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# Excluding Israel from the General Assembly by a Rejection of Its Credentials

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## I. INTRODUCTION

The initial draft of the United Nations Charter did not include a provision authorizing the expulsion of members. Emphasizing the goal of universality, the Western states opposed the inclusion of such a provision. Although as finally adopted, the Charter does provide that a member state that "has persistently violated" its principles "may be expelled," that decision may not be made by the General Assembly alone. It may only be made by the General Assembly "upon the recommendation of the Security Council." Suspension of a member's "rights and privileges" similarly requires a decision by the General Assembly "upon the recommendation of the Security Council." Notwithstanding these requirements there have been attempts to achieve the same result—exclusion of a member state from participating in the United Nations—without Security Council concurrence, through the accreditation process. That is, the credentials of a state's delegation to the General Assembly are rejected and the state is barred from participating in the work of the General Assembly; in effect, the state is suspended or expelled from the United Nations without a recommendation by the Security Council. That course was taken with respect to South Africa in 1974 and was attempted with respect to Israel in 1982.

This Note briefly summarizes the sequence of events in the last session of the General Assembly with respect to Israel and examines the legality of excluding a member state from the General Assembly by refusing to accept its representatives' credentials.[1] In considering that question, it analyzes the relevant Charter provisions and discusses the General Assembly's action with respect to South Africa. The author takes the position that a decision to accept or reject credentials properly involves questions concerning the propriety of the credentials, not judgments concerning the legitimacy of the government issuing the credentials, and that use of the accreditation process as an alternative method of suspension or expulsion is contrary to the purposes and provisions of the Charter.

When, as has happened on several occasions, the General Assembly must choose between two sets of credentials emanating from rival authorities, each

[1] The discussion that follows focuses on the General Assembly. The analysis would apply equally, however, to the other organs of the United Nations and to the specialized agencies, participation in which is one of the rights and privileges of membership in the United Nations. Thus, when the question first arose of which of two rival delegations' credentials to accept, UNESCO asked the General Assembly to "establish guiding principles to be followed so that uniform action may be taken by their various organs and by the Specialized Agencies." *See* note 24 *infra* and accompanying text.

While a comparative study of other international organizations would be interesting, it would have no direct bearing on the legitimacy of the use of the accreditation process to exclude member states from the United Nations, since that must be evaluated in light of the provisions of the UN Charter, particularly Articles 5 and 6 of the Charter, which give the Security Council veto power on questions of suspension and exclusion of member states.

claiming to be the government of the member state, its decision necessarily involves not only an evaluation of the credentials but also judgments about the governments issuing them. Assuming that the General Assembly has the authority to make such judgments incident to the accreditation process for the purpose of determining which government's credentials to accept, it does not have the authority to do so for the purpose of excluding a member state from the United Nations. Whether the determination is based on "effective control," as recommended by the Secretary-General, or made in "light of the purposes and principles of the Charter and the circumstances of each case," as stated in the resolution adopted by the General Assembly, the application of these criteria in the accreditation process not for the purpose of determining *which* credentials to accept, but for the purpose of excluding a member state from the United Nations, violates the Charter. There are two reasons for this. First, the Charter does not authorize the General Assembly to decide whether a particular authority is the lawful government of a member state. Even when more than one authority issues documents accrediting a delegation to the United Nations, the General Assembly's authority to make that determination must be justified on the basis of necessity, a justification that does not apply when there is only one government. Second, when the Assembly is choosing between rival delegations, its decision does not result in the exclusion of a member state from the General Assembly, since it will presumably accept one delegation's credentials. If, however, there are no rival claimants, rejection of credentials effectively excludes the member state from the United Nations.

## II. FACTUAL BACKGROUND

On October 6, 1982, the Credentials Committee of the General Assembly[2] adopted a resolution recommending that the Assembly accept the credentials of the 90 states, including Israel, that had submitted formal credentials to the Secretary-General.[3] In a letter to the Secretary-General, dated October 22, 1982, 42 states expressed their "reservation on the credentials of the delegation of Israel."[4] The letter listed a number of reasons, among them that Israel had violated principles of international law and of the UN Charter, that it had refused to abide by various resolutions of the General Assembly and of the Security Council, and that its actions demonstrated that "it is not a peace-loving Member State."[5] The letter added that "the present reservation should not in

[2] Rule 28 of the General Assembly Rules of Procedure provides: "A Credentials Committee shall be appointed at the beginning of each session. . . . It shall examine the credentials of representatives and report without delay." Rules of Procedure of the General Assembly, UN Doc. A/52/Rev.12 (1974).

[3] *See* UN Press Release GA/6670, Oct. 6, 1982. The vote and recommendation followed a debate on whether the credentials of Democratic Kampuchea or of the People's Republic of Kampuchea should be approved, and a challenge to the credentials of Afghanistan and Chile. There was no challenge to the credentials of Israel in the Credentials Committee. *See* First Report of the Credentials Committee for the 37th Session of the General Assembly, UN Doc. A/37/543 (Oct. 14, 1982).

