also, Lauterpacht, *The Credentials of the Abyssinian Delegation to the Seventeenth Assembly of the League of Nations*, 18 BRIT. Y. B. INT’L L. 184-86 (1937).

25. While no one on the committee suggested an outright rejection of the credentials issued by Emperor Haile Selassie, “all the members of the Committee felt some doubt whether they really were in order.” After rejecting the idea of referring the question to the Permanent Court on grounds that the opinion would come too late to affect proceedings at that session of the Assembly, the committee recommended that the Assembly consider the Abyssinian credentials “despite the doubt as to their regularity, as sufficient to permit that delegation to sit at the present session.” *DOCUMENTS ON INTERNATIONAL AFFAIRS*, *supra* note 24, at 546.

26. Ciobanu, *Credentials of Delegations and Representation of Member States at the U.N.*, 25 INT’L L. & COMP. L. Q. 351, 367 (1976).

“be regarded as representative of that country.”²⁷ While the British expressed “misgivings regarding the representative character of the Hungarian authorities,”²⁸ the United States delegate, Mr. Lodge, found it clear that “the present Hungarian authorities [were] not capable of representing the freedom-loving people of Hungary in the United Nations. . . .”²⁹ In addition, the Soviet Union challenged the credentials of the Nationalist Chinese, stating that they were “private persons who style themselves representatives of the Republic of China and claim to represent China in the [United Nations] when, in fact, they represent no one.”³⁰

The practice of investigating into the legitimacy of challenged governments was taken a step further in the Congo case. By resolution 1480 (XV), adopted on September 20, 1960,³¹ the General Assembly admitted the Republic of the Congo, Leopoldville, to United Nations membership. However, faced with an unclear political and constitutional situation, the Assembly referred the question of Congolese representation to the Credentials Committee.³² The Committee met November 9, 1960, and recommended that the credentials of the Kasavubu delegation be accepted. In the debate over the Credentials Committee’s report, several delegations quoted and interpreted provisions of the Congolese *Loi Fondamentale* to “prove” that one faction or another in the domestic power struggle was the legitimate authority to issue credentials.³³ It is clear then, that when questions concerning representation arise in the General Assembly, the lack of specific representation rules has been dealt with by using the rules pertaining to credentials.

However, there is another reason why rules regarding credentials have been utilized in cases where representation has been questioned. In order to challenge the representation of a governmental authority in the General Assembly, particularly one already seated there, one can either present the question at the annual review of credentials or raise the issue under a specific agenda item. The former has the obvious advantage of providing the objector with a ready-made forum. This is why Professor Briggs concludes that “[a]lthough there may be

27. 12 U.N. GAOR (726th plen. mtg.) 565, U.N. Doc. A/PV.726 (1957).

28. U.N. Doc. A/3773 at 1 (1957).

29. 13 U.N. GAOR (792d plen. mtg.) 609, U.N. Doc. A/PV.792 (1958).

30. *Id.* at 610.

31. GA Res. 1480 (XV), 15 U.N. GAOR, Supp. (No. 16) 64, U.N. Doc. A/4684 (1960).

32. 15(1) U.N. GAOR (864th plen. mtg.) 6, U.N. Doc. A/PV.864 (1960).

33. *See* 15(1) U.N. GAOR (917th-924th plen. mtgs.) 871-980, U.N. Doc. A/PV917-24 (1960).

grounds for distinguishing a decision on representation from one on credentials, procedurally the vote can only be on credentials—unless the organ wishes to incur the charge of interfering in the internal affairs of a Member State.”³⁴ Thus, it is easier under the existing United Nations rules to challenge the representation of a delegation by denying its credentials.

Although this approach to representation questions has been utilized in several cases, it leaves much to be desired.³⁵ Procedurally it is confusing to use the same set of rules to tackle the distinct, albeit related, questions of credentials and representation. The General Assembly’s practice in these matters has not helped; it has taken three distinct actions on credentials: approval, no action, and rejection. In *all* cases, including those cases where credentials have been rejected, the delegates whose credentials are in question have participated fully in the deliberations of the General Assembly.³⁶ One delegate, on whose credentials the General Assembly had decided to take “no action”, was even elected as rapporteur of the Assembly’s First Committee for the Seventeenth Session.³⁷ Moreover, when one compares the scant importance that the General Assembly has attached to credentials, by accepting them late and in improper forms, with the bitter debates over representation issues; one logically may conclude that

34. Briggs, *Chinese Representation in the United Nations*, 6 INT’L ORGAN. 192, 208 (1952). This view is substantiated by the experience of the Chinese case, where the question was annually raised in the Credentials Committees and in the plenary when discussing Credentials Committee reports. Attempts to change the representation of China in the Assembly were defeated each year. For instance, see the annual reports of the Secretary-General since 1950 under the heading “The Question of the Representation of China in the United Nations.” This explains why the fight on representation was waged in the Credentials Committee.

