CREDENTIALS OF STATE DELEGATIONS TO THE U.N. GENERAL ASSEMBLY: A New Approach to Effectuation of Self-Determination for Southern Africa

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Forward: The Constitutional Law of International Organizations

The constitutional law of the United Nations and of other international institutions remains an often neglected, but potentially most significant, branch of transnational legal studies. Foreshadowed in the seminal studies of the great Hans Kelsen, in the works of the distinguished Danish scholar, Alf Ross, and to some extent in the writings of the Polish jurist, Manfred Lachs, and the Soviet jurist, Gregory Tunkin, the constitutional law of international organizations is developing into a scientific study in its own right. For the United Nations Charter, not less than the constitutional instruments of individual nation-states must, to remain viable and operational, evolve with, and in response to, the changing balance of political forces within the community for which it was created. The symbiotic relation between changing law and changing society is demonstrated, in the case of the world community, by the shift in the nature and character of the United Nations from an originally western influenced and western dominated organization to what has now become essentially a forum for expression of Third World special needs and special discontents that sometimes serves as an arena for interaction of the developing countries with the wealthier, post-industrial societies, both communist and western. In international institutional terms, it has meant a new, activist, assertedly "lawmaking" role for the United Nations General Assembly, contrary to the original intentions of

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the founding fathers, who foresaw in 1945 a more muted function for the General Assembly in contrast to an all-powerful, Big Power-dominated Security Council. In the wake of the 1950 Korean crisis, when the Soviet veto threatened to frustrate Security Council action, the United States and the West were first to sponsor the concept of the General Assembly's ability, and at times obligation, to "fill the gap" in the event of neglect or stalemate in the Security Council's exercise of its primary responsibility for the maintenance of international peace and security. Developments in General Assembly practice in the intervening quarter of a century have, however, transformed the General Assembly into the prime institutional instrument for the liquidation of the last remaining elements of colonialism and the building of the "New Economic Order." In the General Assembly, the Security Council and the other main United Nations arenas, the corresponding modification and adjustment of old United Nations practices to meet radically new political conditions have meant not merely pragmatic, instrumental, policy making interpretations of the United Nations' own rules and precedents but also, where those have been lacking, legal eclecticism and attempts creatively to synthesize common law and civil law doctrines drawn from the main national, municipal legal systems. The current discussions in the United Nations centering around the issue of United Nations membership and the credentials of individual state delegations to the various United Nations organs are an illustration of this process of constitutional-law-in-the-making in international organizations.

The Credentials Question

Until recently, the main thrust of the Third World majority in the United Nations General Assembly, in its movement towards political and legal effectuation of the international law principle of self-determination of peoples, has been directed towards Chapter II (articles 3 to 6)[1] of the United Nations Charter, which governs membership in the

1. U.N. CHARTER chapter II, art. 3-6:

ARTICLE 3. The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

ARTICLE 4. 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

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

ARTICLE 5. A Member of the United Nations against which preventive or enforce-

international organization. But the relevant articles of the charter upon which the Third World majority has focused, article 5 on suspension of the exercise of the rights and privileges of membership[2] and article 6 on expulsion,[3] predicate any General Assembly action upon a recommendation of the Security Council. Since membership is considered a substantive and not a procedural matter, the "Big Power Veto" applies to block action on membership if a permanent member of the Security Council so desires.[4] This strategy has been particularly evident in Third World attempts to implement various United Nations General Assembly resolutions on race relations in the Union of South Africa and on relinquishment of the South African mandate over Namibia (South-West Africa). Present Big Power attitudes toward concrete United Nations measures directed against the government of South Africa have induced some Third World countries to seek alternative United Nations control measures to which the Big Power veto could not "constitutionally" be applied. The Third World members have posited the argument that the General Assembly possesses the inherent power to determine the credentials of its members, as confirmed by the article 21 grant of power to the General Assembly to adopt its own procedures. They argue that the power to scrutinize those credentials actually presented to the General Assembly by the various state representatives and delegations and to reject credentials in appropriate cases is necessarily included in the power to determine the credentials of its members. This argument is particularly compelling where the state delegation concerned does not accord with international law principles of representativeness or where it represents a government which violates charter principles. To use a conventional international law analogy, the shift is from a recognition of *states* cluster of principles to a recognition of *governments* cluster, with the emphasis upon the right, and in some cases perhaps the duty, of the party making the decision on recognition, to exercise its

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ment action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

ARTICLE 6. A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

2. U.N. CHARTER art. 5.

3. *Id.* art. 6.