[4] UN Doc. A/37/563 (Oct. 22, 1982). [5] *Id.* at 1.

any manner prejudice our position concerning the Israeli presence in the General Assembly."[6]

On October 25, Iran proposed that the report of the Credentials Committee be amended by the addition of the words, "except with regard to the credentials of Israel."[7] The next day, when the Credentials Committee report came up for consideration by the General Assembly, the representative of Finland, speaking on behalf of the Nordic countries, made a motion that "no action be taken on the amendment."[8] The motion was adopted by 74 votes in favor, 9 opposed, and 32 abstentions.[9] While a decision on the Iranian motion was thus avoided, the question arises whether the exclusion of a member state from the General Assembly by a rejection of its credentials, which are admittedly in proper form, is permissible under the Charter.[10] In considering that question, it is necessary to distinguish among membership, accreditation and representation.

## III. MEMBERSHIP, REPRESENTATION AND ACCREDITATION UNDER THE CHARTER

### *Membership*

Admission of new members to the United Nations and expulsion or suspension of existing members are important substantive issues under the Charter. They require an affirmative vote of all the permanent members of the Security Council and of two-thirds of the members of the General Assembly present and voting. Article 5, dealing with suspension, provides that a member "against which preventive or enforcement 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."[11]

[6] *Id.* at 2.

[7] UN Doc. A/37/L.9 (Oct. 25, 1982).

A similar resolution was introduced by Iran and Libya at the current session. The General Assembly voted 79 to 43, with 19 abstentions, to take no action on the resolution. N.Y. Times, Oct. 21, 1983, at A11, col. 1.

[8] UN Doc. A/37/PV.45, at 2 (Oct. 28, 1982).

[9] *Id.* at 3–5. The only Arab states that voted with Iran, against the motion, were Algeria and the Libyan Arab Jamahiriya. Egypt voted for the motion. Most of the Arab states abstained. Following the vote, the representative of Yemen stated that the Arab Group was meeting elsewhere when the vote was taken and "that had he been there he would have voted against the motion." *Id.* at 22. The delegate of Syria made a similar statement. *Id.* at 23.

[10] Even if the Iranian amendment had been considered and adopted by the General Assembly, it would not necessarily have resulted in the exclusion of the representative of Israel from participation in the General Assembly. South Africa—the only state whose credentials the General Assembly voted not to accept—continued to participate in the work of the General Assembly from 1970 to 1974 under a ruling by Edvard Hambro of Norway, the President of the Assembly in 1970, followed by successive Presidents, that the rejection of its representatives' credentials did not bar it from participation. 25 UN GAOR (1901st plen. mtg.) at 25, UN Doc. A/PV.1901 (1970). It was the ruling of the Algerian representative, who presided over the General Assembly at its 29th session in 1974, that resulted in the exclusion of South Africa. *See infra* notes 29–31 and accompanying text. The ensuing discussion assumes, however, that the intent of the Iranian amendment was to exclude Israel from the United Nations.

[11] The original (Dumbarton Oaks) draft of the Charter made no provision for expulsion at all, and a number of states were opposed to such a provision since the goal was for universal membership

Article 6, dealing with expulsion, provides that a member "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." Under Article 18, "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the Members present and voting," and these questions shall include "the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members."

*Accreditation*

Accreditation to the General Assembly, on the other hand, is a procedural formality. It is dealt with not by a provision of the Charter but by the General Assembly's Rules of Procedure.[12] Rule 27 provides that "[t]he credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General. . . . The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs."[13]

Legal Counsel to the United Nations defined credentials as "the document attesting that the person or persons named are entitled to represent their State at the seat of or at meetings of the organization,"[14] and credentials for the General Assembly as "a document issued by the Head of State or Government or by the Minister of Foreign Affairs of a Member State of the United Nations, submitted to the Secretary-General, designating the persons entitled to represent that Member at a given session of the General Assembly."[15]

*Representation*

A situation may arise in which two or more authorities, each claiming to be the lawful government of a state, issue documents accrediting a delegation to the United Nations.[16] Such a situation may result, for example, from a civil

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in the United Nations. The Soviet Union insisted on a provision for expulsion, however, and after considerable discussion, the provision contained in Article 6 was adopted. *See* Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1398–1400 (1964); R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 397 (1958).

[12] These rules were adopted in accordance with Article 21 of the Charter, which provides that the "General Assembly shall adopt its own rules of procedure."

[13] GA Rules of Procedure, *supra* note 2.

[14] 25 UN GAOR Annexes (Agenda Item 3) at 1 n.1, UN Doc. A/8160 (1970).

[15] *Id.* at 2.