It may be noted, however, that dealing with representation questions in the credentials forum has not precluded charges of interference in the internal affairs of a state. For instance, see the Hungarian delegate’s statement to that effect in 12 U.N. GAOR (726th plen. mtg.) 561, U.N. Doc. A/PV. 276 (1957).

35. The credentials approach to representation questions in the United Nations General Assembly has been used in the Chinese, Hungarian, Congolese, Yemenite, Iraqi, and South African cases. For the League experience, see Lauterpacht, *supra* note 24. There is one detailed account of the Chinese case. See, Liang, *Notes on Legal Questions Concerning the United Nations*, 45 AM. J. INT’L L. 689 (1951) [hereinafter cited as Liang]. Since the Sixth Special Session of the General Assembly, some Arab member states have registered objections to the credentials of the delegation from Israel. 6 U.N. GAOR, Special Session, (2228th plen. mtg.) 10-11, U.N. Doc. A/PV 2228 (1974).

36. It can be persuasively argued that because credentials are to be submitted each year and because credentials are the instruments which legitimize an individual’s status as delegate, they, in effect, should be accepted each year. In such a situation, it is suggested that a “no action” decision should be tantamount to a rejection of credentials.

37. The Hungarian delegate, Károly Csatorday, served as rapporteur of The First Committee. 17 U.N. GAOR (1245th plen. mtg.) 21, U.N. Doc. A/PV.1245 (1962).

actions taken on credentials are of a different type than those taken on representation.

II. METHODS OF RESOLVING QUESTIONS CONCERNING REPRESENTATION AND CREDENTIALS

Several attempts have been made to bring a semblance of order to this chaotic area. While no attempt has achieved widespread acceptance, three merit particular notice. The first is Secretary-General Trygve Lie's famous memorandum on "The Legal Aspects of the Problem of Representation in the United Nations."³⁸ The second is General Assembly Resolution 396 (V) on the "Recognition by the United Nations of the Representation of a Member State."³⁹ The third, two decades later, is the Legal Counsel's statement on the "Scope of 'Credentials' in Rule 27 of the Rules of Procedure of the General Assembly."⁴⁰

A. *The Secretary-General's Memorandum on "The Legal Aspects of the Problem of Representation in the United Nations"*

Soon after the 1949 communist take-over in China, Secretary-General Trygve Lie ordered a memorandum on representation prepared by the Secretariat and had it circulated privately to Security Council members. The memorandum⁴¹ sought to establish some criteria on representation. It made a distinction between recognition of a state or government by another government and representation within a multinational organization. The memorandum found these to be two distinct legal acts, performed by entirely different international "persons" which do not share the same international personality.⁴² Furthermore, it can be argued forcefully, that international organizations do not have the legal authority to accord recognition to a state or government. Such "collective recognition" would replace individual recognition by states, which is something that states have not accepted as yet. Thus, for purposes of the present discussion, the conceptual distinction between recognition and representation shall be accepted as settled.

38. 5 U.N. SCOR, Supp. (Jan.-May 1, 1950) 18-22, U.N. Doc. S/1466 (1950).

39. 5 U.N. GAOR, Supp. (No. 20) 24-25, U.N. Doc. A/1775 (1950).

40. 25 U.N. GAOR, Annexes (Agenda Item 3) 3-4, U.N. Doc. A/8160 (1970). Other attempts to bring some order to the problem of representation can be found in Liang, *supra* note 35, at 689-707, and HIGGINS, *supra* note 12, at 146-52.

41. 5 U.N. SCOR, Supp. (Jan.-May 1950) 18-22, U.N. Doc. S/1466 (1950).

42. The International Court found in the *Reparation for Injuries Suffered in the Service of the United Nations* case that the United Nations was an "international person." [1949] I.C.J. 174, 179. However, the Court went on to add, "that is not the same thing as saying that [the United Nations] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State," *Id.*

However, the Secretary-General's memorandum does seek to show that in both legal theory and practice it is "legally inadmissible to condition the latter acts [of admission or representation in the United Nations] by a requirement that they be preceded by individual recognition."⁴³ It argues that while recognition represents the individual political decision of a state, representation is the collective decision of an organ within an international organization. It is therefore legally inadmissible to premise the collective act upon several individual acts.