4. U.N. CHARTER art. 27, para. 3 provides: Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

discretion and judgment on the facts.[5] It is the *constitutive*, and not the *declaratory*, theory of recognition that is involved.[6] If the theory is applied in the case of the Union of South Africa, a decision on the claims of the present South African government to seating of its official delegation to the General Assembly may not seem to present many moral difficulties for United Nations members, a political fact which the South African government has, perhaps, quietly conceded by not pressing its credentials for purposes of the recent (Autumn of 1975) thirtieth session of the United Nations General Assembly. But once adopted in the case of the Union of South Africa, a credentials based United Nations scrutiny of the claims to "representativeness" of any particular state delegation or of that state's implementation of the principle of self-determination of peoples could not stop there. It would logically have to be applied to other conflict situations and to other conflict regions, both "colonial" and "noncolonial." On the one hand, a Pandora's box of problems would be opened—problems which the conventional *declaratory* theory of recognition always sought to avoid by limiting the inquiry of the recognizing authority to a few quite precise, objective criteria, such as effective control of the government concerned over territory and peoples, without any particular recourse to moral standards or value judgments.[7] On the other hand, all the pressures for a "new" international law in place of an erstwhile Western, European based "old" international law would find their reflection and outlet in a new and more genuinely inclusive United Nations organization: one progressively established as a result of an on-the-merits scrutiny of the representative claims and status of all state delegations seeking accreditation at future sessions of the General Assembly.

On September 30, 1974, General Assembly Resolution 3206 was passed, adopting by a vote of ninety-eight to twenty-three, with fourteen abstentions, the first report of the Credentials Committee excluding the representatives of the government of South Africa.[8] This action was followed immediately by General Assembly Resolution 3207, adopting by a vote of 125 to 1 with 9 abstentions, a request to the Security Council to review the relationship between the United Nations and South Africa in light of what the resolution styled as South Africa's

5. *See generally, e.g.*, H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE §§ 71, 73 (8th ed. H. Lauterpacht 1955).

6. *Id.* §§ 71, 71A.

7. *Id.* § 73C.

8. G.A. Res. 3206, 29 U.N. GAOR Supp. 31, at 2, U.N. Doc. A/9631 (1975).

constant violation of the principles of the Charter and of the Universal Declaration of Human Rights.[9]

The Security Council, however, failed to adopt a subsequent resolution presented by Kenya, Mauritania, Iraq and the Federal Republic of Cameroon, recommending South Africa's expulsion from the United Nations because of its racial policies, its refusal to yield Namibia and its violation of the United Nations' boycott of Southern Rhodesia.[10] The resolution failed because three permanent members of the Security Council (France, Great Britain and the United States) voted against it and, in accordance with article 27 of the United Nations Charter, vetoed its adoption.

General Assembly Resolution 3207[11] with its request to the Security Council was addressed to Chapter II (articles 3 to 6) of the United Nations Charter, which governs membership in the United Nations.[12] It establishes two categories of membership in the organization: (1) states which had participated in the San Francisco conference or which had previously signed the declaration by United Nations of January 1, 1942, and which then signed the United Nations Charter and ratified it;[13] and (2) "all other peace-loving states which accept the obligations contained in the . . . Charter and, in the judgment of the Organization, are able and willing to carry out these obligations"[14] and whose admission is effected by a decision of the General Assembly upon the recommendation of the Security Council.[15] Article 5 provides for the suspension from the "exercise of the rights and privileges of membership," in the case of Members "against which preventive or enforcement action has been taken by the Security Council," by a vote of the General Assembly "upon the recommendation of the Security Council."[16] Article 6 provides for expulsion from the United Nations of members who have "persistently violated the Principles contained in the . . . Charter," by a vote of the General Assembly "upon the recommendation of the Security Council."[17]