[16] The situation first arose with respect to China in 1950. For a discussion of that case, see Briggs, *Chinese Representation in the United Nations*, 6 INT'L ORG. 192 (1952). *See also* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 152–58 (1963); H. KELSEN, THE LAW OF THE UNITED NATIONS 941–44 (1964). Other situations that involve rival claimants include the Congo in 1960 (*see* R. HIGGINS, *supra*, at 162–64; T. FRANCK, LEGAL ASPECTS OF THE U.N. ACTION IN THE CONGO (1963)) and Kampuchea (*see supra* note 3); *see also* General Assembly debate, Sept. 21, 1979, UN Doc. A/34/PV.3 (1979).

war in which each side achieves control over part of the country, or when a new government gains control by use of force and violence and the previous government continues as a government in exile. In order to determine which delegation's credentials to accept, it must be decided which of them is entitled to issue documents of accreditation on behalf of that state.

The question of which of two rival authorities, each claiming to be the government of the state, has the right to represent it in the United Nations is clearly not a procedural matter involving the technical propriety of credentials, but an important substantive question with serious political implications. The Charter does not by its terms authorize the General Assembly to decide that question. However, it does not vest that authority in the Security Council either. It makes no provision at all for determining the matter.

It is arguable that in view of this gap in the Charter and the unavoidability of a decision,[17] a determination by the General Assembly is justified. Since the General Assembly's exercise of authority in those circumstances is based not on a grant of authority in the Charter but on necessity, the scope of such authority is defined by and is coextensive with the necessity that gave rise to it. That is, a determination of the question by the General Assembly is justified only where there are in fact rival delegations seeking accreditation, based on documents issued by different authorities, each claiming to be the legitimate government of the state. This was recognized by the various UN organs that dealt with the problem when it first arose. UNESCO in its resolution requesting the General Assembly to promulgate criteria for dealing with the question,[18] Secretary-General Trygve Lie in his memorandum on Legal Aspects of Problems of Representation in the United Nations,[19] the discussion in the *Ad Hoc* Political Committee[20] appointed by the General Assembly to consider the question,[21] and the resolution submitted by the *Ad Hoc* Committee and adopted by the General Assembly[22] all made clear that they were concerned with the criteria to be applied in determining representation when "more than one authority claims to be the government entitled to represent a member state in the United Nations."[23] Thus, the UNESCO resolution asked the General Assembly to

> establish guiding principles to be followed so that uniform action may be taken by their various organs and by the specialized agencies (irrespective of their composition), whenever the question arises of determining—*in cases where two or more authorities claim to be the regular government of a country*—

[17] The other possibilities are (1) not to accept the credentials of either delegation, or (2) to accept the credentials of both. The first alternative would have the effect of excluding the member state from participating in the General Assembly. The second would give the state more than one vote, which would be contrary to Article 27(1) of the Charter. *Cf.* H. KELSEN, *supra* note 16, at 945 (dealing with a similar problem in the Security Council).

[18] UNESCO was the first to confront the problem. *See* 5 UN GAOR Annexes (Agenda Item 61) at 4–5, UN Doc. A/1344 (1950).

[19] 5 UN SCOR Supp. (Jan.–May 1950) at 18, UN Doc. S/1466 (1950).

[20] 5 UN GAOR Annexes (Agenda Item 61) at 13, UN Doc. A/1578 (1950).

[21] 5 UN GAOR Annexes (Agenda Item 61) at 2, UN Doc. A/1308 (1950).

[22] GA Res. 396 (1950), 5 UN GAOR Supp. (No. 20) at 24–25, UN Doc. A/1775 (1951).

[23] Report of *Ad Hoc* Political Committee, UN Doc. A/1528 (1950).

> which of these authorities should exercise membership rights and fulfil the corresponding obligations.[24]

In his memorandum on the subject, Secretary-General Lie argued that states should not decide representation in the United Nations on the basis of recognition, "which was an essentially political question" for each state, but on the basis of "which of these *two governments* is in fact in a position to employ the resources and direct the people of the state in the fulfilment of the obligations of membership."[25]

The resolution on representation ultimately adopted by the General Assembly provides:

> [*W*]*henever 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.[26]

## IV. Using Accreditation to Exclude a Member

Notwithstanding that the Charter does not by its terms authorize the General Assembly to decide the question of representation and that the justification for its doing so incident to accreditation is the existence of rival claimants, the accreditation process has been used to challenge the legitimacy of a government and its right to represent the member state in the United Nations even when there was in fact only one government: most notably, by the West with respect to Hungary following the Soviet invasion in 1956[27] and by the Third World and Communist bloc countries with respect to South Africa.[28] Denial of accreditation, however, has not been used to exclude a delegation from participating in the General Assembly, absent rival claimants, except for South Africa. The General Assembly has never rejected the credentials of any state other than South Africa, and even South Africa, whose credentials were first rejected in 1970, was not barred from participating in the General Assembly by the rejection of its credentials prior to 1974.[29] Indeed, Legal Counsel to the United Nations stated in a memorandum to the President of the General Assembly:

[24] UN Doc. A/1344, *supra* note 18, at 5 (emphasis added).