"Rules" regarding criteria for representation are uncertain at best, because neither the Charter nor the several rules of procedure for the various organs of the United Nations expressly states what criteria shall be employed for determining questions or representation. The United Nations Preparatory Commission ignored a warning from the Cuban delegate that the Credentials Committee "might easily find itself involved in political complications."⁴⁴ The issue went unresolved, and the General Assembly's *Ad Hoc* Political Committee and a special committee appointed in 1950 were forced to consider the issue in the initial stages of the Chinese representation question. The various views stated at the time, including resolution 396 (V), make it clear that there was no set of rules on representation that could be identified as "generally acceptable."⁴⁵

It is conceivable that a rule similar to the type proposed by the Secretary-General's memorandum, which precludes prior individual recognition as a criterion for representation in the United Nations, could develop. However, it is clear, that this cannot be asserted upon the same grounds as the memorandum, which is merely upon the fact that recognition is an individual act of a government while representation is the collective act of an organ within an international organization. This is because what appears to be the collective act of an organ at the macrolevel, is actually the result of several individual decisions at the microlevel by the delegates of states represented within that organ. The collective act, then, is composed of and determined by several individual acts. Thus, the connection between individual votes and the collective decision is real and cannot be ignored.

43. 5 U.N. SCOR, *supra* note 38, at 20.

44. *Summary Record of Meetings of Committee 1 of the Preparatory Commission*, 6th meeting (Doc. PC/GA/16) at 11.

45. See the Cuban letter to the Secretary-General, 5 U.N. GAOR, Annexes (Agenda Item 61) 3, U.N. Doc. A/1308 (1950); Cuban Draft Resolution, 5 U.N. GAOR, Annexes (Agenda Item 61) 5, U.N. Doc. A/1308 (1950); United Kingdom Draft Resolution, 5 U.N. GAOR, Annexes (Agenda Item 61) 6, U.N. Doc. A/1308 (1950). For the United States position in the Credentials Committee, see 29 U.N. GAOR, Annexes (Agenda Item 3) 2, U.N. Doc. A/9779 (1974).

The Nationalist Chinese delegate addressed himself to this connection in his scathing and persuasive reply to the Secretary-General's memorandum. He informed the Secretary-General:

On the technical side, your memorandum asserts that it is wrong to link the question of representation with the question of recognition by Member States. *International Law has nothing direct to say for or against this linkage*. As practised [*sic*] in the League of Nations as well as in the United Nations, *this linkage is the general rule*; the few cases of non-operation of linkage which your memorandum cited, have been the exceptions.⁴⁶

The Chinese representative's opinion is similar to that of Professor Briggs, who concluded that one of the "real reasons" for refusing the communist government the right to represent China in the United Nations was that "it had not been recognized by a majority of United Nations Members."⁴⁷ United Nations practice, although not totally uniform, bears testimony to this linkage between representation and recognition. The Secretary-General concedes in the opening sentence of his memorandum, that "[t]he primary difficulty is that this question of representation has been linked up with the question of recognition by Member States."⁴⁸

It is understandable that governments have attempted to achieve some consistency within their foreign policies, which includes their positions as stated by their representatives to the United Nations. Examples of such attempts are numerous, but the presentation of one or two will be sufficient:

As regards China, the representative of Sweden stated that he was not in a position to approve the credentials issued by the Formosa Government as Sweden had acknowledged and maintained diplomatic relations with the Central People's Government of the People's Republic of China.⁴⁹

In connection with the same issue, "[t]he representative of Burma stated that his Government had recognized the Central People's Government of the People's Republic of China and was therefore unable to approve the credentials of the representatives of another government."⁵⁰

46. 5 U.N. SCOR, Supp. (Jan.-May 1950) 24, U.N. Doc. S/1470 (1950) (emphasis added).

47. Briggs, *supra* note 34, at 200, 207.

48. 5 U.N. SCOR, Supp. (Jan.-May 1950) 18-19, U.N. Doc. S/1466 (1950).

49. First Report of Credentials Committee, 7 U.N. GAOR, Annexes (Agenda Item 3) U.N. Doc. A/2234 (1952).

50. *Id.* at 2. The reports of the Credentials Committee are replete with reservations on the credentials of several delegations on precisely this ground.

The British are unique in their Jekyll-and-Hyde approach to the Chinese representation question:

As this Assembly knows, Her Majesty's Government in the United Kingdom recognizes the Central People's Government of the People's Republic of China as the Government of China. Nevertheless, it proposes to support the motion . . . in which the Assembly is asked to decide not to consider [the Chinese representation] question at the current session during the current year.⁵¹

Mr. Nutting, to whom the above statement is attributed, apparently was not disturbed by the fact that the above action helped to perpetuate the participation of a delegation which his government did not consider as representing any member state.