The membership articles of the Charter have been the subject of considerable juridical debate and discussion within the United Nations,

9. G.A. Res. 3207, 29 U.N. GAOR Supp. 31, at 2, U.N. Doc. A/9631 (1975).
10. 29 U.N. SCOR, Supp. Oct.-Dec. 1975, at 34, U.N. Doc. S/11543 (1975).
11. G.A. Res. 3207, *supra* note 9.
12. See note 1 *supra.*
13. U.N. CHARTER art. 3.
14. *Id.* art. 4, para. 1.
15. *Id.* art. 4, para. 2.
16. *Id.* art. 5.
17. *Id.* art. 6.

from the earliest days of the organization—both in the General Assembly and its specialized committees, and in the Security Council. The membership articles have also been the subject of two important advisory opinions of the International Court of Justice, rendered in 1948[18] and in 1950[19] following official requests by the General Assembly to the court pursuant to article 96 of the Charter.[20]

It was recognized very early in the history of the United Nations that despite the seemingly objective legal criteria established in Chapter II for governing membership questions, the application of articles 3 to 6 to specific cases might give rise to serious political conflicts. Concerns over possible conflicts were supported by the strong *role* envisaged for the Security Council in Chapter II and the ever present possibility of the application of the veto of a permanent member of the Security Council to any membership question coming before it. The ensuing years of Big Power tug of war, especially during the Cold War era, over the admission of new members brought a search for ingenious political and legal methods for breaking the stalemate. The search often involved recourse to what the distinguished Danish jurist, Alf Ross, calls legal "casuistry,"[21] or what the common law jurisprudence has traditionally called pious perjury. The delegate of Argentina as early as November, 1948, attempted to circumvent the Big Power veto in the Security Council, which was then blocking action on admission of new states, by pointing out in the debates in the *ad hoc* political committee of the General Assembly that while article 4 speaks of a "recommendation" by the Security Council as a condition precedent to General Assembly action, it nowhere states that this must be a *favorable* recommendation. According to this argument, the General Assembly would be competent to admit a new applicant state to membership in the organization even though the Security Council had not given a favorable recommendation. The Argentine delegate proposed that the General Assembly

18. Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, [1948] I.C.J. 57 [hereinafter cited as Advisory Opinion on Conditions of Admission].

19. Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations [1950] I.C.J. 4 [hereinafter cited as Advisory Opinion on Competence].

20. U.N. CHARTER art. 96 provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

21. ROSS, THE UNITED NATIONS PEACE AND PROGRESS 93 (1966).

should proceed to act upon the International Court of Justice's advisory opinion on "Conditions of Admission of a State to Membership in the United Nations,"[22] and admit Italy, Austria, Finland, Trans-Jordan, Portugal and Eire to membership, ignoring the negative attitude of the Security Council, which had withheld recommendation due to the veto by a single permanent member.[23]

In its advisory opinion of March 3, 1950,[24] the International Court of Justice rejected this argument, declaring that article 4 "envisages a favourable recommendation of the Security Council and *that* only."[25] On the other hand, the very strong dissenting opinion of the distinguished Latin American jurist, Judge Alvarez, appeals strongly for a break from the "precepts of traditional or classic international law, which were established on an individualistic basis and have hitherto prevailed,"[26] and for decision on the basis of the "new international law, which is now emerging."[27] With a political prescience that may seem surprising in an opinion rendered so long ago, Judge Alvarez, who qualifies through his scientific writings as well as his judicial opinions as one of the founders of the "new international law,"[28] asserts the right of the General Assembly to appraise the actual use of the veto in the Security Council, when a state seeking membership in the United Nations obtains the requisite number of votes in the Security Council but fails to be admitted nevertheless because of the negative vote of a permanent member in the Security Council.[29] Judge Alvarez suggests that the right of veto is not an unqualified one but must be interpreted and applied within its "proper limits," *i.e.*, matters concerning the maintenance of international peace and security as to which article 24 of the Charter has given the Security Council "primary responsibility."[30] Judge Alvarez concludes

22. Advisory Opinion on Conditions of Admission, *supra* note 18.

23. Draft Resolution of Argentina, 3 U.N. GAOR, Ad Hoc Pol. Comm. Annexes, Agenda Item No. 14, at 9, U.N. Doc. A/AC.24/15 (1948).