[25] UN Doc. S/1466, *supra* note 19, at 22–23 (emphasis added).

[26] GA Res. 396, *supra* note 22, at 24–25 (emphasis added). A number of more specific guidelines had been suggested, but the committee was unable to agree on any of them. *See* Report of *Ad Hoc* Committee, *supra* note 23.

[27] *See* R. Higgins, *supra* note 16, at 158–59.

[28] *See* McWhinney, *Credentials of State Delegations to the U.N. General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa*, 3 Hast. Const. L.Q. 19, 30 (1976).

[29] From 1956 to 1962, the General Assembly took "no action" with respect to the credentials of Hungary. *See* R. Higgins, *supra* note 16, at 158–59. Similarly, up to 1965 it dealt with the challenge to the credentials of South Africa by deciding "to take no decision on the credentials submitted on behalf of the representatives of South Africa." 20 UN GAOR (1407th plen. mtg.) at 10, 15–16, UN Doc. A/PV.1407 (1965). Since Rule 29 of the General Assembly Rules of Procedure provides that "[a]ny representative to whose admission a Member has made objection

> 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 from the exercise of rights and privileges of membership in a manner not foreseen by the Charter. . . . The participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership. Suspension of this right through the rejection of credentials would not satisfy the . . . requirements [of Article 5] and would therefore be contrary to the Charter.[30]

In 1974, however, Abdelaziz Bouteflika of Algeria, who presided over the Assembly at that session, interpreted the rejection of South Africa's credentials as a decision to bar it from participation in the work of the Assembly. He stated:

> On the basis of the consistency with which the General Assembly has regularly refused to accept the credentials of the delegation of South Africa, one 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.[31]

This ruling, of course, was directly contrary to the view expressed by Legal Counsel that rejection of credentials by the General Assembly for the purpose of excluding a member state from participating in its meetings "would have the effect of suspending a Member from the exercise of rights and privileges of membership in a manner not foreseen by the Charter" and would "be contrary to the Charter."[32]

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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," the decision to take no action had the effect of permitting Hungary and South Africa to continue participating in the United Nations. At its 25th session in 1970, the General Assembly for the first time rejected the credentials of South Africa. Edvard Hambro of Norway, who presided at that session, interpreted the rejection of its credentials as a "very strong condemnation of South Africa," 25 UN GAOR (1901st plen. mtg.) at 25, UN Doc. A/PV.1901 (1970), but not as barring it from participation in the work of the Assembly.

[30] 25 UN GAOR Annexes (Agenda Item 3), at 3, *supra* note 14. Quite clearly, the point made by Legal Counsel is that rejection of credentials satisfying Rule 27 for the purpose of excluding a member state would violate the Charter because it would be inconsistent with the Security Council's veto power under Article 5. Thus, exclusion by the General Assembly by a rejection of credentials could not be legalized by amending Rule 27 to authorize the General Assembly to take such action. Moreover, Rule 27 was adopted by the General Assembly pursuant to Article 21 of the Charter, authorizing the General Assembly to adopt its own "rules of procedure." Judgments about the legitimacy of the government issuing credentials manifestly involve more than "rules of procedure."

[31] 29 UN GAOR (2281st plen. mtg.) at 76, UN Doc. A/PV.2281 (1974). The ruling was confirmed by the General Assembly. The vote was 91 in favor, 22 against and 19 abstentions. *Id* at 86.

[32] *See* text at note 30 *supra*. It may be argued that excluding a state from the General Assembly is a lesser sanction than expulsion or suspension from the United Nations, and therefore may be imposed by the General Assembly itself. This argument is untenable for two reasons. First, while

Nor can it be argued that if the Security Council fails to make a recommendation on questions of membership, as contemplated by the Charter, because of the negative votes of permanent members,[33] the Assembly may do so. This reasoning was specifically rejected by the International Court of Justice when the question arose with respect to admission of members. In considering whether "the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it,"[34] as required by Article 4(2) of the Charter, the Court stated:

> To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.[35]

While that decision was based on Article 4(2), dealing with admission of members to the United Nations, Article 6, dealing with exclusion of members, provides