The Secretary-General attempted to support his argument concerning recognition and representation by referring to the advisory opinion of the International Court in the (*First Admissions*) case,⁵² and by drawing an analogy between criteria for representation and criteria for membership as expressed in article 4 of the Charter. One author has expressed skepticism for such an analogy because article 4 "concerns admission, while representation is concerned with a situation arising subsequent to admission."⁵³ Perhaps the Secretary-General was ill-advised in choosing that particular opinion of the Court, because while the opinion affirmed that a member state "is not juridically entitled to make its consent to . . . admission dependent on conditions not expressly provided by paragraph 1 of [article 4 of the Charter]."⁵⁴ It also allowed that "no relevant political factor—that is to say, none connected with the conditions of admission—is excluded."⁵⁵ The majority in that advisory opinion was slim and was made possible only by the concurring votes of Judges Alvarez and Azevedo, both of whom allowed that special circumstances may require the *denial* of admission to an applicant who otherwise fulfilled the conditions of article 4(1) of the Charter.⁵⁶ Moreover, the joint dissenting opinions of Judges Basdevant, Winiarski, Sir Arnold McNair, and Read exposed the

51. 10 U.N. GAOR (516th plen. mtg.) 4, U.N. Doc. A/PV.516 (1955).

52. Advisory Opinion on the Admission of a State to the United Nations, [1947-48] I.C.J. 57 [hereinafter cited as Admissions Case].

53. HIGGINS, *supra* note 12, at 153.

54. Admissions Case, *supra* note 52, at 65. For a thorough discussion of the question of membership and the Court's opinion, see Gross, *Election of States to UN Membership*, 48 PROC. AM. SOC'Y INT'L. L. 37 (1954).

55. Admissions Case, *supra* note 52, at 63.

56. *Id.* at 71, 77-78. The Court's former Registrar, Edvard Hambro, casts similar doubts on this opinion. See, Hambro *The Authority of the Advisory Opinions of the International Court of Justice*, 3 INT'L & COMP. L.Q. 2, 21 (1954). See also Gross, *supra* note 54, at 45.

weakness of the majority opinion when it rejected the “distinction, which it has been attempted to introduce between the actual vote [on membership] and the discussion preceding it. . . .”⁵⁷ The joint dissent added that “it would be a strange interpretation which gave a Member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote.”⁵⁸

Regarding the practice referred to in the Secretary-General’s memorandum, it should be noted that it is the practice of organs acting solely on *membership* applications. The practice referred to deals with “instances of States for whose admission votes were cast by Members which had not recognized the candidates as States”⁵⁹ and while this is undoubtedly so, the converse is equally true. Member states have voted against admitting those states which they have not recognized.⁶⁰ The important issue is that the alleged practice is permissive rather than mandatory in nature. Member states are not precluded from voting in favor of membership status concerning an applicant with whom they have no diplomatic relations or whom they have not yet recognized. Nothing binds member states to follow such a practice since mere practice is insufficient to form a legally binding rule. In order to form a rule, the practice in question must be “of a peaceable, uniform and undisputed character accepted in fact by all current Members. . . .”⁶¹

It is well settled that for a practice to be legally binding it must not only be consistent over a sufficient interval of time, but must also be *opinio juris*, which is the conviction that the practice in question is required by law. As Oppenheim has said, “custom must not be confounded with usage.”⁶² When voting on admission questions, it is clear that member states are not averse to vote in favor of an applicant that they have not yet recognized. Yet, this fact does not indicate that

57. Admissions Case, *supra* note 52, at 83.

58. *Id.* at 82.

59. 5 U.N. SCOR, Supp. (Jan.-May 1950) 21, U.N. Doc. S/1466 (1950).

60. This was true until 1955. Since then there have not been major struggles over admissions except with divided states, such as East and West Germany, North and South Korea, and North and South Vietnam. The Secretary-General’s memorandum held true at the time it was written in 1950.

61. Advisory Opinion On Certain Expenses of the United Nations [1962] I.C.J. 151, 195 (separate opinion of Sir Percy Spender, J.) [hereinafter cited as the Expenses Opinion].

62. I L. OPPENHEIM, INTERNATIONAL LAW, 22 (2d ed. 1912). In his separate opinion in the *Barcelona Traction* case, Judge Ammoun has called it “the psychological element of *opinio juris*.” *Barcelona Traction Case*, [1970] I.C.J. 3, 329.

opinio juris exists. Therefore, the effect of the Secretary-General's memorandum is to claim that what states are *willing* to do, they *must* do by law.

The Secretary-General's memorandum does have some merit in that it suggests criteria for deciding representation questions. It proposes that the claimant exercise "effective authority within the territory of the State and [be] habitually obeyed by the bulk of the population."⁶³ Effective control of a state's resources and people by the governmental authority seeking to represent the state in the United Nations seem to be essential for the state to fulfill its obligations under the Charter. Member states assess effective control when voting on admission because an express criterion for admission is that applicants, "in the judgment of the Organization, [be] able and willing to carry out these obligations."⁶⁴ If effective control is the test by which a governmental authority is to be judged at the time of admission, one may inquire as to whether it is reasonable to expect any less from a governmental authority whose representativeness has been challenged.