24. Advisory Opinion on Competence, *supra* note 19.

25. *Id.* at 9 (emphasis added).

26. *Id.* at 12 (emphasis omitted).

27. *Id.*

28. *See* A. ALVAREZ, LE DROIT INTERNATIONAL NOUVEAU DANS SES RAPPORTS AVEC LA VIE ACTUELLE DES PEUPLES (1959).

29. Advisory Opinion on Competence, *supra* note 19, at 19-21 (Alvarez, J., dissenting).

30. U.N. CHARTER art. 24, para. 1 provides:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

that the right of veto may be abused, that it is open to the General Assembly to determine whether abuse has occurred, and if so, to proceed to consider admission without any recommendation by the Security Council.[31]

In his emphasis upon a continental European civil law derived from teleological interpretation of the Charter, directed towards what he saw as the then emerging new international "regime of interdependence,"[32] Judge Alvarez parallels, in remarkable measure, contemporary North American, legal realist, instrumental or "policy-oriented" approaches to interpretations of the Charter.[33] The legal realist approach was first developed to circumvent the Big Power veto in the Security Council which might otherwise legally inhibit the United Nations from acting in a problem situation.[34] The most notable examples of its use were the Security Council resolutions of 1950 on the Korean question,[35] adopted during the absence of the Soviet Union, and the Uniting for Peace Resolution passed by the General Assembly.[36] While clearly it would, as Judge Alverez noted, be an "absurdity" if all United Nations action under Chapter II of the Charter could be frustrated by a Big Power veto,[37] any politically corrective action against such a situation would seem to call for the prior political support and authority of another World Court opinion, addressed to the same general issues as were contained in the Court's advisory opinion of March 3, 1950, but directed particularly to articles 5 and 6 of the Charter.

The foregoing discussion relates to the issue of admission of a state to membership in the United Nations. The same principles, however, would control any attempt to *expel* a member of the United Nations. For example, an attempt to expel the state of South Africa from the United Nations, or to suspend some or all of South Africa's rights and privileges of membership, because of its alleged violation of General Assembly

31. Advisory Opinion on Competence, *supra* note 19, at 20-21 (Alvarez, J., dissenting).

32. *Id.* at 13 (emphasis omitted).

33. For an example of this approach, *see* M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967).

34. *See, e.g.*, McDougal & Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258 (1951), written in reply to Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 YALE L.J. 209 (1951).

35. S.C. Res. 82, 5 U.N. SCOR 4, U.N. Doc. S/1501 (1950); S.C. Res. 83, 5 U.N. SCOR 5, U.N. Doc. S/1511 (1950); S.C. Res. 84, 5 U.N. SCOR 5-6, U.N. Doc. S/1588 (1950); S.C. Res. 85, 5 U.N. SCOR 6-7, U.N. Doc. S/1657 (1950).

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

37. Advisory Opinion on Competence, *supra* note 19, at 21 (Alvarez, J., dissenting).

resolutions, World Court rulings, or Charter principles generally would be governed by the same charter provisions as interpreted by the World Court rulings just outlined. There remains, however, considerable scope for possible United Nations action in regard to South Africa that is not related to the membership question in general or to the membership sections of the Charter, and that is not dependent upon Security Council interposition with all the political risks of a frustrating Big Power veto.

The route through Chapter IV of the Charter,[38] which governs the General Assembly, leads to the issue (separate and distinct from the issue of a state's membership in the United Nations) of the actual representation of that state in the United Nations and its main organs. This distinction is a familiar one in general international law, which notes the difference between recognition of states and recognition of governments. In the constitutional law of the United Nations, the issue of the actual political representation of a state which has already been admitted to the United Nations has been accepted, from the outset, as something to be determined by the United Nations organ or special agency concerned. At the San Francisco Conference of 1945, the issue of Polish representation arose. Poland was one of the states automatically entitled to membership in the United Nations because it signed the declaration by United Nations of January 1, 1942.[39] The host powers at San Francisco, however, simply could not agree as to which of the two then competing governments of Poland, the so-called London government or the so-called Lublin government, should be recognized as representing Poland, and it was not until the announcement of the composition of the new Polish government on June 28, 1945, too late for the San Francisco Conference itself, that this question could be resolved.