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barring a state from participating in the work of the General Assembly may be distinguished from suspension in theory, there is very little difference in practice. The General Assembly is the major organ of the United Nations and, at least for states not members of the Security Council, probably the most important one. As the memorandum of Legal Counsel stated, "participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership" and denial of that right "would have the effect of suspending a member state." Second, the Charter sets out very clearly the circumstances under which the rights of membership may be curtailed, the extent to which they may be curtailed in each of those circumstances and the procedure for doing so. It provides three distinct sanctions: expulsion, suspension and loss of voting rights. The ultimate sanction of expulsion may be imposed on a member that has "persistently violated" the principles of the Charter (Article 6). The lesser sanction of suspension may be imposed on a member "against which preventive or enforcement action has been taken by the Security Council" (Article 5). Loss of the right to vote, a still lesser sanction, is imposed for arrears in payment (Article 19). The first two may be imposed by a two-thirds vote of the General Assembly upon the recommendation of the Security Council; the right to vote is lost if the amount by which a state is in arrears in its payments exceeds its dues for the preceding two years, but this sanction may be waived by the General Assembly if it concludes that the failure to pay is due to conditions beyond the member's control. Thus, the Charter provides three levels of sanctions and specifies when, how and by whom they may be imposed. Had the drafters intended a fourth sanction, exclusion from the General Assembly, they would have specified the circumstances under which and the procedure by which it could be imposed.

[33] A resolution to expel South Africa from the United Nations was introduced in the Security Council. It received a majority but failed to pass because three of the permanent members, the United States, Great Britain and France, voted against it. The states that opposed the expulsion of South Africa argued that the United Nations would be in a better position to influence the actions of South Africa in the future if it remained in the Organization. Those that favored expulsion argued that a state that has persistently violated the principles of the Charter should not be permitted to remain as a member. *See* 29 UN GAOR Annexes (Agenda Item 3), UN Doc. A/9779 (1974). The debate on whether to expel South Africa reflects a tension inherent in the Charter, which, on the one hand, aims at universal membership, and on the other, provides for the expulsion of states that violate the principles of the Charter; and it parallels the debate between the Soviet Union and the West at the time Article 6 was adopted. *See supra* note 11.

[34] Competence of the General Assembly for the Admission of a State to the United Nations, 1950 ICJ REP. 4, 7 (Advisory Opinion of March 3).

[35] *Id.* at 9.

in identical terms for action by "the General Assembly upon the recommendation of the Security Council." Application of the Court's reasoning with respect to admission under Article 4(2) would lead to the same result with respect to exclusion under Article 6.

Nevertheless, given the universal abhorrence for apartheid, it is not surprising that several writers have attempted to find a legal basis for the General Assembly's decision to exclude South Africa.[36] Although acknowledging that General Assembly Resolution 396 (V), which deals with representation, refers to situations in which "more than one authority claims to be the government entitled to represent a Member State in the United Nations,"[37] one writer rejects the position that it does not apply where credentials of only one authority are submitted. He argues that "[w]hatever 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," and that "it is only equitable to expect that all authorities meet the same criteria to represent their respective states."[38] He similarly challenges the opinion of Legal Counsel to the United Nations that "where there is no question of rival claimants, rejection of a member state's credentials for the purpose of excluding it from participating in the meetings of the U.N. would be contrary to the Charter."[39] He contends that the distinction between situations in which there are rival claimants and those in which there are not is superficial because, "upon . . . 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."[40]

Admittedly, all states should be required to satisfy the same criteria for membership. However, the Charter provides that the question of whether a state satisfies the criteria for membership is to be determined by the General Assembly upon the recommendation of the Security Council. To the extent that the General Assembly may decide the question of representation at all, it may do so because it necessarily arises incident to accreditation, i.e., when more than one authority claims the right to represent the member state in the United Nations and to accredit delegates to it. Thus, it is not that different criteria apply absent rival claimants, but that absent rival claims to representation, the determination of whether a state satisfies the applicable criteria for membership is made only in the context of a decision on admission or expulsion,[41] and only "upon the recommendation of the Security Council."

[36] *See* McWhinney, *supra* note 28; Jhabvala, *The Credentials Approach to Representation in the U.N. General Assembly*, 7 CAL. W. INT'L L.J. 615 (1977); Note, *The General Assembly 29th Session: The Decredentialization of South Africa*, 16 HARV. INT'L L.J. 576 (1975).

[37] Jhabvala, *supra* note 36, at 630. [38] *Id.*

[39] *Id* at 633. [40] *Id.*

[41] If a determination on whether a state satisfies the criteria for membership were to be made as part of the accreditation process, regardless of the existence of rival claimants, the General Assembly would have to make the decision prior to each session with respect to each member. Jhabvala apparently recognizes the problem with the approach he urges, since he argues for the need to adopt rules in this area "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." Jhabvala, *supra* note 36, at 638. A de novo decision on whether a

Indeed, Secretary-General Lie took the position that even when rival claimants exist and the question of representation must be decided by the General Assembly, the Assembly's decision should be limited to which authority "is in a position to" fulfill "the obligations of membership."[42] The test suggested by the Secretary-General precludes consideration by the Assembly of whether the state satisfies the criteria for membership and thus avoids exercise by the Assembly, even in those situations where rival claimants do exist, of authority that the Charter vests in the first instance in the Security Council.[43]

There is another significant difference between situations in which two governments claim the right to represent the state and those in which there are no rival claimants in fact. Where the choice is between rival claimants, the state is not excluded from voting and otherwise participating in the General Assembly. Rejection of one delegation's credentials is coupled with acceptance of those of the other delegation. Thus, the General Assembly is not asserting authority that under Articles 5 and 6 of the Charter must be exercised in the first instance by the Security Council.