B. General Assembly Resolution 396 (V) on "Recognition by the United Nations of the Representation of a Member State"

The question of Chinese representation first made its impact in the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁶⁵ The Director-General of UNESCO sent a letter on June 1, 1950, to the United Nations Secretary-General, transmitting the text of a resolution adopted by the UNESCO General Conference,⁶⁶ in which it was considered

highly desirable [that] in cases where two or more authorities each claim to be the only regular government of a Member State, . . . [the] United Nations should lay down guiding principles which would allow the various organs of the United Nations and of the specialized agencies, irrespective of differences in the composition of these bodies to adopt a uniform policy⁶⁷

63. 5 U.N. SCOR, Supp. (Jan.-May 1950) 23, U.N. Doc. S/1466 (1950).

64. U.N. Charter art. 4, para. 1. Although it is states that are admitted to the United Nations, the effective control of some governmental authority is implied therein. The decision on the effective control of a governmental authority is telescoped into the decision to admit a state. The two can be distinct stages, and this is illustrated by the Congo case, where the Republic of the Congo, Leopoldville, was admitted to the United Nations on September 20, 1960. G.A. Res. 1480, 15 U.N. GAOR, Supp. (No. 16) 64, U.N. Doc. A/4684 (1960). The decision on representation was not taken until November 22, 1960. G.A. Res. 1498 (XV), 15 U.N. GAOR, Supp. (No. 16) 1, U.N. Doc. A/4684 (1960).

65. Liang, *supra* note 35, at 691.

66. 5 U.N. GAOR, Annexes (Agenda Item 61) 3, U.N. Doc. A/1344 (1950).

67. *Id.*

The question was independently raised in the United Nations by the Cuban representative, who in a letter dated July 19, 1950, requested that the Secretary-General place the question concerning recognition by the United Nations of the representation of a member state on the provisional agenda of the General Assembly.⁶⁸ The Assembly channeled the item to the *Ad Hoc* Political Committee.⁶⁹ The committee considered the question at eleven meetings, appointed a subcommittee to look into the matter, and finally submitted a report⁷⁰ that included a draft resolution to the General Assembly.⁷¹ The General Assembly adopted the draft resolution as resolution 396 (V), but only after approving an amendment submitted by the Egyptian delegation.⁷²

Resolution 396 (V), among other things,

[r]ecommends that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case. . . .⁷³

It is arguable that since the resolution addresses itself to a situation where rival claimants exist, it does not apply to a situation such as exists in South Africa where the credentials of only one authority were submitted and considered. Then, it could be concluded that resolution 396 (V) applies solely to multiple claimants, leaving the issue of a sole claimant open to question.

It is suggested that this position is a distinction without a difference. Whatever criteria is used to establish one authority over the claims of another authority, that same criteria must be used to establish representation of a state in the Assembly. Therefore, if one of two claimants fulfills the criteria for representation "in the light of the Purposes and Principles of the Charter," as envisaged by resolution 396 (V), it is only equitable to expect that all other authorities meet the same criteria to represent their respective states. Merely because one

68. 5 U.N. GAOR, Annexes (Agenda Item 61) 13, U.N. Doc. A/1578 (1950). The Cuban letter is found in 5 U.N. GAOR, Annexes (Agenda Item 61) 1, U.N. Doc. A/1292 (1950).

69. 5 U.N. GAOR, Annexes (Agenda Item 61) 13, U.N. Doc. A/1578 (1950).

70. *Id.*

71. *Id.* at 15. For the subcommittee's report, see 5 U.N. GAOR, Annexes (Agenda Item 61) 8, U.N. Doc. A/AC.38/L.45 (1950).

72. 5 U.N. GAOR (325th plen. mtg.) 675, U.N. Doc. A/PV.325 (1950).

73. G.A. Res. 396(V), 5 U.N. GAOR, Supp. (No. 20) 24-25, U.N. Doc. A/1775 (1950).

governmental authority is challenged by another is no reason to subject it to more or less stringent criteria than one which does not face such a challenge.

This is compatible with the possibility that in the case of two rival authorities, the claims of each may be more diligently examined, whereas in the case of only one authority claiming to represent a state, its claim may be examined less diligently. In light of international law's bias in favor of incumbent regimes, there may be some relaxation of the criteria in such cases. Nevertheless, the legal criteria must be, *a priori*, the same in all cases since it is the *representative capacity* of the authority which is in question. Thus, it follows that although resolution 396 (V) refers expressly to cases in which "more than one authority claims to be the government entitled to represent a Member State in the United Nations," any principle of representativeness that it embodies should rule in all cases where representation is questioned.