The issue of Chinese *representation*, China being of course both an original member of the United Nations and also a permanent member of the Security Council, was raised at the United Nations as early as November 18, 1949, when the Chinese Communist government requested the United Nations immediately to deprive the Chinese Nationalist government of "all rights to further represent the Chinese people in the United Nations."[40] On January 10, 1950, the Soviet Union submitted to the Security Council a resolution that the Security Council not

38. U.N. CHARTER arts. 9-22.

39. Docs. 168-346-54, 1 U.N.C.I.O. (1945); Docs. 93-96, 118, 305, 379, 5 U.N.C.I.O. (1945).

40. U.N. Doc. A/1123 (1949). *See* 4 U.N. GAOR, Annex, at xvii (1949).

recognize the credentials of the Chinese Nationalist government representative and that the representative be excluded from the Council.[41] The Soviet government raised the issue as a *credentials* issue, and it was debated as such, the question of a Chinese state *membership* in the United Nations hardly being open to question. After the rejection of the Soviet Union proposal the Soviet representative made his celebrated walkout from the Security Council. After the Soviet Union's delegate returned, on August 1, 1950, to take up the Soviet Union's right under normal rotation practices to the Security Council presidency, he ruled that the Chinese Nationalist representative did not represent China and, therefore, could not take part in the Security Council debates. This ruling was challenged and overruled by a vote of eight to three.[42] The question of Chinese representation in the Security Council and in the General Assembly remained a prime political issue for each successive General Assembly until the final seating of the Chinese Communist delegation in place of the Chinese Nationalist delegation in 1971. Each time it was treated as a credentials question, separate and distinct from any issue of Chinese state *membership* in the United Nations, although an "important question" requiring a two-thirds majority vote under article 18 of the Charter.[43] The actual decision of the General Assembly to seat the Chinese Communist delegation was embodied in a resolution adopted on October 25, 1971, by a vote of seventy-six to thirty-five with seventeen abstentions, which declares that the representatives of the government of the People's Republic of China are the "only lawful representatives of China to the United Nations. . . ."[44] The General Assembly Resolution proceeds to "restore all its rights to the People's Republic of China . . . and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."[45] A twenty-two state sponsored draft resolution which would have treated any proposal to deprive the Chinese Nationalist government of representation in the United Nations as an "important question" in terms of article 18(2) of the Charter and thereby requiring a two-thirds majority for approval, was defeated by a vote of fifty-nine to fifty-five with fifteen abstentions.[46]

41. 5 U.N. SCOR, 459th meeting 3 (1950).
42. 5 U.N. SCOR, 480th meeting 1-10 (1950).
43. *See* G.A. Res. 1668, 16 U.N. GAOR Supp. 17, at 66, U.N. Doc. A/5100 (1962).
44. G.A. Res. 2758, 26 U.N. GAOR Supp. 29, at 2, U.N. Doc. A/8429 (1971).
45. *Id.*
46. 26 U.N. GAOR 34-35 (1971).

Treated as a *membership* question under Chapter II of the Charter, the seating of the People's Republic of China delegation in the General Assembly and the expulsion of the Chinese Nationalist Government delegation from the General Assembly would each have required prior Security Council "recommendations" as conditions precedent to any General Assembly action. Treated as a *representation* question going to the issue of which of two competing delegations could legitimately claim to exercise the credentials of the state of China, both these matters were disposed of by the General Assembly acting on its own initiative. The conclusions which can be drawn from this contemporary United Nations constitutional practice are clear: either the *membership* articles[47] of the Charter have been so transformed through developing United Nations internal constitutional custom and convention that the requirement of prior Security Council "recommendation" has atrophied and effectively lapsed into constitutional desuetude so that the General Assembly can now constitutionally act alone; or the actual political composition of the delegation of an existing member-state of the United Nations is not a *membership* question at all, but a decision for which General Assembly action alone is legally sufficient. In looking to the General Assembly's pragmatic interpretation of the Charter in its resolution on the "Chinese" question[48] one is reminded of Chief Justice John Marshall's celebrated dictum in *M'Culloch v. Maryland* that "we must never forget, that it is *a Constitution* we are expounding;"[49] or of Lord Sankey's declaration in the Privy Council regarding the British North America Act of 1867 that one had "planted in Canada a living tree capable of growth and expansion within its natural limits . . . . Their Lordships do not conceive it to be the duty of this Board . . . to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation . . . ."[50]