Some scholars have suggested that an international organization may establish through practice authority beyond that conferred upon it by its constitutive instrument.[44] One writer, at least, attempts to justify the exclusion of South Africa on that basis.[45] After reviewing several cases in which the right of a delegation to represent the state in the United Nations has been questioned, he argues that the practice of the United Nations in this area makes "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."[46] He further argues that "the settled, unchallenged practice" has been that "the 'representative' quality of a government and its official delegation is a credentials question—to be determined by the General Assembly . . . and not a state membership question to be decided according to the provisions of Chapter II

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member state is willing and able to carry out the obligations imposed by the Charter would clearly be improper. *See, e.g.,* R. HIGGINS, *supra* note 16, at 158. "A member cannot be called upon to show proof of its ability and willingness to carry out the obligation of the Charter at every stage." *See also* the statement of Judge Lachs, made when he was the Polish representative to the United Nations, quoted *infra* note 56.

[42] *See* text at note 25 *supra.*

[43] While the test suggested by Secretary-General Lie was not adopted by the General Assembly and has not been followed in practice, both the Communist bloc and the West having argued on different occasions for rejecting credentials emanating from a government that satisfied the criteria he suggested, the Assembly has not adopted any other test providing meaningful objective criteria for determining which delegation's credentials should be accepted when there are rival claimants, not has one emerged in practice. Distasteful as it is to adopt a test that would require acceptance of credentials emanating from a government that has achieved effective control through force and violence, that is true of many states whose delegations' credentials are not being challenged. Adoption of the criteria urged by Lie would at least have the merit of preventing transformation of accreditation, which should be a procedural process, into a highly controversial political process.

[44] *See, e.g.,* Sohn, *supra* note 11, at 1420 *ff.*; McWhinney, *supra* note 28.

[45] *See* McWhinney, *supra* note 28.

[46] *Id.* at 30.

of the Charter."[47] He criticizes the opinion of Legal Counsel that the General Assembly cannot legally reject credentials where there are no rival claimants as failing to distinguish between "the United Nations constitutional law concerning *admission of states to membership* in the United Nations . . . and the question of the legitimacy of claims to *representativeness*" by states that are members.[48]

The proposition that the General Assembly's exclusion of South Africa is justified by an established practice is problematic in several respects. First, even if an international organization may through practice establish authority beyond that specifically conferred upon it by its charter, it may not assert authority that contravenes specific provisions of its charter that are fundamental to the structure of the organization.[49] The requirement that all the permanent members of the Security Council concur in any decision regarding admission or exclusion of states is clearly such a provision.[50] Second, the justification for the General Assembly's determining the question of representation incident to the accreditation process in the first place was the *necessity* to decide that question in order to decide *which* delegation's credentials to accept when rival claimants presented documents for accreditation. When there is no question as to *which* delegation's credentials to accept because there are no rival claimants in fact,[51] the need to decide the question of representation and consequently the authority to do so based on that necessity do not arise. Third, although as noted above, both the Communist bloc and the West have used the accreditation process to question the right of a particular government to represent the state even where there were no rival claimants, the practice was neither "settled" nor "unchallenged." There has always been "a minority view denying the power of the General Assembly and its Credentials Committee to inquire into the matter of repre-

[47] *Id.* at 31. [48] *Id.* at 32 (emphasis in original).

[49] *See* Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT'L & COMP. L.Q. 351, 375–80 (1976).

[50] That a decision by the General Assembly alone regarding membership would be contrary to the fundamental structure of the Charter is clear from the ICJ Advisory Opinion on *Admission of a State to the United Nations* (*see supra* notes 34–35 and accompanying text), and from the history of the negotiations preceding the adoption of Article 6 (*see supra* note 11). This was explicitly recognized by Legal Counsel in his opinion on the matter (*see supra* notes 14–15 and accompanying text), and was at least implicitly recognized by the General Assembly itself both in Resolution 396 (V) on representation, which is by its terms limited to "whenever more than one authority claims to be the government entitled to represent a state," and in its action with respect to South Africa from 1970 to 1974, when Edvard Hambro and successive Assembly Presidents interpreted the failure to accept South Africa's credentials as not barring it from participating in the Assembly's work.