Paragraph 1 of resolution 396(V) recommends that representation questions "be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case." The terms seem designed to create ambiguity, with the effect of giving free play to the political interests of member states. However, this result could be achieved only after more concrete proposals have been rejected. The Cuban proposal had recommended that representation questions be decided in the light of 1) effective authority over the national territory, 2) the general consent of the population, 3) ability and willingness to achieve the purposes of the Charter, to observe its principles, and to fulfill international obligations of the state, and 4) respect for human rights and fundamental freedoms.⁷⁴ A British proposal had recommended that "the right of a government to represent the member state" in the United Nations be recognized if it "exercises effective control and authority over all or nearly all the national territory, and has the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appear to be of a permanent character."⁷⁵

The subcommittee which had been appointed by the *Ad Hoc* Political Committee recommended that "effective control over the territory," general acceptance by the population, willingness to accept Charter responsibilities, and the extent to which the authority in question had been established through "internal processes in the Member

74. 5 U.N. GAOR, Annexes (Agenda Item 61) 5, U.N. Doc. A/1308 (1950).

75. *Id.* at 6, 8.

State” be “among the factors to be taken into consideration.”⁷⁶ Yet, these recommendations of the subcommittee were excluded by the *Ad Hoc* Political Committee when an Egyptian motion to that end was adopted by a vote of twenty-seven in favor, thirteen against, and eleven abstentions.⁷⁷ The Secretary-General’s annual report for that year states:

[V]arious representatives expressed doubts concerning the advisability of attempting to adopt various criteria that had been proposed. Some of them held that every case should be decided on its merits; others declared that the only criterion universally accepted in international law was that of effective control and authority over the territory of the State concerned.⁷⁸

Apparently, member states were unwilling to curtail not only their freedom of action, but also the scope of their political judgments, and adopted resolution 396 (V). This follows when one examines the text of the resolution and discovers that it does not place restrictions upon the free judgment of states, but, rather, safeguards it. Members of the United Nations have already accepted, by the introductory paragraph of article 2 and by other articles of the Charter such as articles 2 (2) and 4 (1), the obligations, purposes, and principles of the Charter, and are expected always to bear these in mind.⁷⁹ The phrase which requires that the question be considered “in the light of the Purposes and Principles of the Charter” advances us no closer to resolving representation questions. Moreover, the clause that refers to “the circumstances of each case” sets the foundation in which member states are literally unfettered in exercising their political judgments on the question of representation.⁸⁰

It should be noted that even if the text of resolution 396 (V) had contained express criteria, it would not have changed matters significantly. Such criteria would only aid member states in making the legal constataions, but would not bind the states to the further step of acting upon the basis of such constataions. An interpretation similar to that

76. 5 U.N. GAOR, Annexes (Agenda Item 61) 9, U.N. Doc. A/AC.38/L.45 (1950).

77. 5 U.N. GAOR, Annexes (Agenda Item 61) 15, U.N. Doc. A/1578, (1950).

78. Annual Report of the Secretary-General on the Work of the Organization, 6 U.N. GAOR, Supp. (No. 1) 70, U.N. Doc. A/1844 (1951). See also 5 U.N. GAOR, Annexes (Agenda Item 61) 11-12, U.N. Doc. A/AC.38/L.45 (1950).

79. It is entirely possible that member states do become somewhat absentminded regarding the purposes and principles of the Charter, and that resolution 396(V), like so many other reiterative resolutions of the United Nations, was designed to serve a mind-jogging purpose, rather than boldly propose new principles or criteria.

80. The British delegate echoed this sentiment in reference to the subcommittee draft, which did offer some criteria. See 5 U.N. GAOR, Annexes (Agenda Item 61) 12,

adopted by the International Court of Justice in the *(First) Admissions* case, where “no relevant political factor” was excluded, would have to be extended to the resolution.⁸¹

C. Statement by the United Nations Legal Counsel on the “Scope of ‘Credentials’ in Rule 27 of the Rules of Procedure of the General Assembly”

The statement pertaining to rule 27 was submitted to the President of the General Assembly and conforms to traditional bounds. It asserts that “[u]nlike the acceptance of credentials in bilateral relations, the question of recognition of a Government of a Member-State is not involved. . . .”⁸² This argument has been examined at length in connection with our consideration of Secretary-General Trygve Lie’s memorandum on representation.⁸³

The Legal Counsel continued to follow tradition by distinguishing between cases where rival claimants do exist and where they do not exist.⁸⁴ This article has suggested that such a distinction is superficial and that upon further analysis, one cannot escape the fact that each delegation seated in the Assembly should satisfy the same criteria, regardless of the number of claimants involved.⁸⁵ This position is borne out by the Legal Counsel’s argument:

Should the General Assembly, where there is no question of rival claimants, reject credentials satisfying the requirements of rule 27 for the purpose of excluding a Member State from participation in its meetings, this would have the effect of suspending a Member State . . . in a manner not foreseen by the Charter.⁸⁶

Such a “suspension”, according to the Legal Counsel, would be contrary to the Charter.⁸⁷ Is the implication, then, that where there *are* rival claimants, the General Assembly can reject “credentials satisfying the requirements of rule 27” without incurring the same fatal conflict with the Charter?⁸⁸ This article assumes the answer to be in the

U.N. Doc. A/AC.38/L.45 (1950) It may be added that member states remain obligated to abide by Charter principles of “good faith” (U.N. Charter art. 2, para. 2) and “friendly relations” (U.N. Charter art. 1, para. 2).