The representation issue came up again in 1957 when the credentials of the Hungarian government, which had finally supressed the abortive 1956 uprising, were challenged. The Hungarian delegation was thereafter permitted to take part in the General Assembly debates on the provisional seating basis of article 29 of the General Assembly's Rules of Procedure.[51] This provisional seating procedure was continued for the Hungarian delegation until 1963. In the aftermath of the

47. U.N. CHARTER arts. 3-6.

48. G.A. Res. 2758, *supra* note 45.

49. 17 U.S. (4 Wheat.) 316, 407 (1819).

50. *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, 136 (P.C. 1929).

51. *See, e.g.*, 11 U.N. GAOR, Annexes, Agenda Item No. 3, at 1-2, U.N. Doc. A/3536 (1957).

Congo independence in 1960, the claims of various Congolese delegations sponsored by the Soviet Union and the United States were examined by the General Assembly Credentials Committee; and what was essentially an ideologically based conflict between rival, Big Power-sponsored political groupings in the Congo was decided by majority vote of the General Assembly under the rubric of General Assembly procedure when the General Assembly approved the Credentials Committee report.[52]

The issue of South African representation in the United Nations was first raised in the Credentials Committee in 1963 by Algeria, Liberia and the Soviet Union, who argued that the South African government was not representative of the people of South Africa,[53] and the question has recurred at regular intervals since that time. General Assembly Resolution 3206,[54] which approved the Credentials Committee report excluding the representatives of the government of South Africa, is simply the latest expression of General Assembly attitudes in this area.

To recite the history of the "representation" issue in the United Nations and to detail the sustained United Nations practice in this area is to make clear, beyond doubt, that in the constitutional law and the history of the United Nations, the "representation" issue has never been coterminous with the "membership" issue. Representation developed separately and distinctly from membership, forming its own autonomous body of customary law principles. The logic of that separate and autonomous constitutional law and practice as to "representation" is clear enough, the law and practice being firmly anchored in the experience of representative, legislative assemblies in the common law-influenced world not less than in the civil law-influenced world. The United States Constitution, for example, makes each House "the judge of the elections, returns and qualifications of its own members . . . ."[55] A separate article of the Constitution controls the admission of new states into the Union.[56]

The right to pass on the credentials of one's members is, it may be submitted, an inherent part of the prerogatives of a representative

52. 15 U.N. GAOR 978-79 (1960).

53. 18 U.N. GAOR, Annexes, Agenda Item No. 3, at 2, U.N. Doc. A/5676/Rev. 1 (1963).

54. G.A. Res. 3206, *supra* note 8. The Resolution was adopted by a vote of 98 to 23, with 14 abstentions.

55. U.S. CONST. art. I, § 5.

56. *Id.* art. IV, § 3.

legislative assembly, and express constitutional provisions to the contrary are required to derogate from, or to take away, that right. Such restrictions clearly are not present in the United Nations Charter: Chapter II (articles 3 to 6) relates only to the different question of membership of states in the United Nations, and there is nothing in Chapter IV (articles 9 to 22), governing the General Assembly, that trenches upon the traditional prerogatives, under both common law and civil law constitutionalism, of the General Assembly to pass on the credentials of delegations claiming to represent individual member-states. Furthermore, the settled, unchallenged practice of the General Assembly and the Security Council since the formation of the United Nations in 1945 has been to confirm, consolidate and extend the principle that the "representative" quality of a government and its official delegation is a credentials question—to be determined by the General Assembly, Security Council, specialized agency or other international arena to which the particular government delegation seeks accreditation, *ex proprio motu*—and not a state membership question to be decided according to the provisions of Chapter II of the Charter. To disregard the cumulative weight of thirty years of unbroken United Nations constitutional law practice legitimating, if that be needed, the power to pass on the credentials of its members that is inherent in any legislative assembly is surely to misunderstand the creative element in common law and civil law constitutionalism and the extent to which, as Dicey proclaimed in relation to English-derived constitutional law, developing custom and convention amplify and extend positive law principles.[57]