[51] In arguing for the rejection of the credentials of South Africa, some states referred to General Assembly Resolution 3151G (XXVII), which declared that "the South African régime has no right to represent the people of South Africa and . . . the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people." 28 UN GAOR Supp. (No. 30) at 33, UN Doc. A/9030 (1973), *cited in* 29 UN GAOR Annexes (Agenda Item 3), *supra* note 33, at 3. They may have intended to argue thereby that in the case of South Africa, too, the determination of representation by the General Assembly was justified by the existence of rival claimants. There was, however, in fact no rival delegation claiming the right to represent South Africa.

sentation"; "member states have changed their legal position on the issue from one session to another"; and "on several occasions, in one and the same meeting of the Credentials Committee of the General Assembly, representatives of States have advocated the power in one case and denied it in another."[52] Finally, questioning the legitimacy of a government in the Credentials Committee of the General Assembly and barring the delegation sent by that government from participating in the work of the General Assembly are vastly different matters. Only in the case of South Africa has the General Assembly voted to reject the credentials of a delegation, let alone to bar the delegation from participating in the General Assembly's work, absent rival claimants. Thus, there was no prior practice, established or otherwise, of using the accreditation process to exclude a state from participating in the General Assembly.

Moreover, even the action with respect to South Africa was not interpreted by other commentators or by the various states that addressed the question in the General Assembly or the Credentials Committee as establishing a practice under which the accreditation process could be used by the General Assembly to exclude member states from participating. A student Note in the *Harvard International Law Journal,* while admittedly seeking to find "some basis in support for the General Assembly's action" with respect to South Africa, concludes that "[t]he precedential weight of the action, however, is in doubt. . . ."[53] In the United Nations, all the Western states that spoke on the question considered the Assembly's action illegal, including Australia, which believed that South Africa should be expelled and which had so voted when the matter was before the Security Council.[54] Those states that defended the Assembly's action stressed South Africa's adamant perpetuation of apartheid despite the repeated and universal condemnation of the practice as a crime against humanity.[55] None of the permanent members considered the action on South Africa as establishing

[52] Ciobanu, *supra* note 49, at 367. He further states:

> [N]ot only was there significant dissent in the General Assembly when Resolution 396 (V) was adopted, but in all individual cases that followed the adoption of this Resolution, the argument was made that the Assembly and its Credentials Committee had no power under the Charter to inquire into the matter of representation.

*Id.* at 367 n.74.

[53] *See* Note, *supra* note 36, at 588. The authors stress that "[i]n assessing the precedential value of the Assembly's suspension of South Africa it is important to remember that South Africa is in a number of ways a special case." *Id.* at 586. It has "institutionalized a system of differentiation and classification based on race" and has continued to administer Namibia in defiance of resolutions of the General Assembly and Security Council and of decisions of the International Court of Justice. *Id.* at 587.

[54] *See* 29 UN SCOR (1807th plen. mtg.) at 26–31, UN Doc. S/PV.1807 (1974).

[55] *See* 29 UN GAOR (2281st plen. mtg.), *supra* note 31, at 2–10 (Tanzania), 11–16 (Tunisia), 16–17 (Syria), 18–22 (Guyana), 22–25 (Yugoslavia), 31–35 (India), 43–52 (Philippines), 52–57 (USSR), 57–62 (Nigeria), 63–65 (China), 67–70 (Iraq), 71 (Kenya), and 98–100 (Nepal).

Most of the states that considered the Assembly action to be illegal also expressed their condemnation of apartheid. *Id.* at 25–30 (United Kingdom), 36–37 (United States), 37–42 (France), 66 (Guatemala, abstaining), 87 (Finland), 87–91 (France, speaking for the European Economic Community), 91–92 (Canada), 93–96 (Federal Republic of Germany), 96–97 (Australia), 97–98 (New Zealand), and 101 (Nicaragua and Austria).

a precedent for the exclusion of member states from the United Nations by the General Assembly through the accreditation process, rather than by the Security Council and General Assembly as provided for under Article 6. The United States, Great Britain and France denounced the action as illegal. The Soviet Union, while supporting the General Assembly's action against South Africa, characterized it as a "*sui generis* international trial of . . . *Apartheid* . . . a sort of second international Nuremberg trial."[56]

## V. SUMMARY AND CONCLUSION

In sum, under the specific provisions of the Charter, the admission to, expulsion from and suspension of membership in the United Nations can only be decided by a two-thirds vote of the General Assembly upon the recommendation of the Security Council. The International Court of Justice has held that this requirement of the Charter cannot be obviated even when the Security Council becomes immobilized as a result of the veto power. Although both the Communist bloc and the West have used the accreditation process to question the legitimacy of a particular government, that process has been used to preclude a member state from participating in the General Assembly only with respect to South Africa.

The legality of that action is open to serious question. However, even if one does not consider the General Assembly's exclusion of South Africa as illegal but views it as justified by that country's persistent and adamant practice of apartheid, the Assembly's action must be seen as sui generis, not as establishing a practice that substitutes the General Assembly for the Security Council as the UN organ empowered to suspend or expel members. Thus, it seems beyond cavil that the exclusion of Israel by a rejection of its credentials would have been illegal.[57] Nevertheless, the Assembly's decision not to consider Iran's

[56] *Id.* at 52–55. When the question of representation was before the *Ad Hoc* Political Committee in 1950, the Communist bloc opposed the Cuban resolution, which specified the factors to be considered by the General Assembly in determining which of two rival governments had the right to represent the state. Judge Lachs, then the representative of Poland, argued that the Assembly "merely had to decide as to the proper order of the credentials of representatives of governments exercising authority in their countries" and that it did not have "*the right to decide as to the legitimacy of the representation of member states.*" R. HIGGINS, *supra* note 16, at 148 (emphasis added).