81. Admissions Case, *supra* note 52, at 17.

82. 25 U.N. GAOR, Annexes (Agenda Item 3) 3, U.N. Doc. A/8160 (1970).

83. See text accompanying notes 43-52 *supra*.

84. See text accompanying note 73 *supra*.

85. 25 U.N. GAOR, Annexes (Agenda Item 3) 3, U.N. Doc. A/8160 (1970).

86. *Id.*

87. *Id.* at 4.

88. The General Assembly’s official records do not inform us of the precise question asked of the Legal Counsel. All that can be found is the Greek delegation’s statement that it would like to have the Legal Counsel’s opinion regarding the object of

negative. What, then, is the point of adding the caveat "where there is no question of rival claimants" if it is not meant to be an enumerative or exclusive type of statement? The distinction between single-claimant and multiclaimant cases thus dissolves under the force of the Legal Counsel's logic.

The invocation of the Charter and its suspension clause under article 5 is also incorrect for use in representation and credentials cases. Suspension under the Charter is an action taken against a state "against which preventive or enforcement action has been taken by the Security Council"⁸⁹ The General Assembly's "powers of decision" under article 5 "are specifically related to preventive or enforcement measures," according to the Court in its *Expenses* opinion.⁹⁰ Presumably, such preventive or enforcement measures would be applied toward the goal contained in article 1(1) of the Charter, which is to maintain international peace and security. Yet, questions of credentials and representation are distinct from questions of maintenance of international peace and security. The former deal primarily with the composition of the organs of the United Nations and have no relation to the latter.

Rights of membership are inherent in the member state and not in any particular representative or government. Even after the credentials of a representative have been rejected or after the "representativeness" of a government has been denied, the state's position *vis-à-vis* its rights remains unaffected. Consider the chain of legal connection⁹¹ which starts with the state and goes through the government to the delegate. Within this chain, suspension is an action taken against the first subject, which is the state—the true international person. Questions of representation and credentials do not reach that far up the chain, but merely deal with governments and representatives.

The General Assembly's Rules of Procedure provide for a cessa-

the discussion of a proposal to reject South African credentials. 25 U.N. GAOR (1900th plen. mtg.) 11, U.N. Doc. A/PV.1900 (1970). The President of the Assembly, Edvard Hambro, replied, "in anticipation of such a question, a legal opinion has in fact been prepared by the Legal Counsel. . . ." *Id.*

89. U.N. Charter art. 5.

90. Expenses Opinion, *supra* note 61, at 163-64. See, Abbott, Augusti, Brown, and Rode, *The General Assembly 29th Session: The Decredentialization of South Africa*, 16 HARV. INT'L L. J. 576 (1975), where it is argued that the Assembly's power to exclude a delegation whose credentials have been rejected, "while not clearly authorized by Article 21 of the Charter[,] . . . has long been recognized." They add, however, that despite President Bouteflika's attempt to differentiate between the effect of his ruling and suspension under article 5 of the Charter, "there is little doubt that his ruling . . . conflicts with a literal reading of that Article." *Id.*

91. See text accompanying notes 21-22 *supra*.

tion of participation by those persons whose credentials have been rejected. The Legal Counsel argues that as of 1970, there had not been any instance "where the representatives were precluded from participation in the meetings of the General Assembly."⁹² That may be the case, but it proves little because rule 29 states:

Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives *until the Credentials Committee has reported and the General Assembly has given its decision.*⁹³

The above rule indicates that a representative exercises the rights of membership vested in his state until such time as any objections to his seating are ruled upon. There is nothing in the rule to suggest that all objections will be disposed of solely in a manner favorable to the participation of that individual. It is likely that some objection to a certain individual would be sustained. If this were not the case, there would be no reason to seat that person "provisionally". If the objection is sustained by the Assembly, the individual must be deemed to have lost the exercise of his rights pertaining to his state; his rights merely were provisional, pending the final decision of the Assembly. The eviction of such a person has no bearing on any suspension of the member state as envisaged in article 5 of the Charter.⁹⁴

This rule is based on logic, because the manner in which the General Assembly recognizes an individual as possessing the capacity to represent his state is by accepting his credentials. Otherwise that individual lacks legal standing to speak for his state. Inserted in between the state, which is the member of the United Nations, and the representative, who exercises the rights of membership, is the governmental authority which supplies the link between the two. It is this link, the governmental authority, that is challenged when representation questions are raised. Such questions must be distinguished from those in which "preventive or enforcement action has been taken by the Security Council" because both pertain to states. Yet, in one case, one looks into the legitimacy of the government, while in the other case, one looks into the fulfillment by the government of its international obligations, particularly those under the Charter.