If the issue of representation, and the ability to pass on the representativeness of any official government delegation falls within the competence of the Security Council and the General Assembly, each acting in its own right for purposes of its own acts of accreditation, then legal guidelines as to the actual exercise of this power in concrete cases do exist. As early as October 7, 1950, the General Assembly, upon the initiative of the Cuban delegation, had received a draft resolution recommending that the issue of representation be decided, in the future, according to a number of specific criteria. The Cubans proposed that the General Assembly make its decision on the legitimacy of the representation of any member-state in light of various criteria: the effectiveness of its authority over the national territory; the general consent of the population; its respect for human rights and fundamental freedoms; and its ability and willingness to achieve the

57. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 417 (1st ed., 1885).

purposes of the Charter, to observe its principles and to fulfill the international obligations of the state.[58] After considerable discussion, including a number of amendments and alternative proposals, the General Assembly adopted a resolution stipulating that when any difficulties might arise regarding the representation of a member-state, and in particular when more than one authority might claim to be the government entitled to represent a member-state 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 . . . "[59] and that the General Assembly is the organ of the United Nations in which the matter can best be considered.[60]

A Legal Opinion of November 11, 1970 submitted to the president of the General Assembly by the United Nations general counsel argued that the General Assembly could not reject credentials "where there is no question of rival elements . . . ."[61] This position stems, it is submitted, from an indefensible assimilation of the United Nations constitutional law concerning *admission of states to membership* in the United Nations and suspension and expulsion of those states from membership[62] to the question of the legitimacy of claims to *representativeness*, advanced by *delegations* of states which have already been admitted to the United Nations. The latter question is one which, under well-settled United Nations constitutional law practice, is determined by the General Assembly or the Security Council, as the case may be, each acting of its own accord.

Where the United Nations General Assembly resolution of December 14, 1950, speaks, in general terms, of a decision "in the light of the purposes and principles of the Charter,"[63] the progressive development of international law in the United Nations and its main organs since that time offers far more precise criteria for General Assembly and Security Council decision-making on the issue of representativeness. What the distinguished American jurist, Judge Jessup, in his celebrated dissenting opinion in the World Court in the South West Africa case in 1966 referred to as "the views and attitudes of the contemporary international

58. 5 U.N. GAOR, Annexes, Agenda Item No. 61, at 5, U.N. Doc. A/AC.38/L.6 (1950).

59. G.A. Res. 396, 5 U.N. GAOR Supp. 20, at 24-25, U.N. Doc. A/1775 (1950) (emphasis added).

60. *Id.* at 24.

61. 25 U.N. GAOR, Annexes, Agenda Item No. 3, at 3-4, U.N. Doc. A/8160 (1970).

62. *See* U.N. CHARTER arts. 3-6.

63. G.A. Res. 396, *supra* note 60.

community"[64] lead not merely to the "accumulation of expressions of condemnation of apartheid,"[65] but act as "proof of the pertinent contemporary international community standard,"[66] which should be taken into account when interpreting the charter. Much more immediately relevant to issues of representativeness of government delegations seeking accreditation are the principles of the new international law concerning the self-determination of peoples. These principles were first expressed in 1960 in the General Assembly resolution on the "Granting of Independence to Colonial Countries and Peoples,"[67] and have found their latest, most authoritative expression in General Assembly Resolution 2625, entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations."[68] The principles of equal rights and self-determination of peoples constitute today, not merely a guideline to decision of the "representation" issue, but something in the nature of an imperative principle or *jus cogens* that all competent United Nations organs are obligated to respect in their interpretation and application of the Charter. In the case of the government of South Africa, the doubts as to the representativeness of its official delegation are compounded at once by its refusal to respect the World Court's 1971 ruling on the Namibia issue, and by its evident failure, in a plural, multi-cultural society, as amply testified to by successive United Nations commissions of inquiry, to develop a genuinely inclusive system of political representation that takes proper account of the different constituent communities in that society.