The danger in the General Assembly's taking action contrary to the Charter, even in a situation that is sui generis, is that it will be viewed as a precedent on a subsequent occasion. In opposing the exclusion of South Africa, the representative of Nicaragua warned, "[T]his decision sets a precedent which endangers the existence of our organization and violates the principles of the U.N. Charter and the rules of procedure of the General Assembly." 29 UN GAOR (2281st plen. mtg.), *supra* note 31, at 101. The Arab states are apparently trying to bring Israel within the scope of the action on South Africa by resolutions stating, *e.g.*, that "Zionism is Racism," GA Res. 3379, 30 UN GAOR Supp. (No. 34) at 83–84, UN Doc. A/10034 (1975); and that Israel is not a "peace-loving state," GA Res. Es.A/9/1 (9th Emergency Sess. Feb. 9, 1982).

[57] This was also the position of the U.S. Congress (*see* H. Con. Res. 322 and S. Con. Res. 68, 97th Cong., 2d Sess. (1982)), and of the American Bar Association (ABA). A resolution of the ABA provides in pertinent part:

> The American Bar Association endorses the legal interpretations by the United States and other member states that the United Nations Charter, including Article 6, does not permit the suspension or expulsion, directly or indirectly, of any United Nations member state except upon a duly approved recommendation of the Security Council.

amendment was influenced at least as much by political as by legal considerations.[58]

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Resolved at ABA Annual Meeting, August 1975, reaffirmed June 1981. *See also* original text of H. Con. Res. 322, in *U.S. Participation in the United Nations (1982): Hearings and Markup on H. Con. Res. 322 Before the Subcomms. on Int'l Operations, Europe and the Middle East and on Human Rights and Int'l Orgs. of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 135–36 (1982). At the hearings on Resolution 322 Professor Richard Gardner stated: "But the use of the credentials process to deny Israel its rights in the General Assembly is a clear violation of international law." *Id.* at 42.

The appearance of a delegation presenting credentials issued by an authority purporting to represent the Palestinians in the disputed territories would not make the case one in which the General Assembly's authority to decide the question of representation might be justified by the necessity to decide between rival claimants. As stated earlier, the necessity and concomitant authority to decide which delegation's credentials to accept arises where two delegations present credentials emanating from different authorities, each claiming to be the government of the same member state. Whatever the rights of the Palestinians to the disputed territories, the right of Israel to exist as an independent state is beyond question. That right was affirmed by the United Nations in 1948, when it adopted the partition plan, GA Res. 181, UN Doc. A/519 (Jan, 8, 1948), and has been repeatedly reaffirmed by the United Nations since then, even in resolutions such as Security Council Resolution 242, 22 UN SCOR (1382d mtg.) at 8–9 (1967), providing for Israeli withdrawal from "territories occupied in the recent conflicts." If a Palestinian state is established in the territories occupied by Israel in the 1967 war, separate and apart from Jordan (which occupies the major portion of the territory that originally formed the Palestine Mandate and the majority of whose citizens are Palestinians), that state will, of course, have the right to apply for membership in the United Nations in accordance with the Charter, as any other state. But a delegation presenting credentials emanating from an authority purporting to be the government of the Palestinians in those territories would clearly not be entitled to represent the same state as the delegation representing Israel. Thus, the question of deciding which government's credentials to accept does not arise.

[58] The United States declared that if Israel was excluded it would withdraw and would not pay its share of UN expenses, which constitutes a substantial percentage of the United Nations budget; it was not clear that if put to a vote the amendment would pass; and some Arab states believed that the exclusion of Israel at this time would be harmful to the image they were seeking to project. *See* N.Y. Times, Oct. 13, 1982, at A10, col. 1; Oct. 14, 1982, at A15, cols. 1–6; and Oct. 17, 1982, a A1, cols. 1–4.

At the congressional hearings on U.S. participation in the United Nations, William J. vandenHeuvel, a former U.S. Ambassador to the United Nations stated:

> I can assure you there is no member of the United Nations who is not aware that were a successful effort made to exclude Israel from the General Assembly or any other agency of the UN, that the automatic and immediate response of the United States would be to suspend its participation in that body. While serving as United States Ambassador to the United Nations in Europe, I had to face such a challenge to the membership of Israel and Egypt in the World Health Organization. We made it clear what the United States' response would be . . . and because of the firmness of our position there was never a serious challenge offered. . . .

*House Hearings, supra* note 56, at 303.

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