92. 25 U.N. GAOR, Annexes (Agenda Item 3) 3, U.N. Doc. A/8160 (1970).

93. Rules of Procedure, *supra* note 3, at 7 (emphasis added).

94. A parallel situation occurred in the Security Council when the right of the monarchist Iraqi delegate to participate after the 1958 coupe was challenged. 13 U.N. SCOR (827th mtg.) 2, U.N. Doc. S/PV.827 (1958).

95. Mugerwa, *supra* note 11, at 283-84.

CONCLUSIONS

It is clear that recognition, representation, and credentials are distinct legal concepts. It should also be clear that credentials are premised on representation.

Using Secretary-General Trygve Lie's memorandum as a starting point, we have seen that the recognition accorded to states and governments in the United Nations is linked to representation in the General Assembly. Furthermore, it has been suggested that *nothing in law forbids such a linkage*. Indeed, as Mugerwa has said,

The discussions which took place in the General Assembly, and the action taken by it, reveal the reluctance of the majority of members to renounce the prerogative of recognition as determining their position on representation.⁹⁵

General Assembly Resolution 396 (V), the discussions that preceded it, and the Secretary General's memorandum indicate that "effective control" is a possible criterion on which to base constataions on representation. This criterion is one in which there could be general agreement. However, the reverse of that proposition could form the content of a rule that authorities not exercising "effective control" could not be considered as representing the state in question. In any case, such determinations settle eligibility questions, which is the first step of a two-step process that also requires a political decision which completes the process. Professor Briggs has argued:

The equities in balance are the right of a Member State under international law to determine who is authorized to represent it abroad and the right of the United Nations organs under the Charter to control representation in their respective organs.⁹⁶

It must be emphasized that at admission this balance between the member state and the United Nations is clearly on the side of the political organs which must judge, among other things, whether applicant states "are able and willing to carry out" their obligations under the Charter.⁹⁷ Although international law gives the benefit of doubt to incumbent governments, it is submitted that admission to the United Nations cannot be construed as conferring perpetual representation on any particular government. Thus, when questions of representation

96. Briggs, *supra* note 34, at 195.

97. U.N. Charter art. 4, para. 1. On this point, see Lachs, *Recognition and Modern Methods of International Cooperation*, 35 BRIT. Y. B. INT'L L. 255 (1959).

arise, the General Assembly must deal with these despite the silence on the matter within the Charter and the Rules of Procedure. The Assembly cannot ignore the question.

It has been suggested that in voting on such questions, member states enjoy the prerogative of exercising their political judgment. Certainly, the conditions required for representation are no more strict than those for admission of the state, or no more lax than those that determine the acceptability of delegates and their credentials. Logically, the conditions required for representation fit somewhere between these two positions because representation itself provides the link between statehood and the participating delegations. In light of the present state of the law in this area, one may surmise that if authorities lack "effective control", they are ineligible to represent a state. Beyond that, the law of representation in international organizations is conspicuous only by its absence.

When applying these considerations to the case of South Africa, we find that the General Assembly must examine and decide the question of representation when it is raised in that organ. We also find that although the existing constitutional framework lacks *specific* legal criteria in this area, it allows free play to political considerations. Viewed in these terms, it is clear that, although the South African government undoubtedly is in "effective control", such determination would not decide the representation question. Member states still would have to act on their *constatations*. In the case of South Africa, member states decided not to allow the authority in "effective control" to represent the member state in the General Assembly. Yet, it could be that they did not use "effective control" as the eligibility condition, but used some other criterion, such as their abhorrence of apartheid.⁹⁸ Because the existing constitutional framework does not prescribe legal rules and allows member states wide political discretion on the matter, the decision on South Africa was legal. However, it ought to be emphasized that it is the legal "gap" and the consequent political latitude that made such a decision possible. In the Chinese representation case and in the South African case, many argued that such gaps are prone to abuse by member states. The cases serve to illustrate the crying need for settled rules in this sensitive area dealing

98. Paragraph 11 of resolution 3151 G (XXVIII) of the General Assembly declares that "the South African regime has no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people." 28 U.N. GAOR Supp. (No. 30) 33, U.N. Doc. A/9030 (1973). See also G.A. Res. 31/6 (I) (Nov. 9, 1976), 13 U.N. CHRONICLE 77, 79 (Dec. 1976).

with the relationships between states and international organizations. The establishment of rules is particularly pressing if governments are to have any assurance that their representative capacity will not be challenged each time they are involved in an international dispute or run afoul of their neighbors.