Conclusion

It is clear that the issue of membership in the United Nations, covering admission of states to the United Nations as well as their suspension and expulsion, is controlled and regulated by Chapter II

64. South West Africa Cases, Second Phase, [1966] I.C.J. 6, 441 (Jessup J., dissenting).

65. *Id.*

66. *Id.* This position was brilliantly restated and developed by the World Court in its 1970 advisory opinion on Namibia. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

67. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66-67, U.N. Doc. A/4684 (1961).

68. G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121-24, U.N. Doc. A/8028 (1971).

(articles 3 to 6) of the Charter, with any decision in this area being made by the General Assembly only upon the recommendation of the Security Council. As the constitutional law of the United Nations now stands in light of the World Court Advisory Opinion of 1950,[69] it is doubtful that the General Assembly can act *ex proprio motu* to overcome a Big Power veto in the Security Council in membership cases, exercised after a majority vote in the Security Council in favor of a membership application. However, a General Assembly request to the World Court for a fresh advisory opinion on this point might be given consideration, based upon the dissenting opinions in the 1950 ruling and the progressive development of international law since that time.

It should also be recognized that separate and distinct from the issue of membership of states in the United Nations is the issue of the representative quality of delegations seeking accreditation to the General Assembly or Security Council. This, it is submitted, is a credentials question, which falls generally under Chapter IV (articles 9 to 22) of the Charter, and which should be decided by each appropriate United Nations organ in accordance with its own special rules—in the case of the General Assembly, in accordance with General Assembly Rules of Procedure articles 27 to 29, and through the Credentials Committee which reports directly to the General Assembly. In considering the issue of representation, the General Assembly and its Credentials Committee may properly be guided by new international law principles, such as the principle of the self-determination of peoples,[70] developed or extended since the adoption of the Charter, and also, *inter alia*, by relevant World Court opinions, such as the 1971 ruling on the Namibia question.[71] However, infringements of the Charter or rejections of General Assembly or Security Council resolutions, not directly related to the issue of the representativeness of the delegation seeking accreditation, do not, prima facie, seem to bear upon decisions of the General Assembly and its Credentials Committee in this context. They would, however, be relevant to any Chapter II membership decision by the General Assembly, upon the recommendation of the Security Council, to suspend or expel a state from membership in the United Nations.

Decisions of the General Assembly, acting pursuant to reports of the Credentials Committee, on the representation question would seem

69. Advisory Opinion on Competence, *supra* note 19.

70. *See, e.g.*, G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1967).

71. Advisory Opinion on the Continued Presence of South Africa in Namibia (South West Africa), *supra* note 66.

capable of resolution by a majority of the members present and voting, as provided for by article 18 of the Charter, although General Assembly Resolution 1668[72] on the issue of Chinese representation and subsequent General Assembly practice in relation to the China question treated it as an "important question" to be determined by a two-thirds majority of the members present and voting, pursuant to article 18 of the Charter. It would seem unnecessary for purposes of any General Assembly decision rejecting the credentials of a particular delegation that some alternative, rival or competing delegation be immediately available to claim representation in its place. Finally, any decision of the General Assembly, acting upon the report of the Credentials Committee, to reject the credentials of a particular governmental delegation could, it is submitted, be either a final decision, immediately operative, or it could be a temporary one (with or without provisional seating of the governmental delegation concerned), subject to re-examination and review in the event of new evidence of a bona fide attempt to meet contemporary international law standards with respect to the self-determination of peoples.

72. G.A. Res. 1668, *supra* note 43. In anticipation, perhaps, of an adverse vote in the General Assembly's Credentials Committee, the Government of the Union of South Africa was not represented when the Thirtieth Session of the General Assembly opened on September 16, 1975. "Roelof F. Botha (South Africa) said that his country was unlikely to take part in the subsequent proceedings, judging from present circumstances. He added that South Africa was still considering its relations with the United Nations." U.N. Press Release WC/728, 19 September, 1975.