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Accredito Ergo Sum: Reflections on the Question of Representation in the Wake of the Cambodian Representation Problem in the Fifty-Second Session of the General Assembly

Keywords

Organizations, South Africa, United Nations, Democracy, Politics

“ACCREDITO” ERGO SUM: REFLECTIONS ON THE QUESTION OF REPRESENTATION IN THE WAKE OF THE CAMBODIAN REPRESENTATION PROBLEM IN THE FIFTY-SECOND SESSION OF THE GENERAL ASSEMBLY

ORNA BEN-NAFTALI AND ANTIGONI AXENIDOU*

Between the Idea

And the Reality

Between the Motion

And the Act

Falls the Shadow

T.S. Elliott, *The Hollow Men*

I. INTRODUCTION

In the shadow land between the procedural rules of the United Nations General Assembly concerning the accreditation of individual delegates¹ and the substantive rules of admission of States contained in the

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1. The Rules of Procedure of the General Assembly do not contain a definition of credentials. Generally, however, credentials may be defined as the documentary evidence of a person's authority. Credentials are usually in the form of letters which on their face indicate the authority and capacity of the bearer. Rule 27 of the Rules of Procedure of the General Assembly provides, *inter alia*, that “[t]he credentials [of representatives] shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.” *Rules of Procedure of the General Assembly*, at 6, U.N. Doc. A/520/Rev.15 (1985) [hereinafter *Rules of Procedure*]. Thus, credentials for the General Assembly may be defined as a document issued by the Head of State or by the Minister for Foreign Affairs of a State Member of the United Nations submitted to the Secretary-General designating the

Charter,² lurks the unruly, quasi-rule political validation of representation by governments. Recently, Cambodia found itself obscured by these shadows once again and its seat in the fifty-second session of the General Assembly was vacant.³ The case of Cambodia offers a starting point for an analysis, both comparative and critical, of the problem of representation in the United Nations. The analysis suggests that, if the issue is to receive appropriate consideration, it must be brought to light as a substantive problem of legitimacy, rather than as a procedural matter of accreditation. It is further proposed that the time may have come for the United Nations to play its proper role as a collective legitimizing agent. A vacant seat means that while Cambodia remains a member State of the United Nations, the Cambodian people have no government authorized to represent them in the General Assembly as well as in other organs of the United Nations.⁴ This is a situation of

persons entitled to represent that Member at a given session of the General Assembly. Unlike the acceptance of credentials in bilateral relations, the question of recognition of a Government of a Member State is not involved, and substantive issues concerning the status of Governments do not [normally] arise. See 1971 U.N. Jurid. Y.B. 169-71, para. 3. See also *Scope of Credentials in Rule 27*, U.N. GAOR, Legal Counsel, 25th Sess., Annexes, Agenda Item 3, at 3, U.N. Doc. A/8160 (1970) [hereinafter *Statement by the Legal Counsel*].

2. See U.N. CHARTER art. 4, which sets out the principles of membership of States in the Organization and provides, *inter alia*, that membership "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." On the procedure for admitting new members into the Organization, Article 4 stipulates that such admission is to "be effected by a decision of the General Assembly upon the recommendation of the Security Council."

3. Two sets of credentials were presented to the Credentials Committee in September 1997, which was convened immediately after the opening of the Assembly session for the sole purpose of considering the question of Cambodia's accreditation. Following consideration of the issue, the Committee decided that the consideration of the Cambodian credentials should be deferred. In the United Nations, the issue of Cambodia's representation has surfaced in 1997 for the third time. The legitimacy of that Member State's representation was challenged first in 1973, and then in 1979. For a detailed discussion of those challenges, see discussion *infra* section III.

4. The effect of the decision of the Credentials Committee to defer a decision on the Cambodian accreditation is that, as no credentials for any Cambodian representatives have been accepted by the Committee or the General Assembly, and because the previous representative cannot automatically represent his country at the 52nd session, no representative of Cambodia can be seated provisionally pursuant to Rule 29 of the Rules of Procedure of the General Assembly. See *infra* notes 11, 37. As regards the other organs of the United Nations, each principal organ has its own rules and procedures for reviewing credentials of representatives authorized to participate in its work. See *Practice of the General Assembly with regard to the examination of credentials submitted by Member States*, 1985 U.N. Jurid. Y.B. 128 U.N. Doc. ST/LEG/SER.C/23. Consequently, decisions of the General Assembly concerning credentials are not automatically binding on the other principal organs. However, the decisions of the General Assembly with regard to the credentials of representatives of member States to sessions of the General Assembly provide authoritative guidance to other United Nations organs and conferences and, in

substantive consequences to the Cambodian people, to the status of Cambodia and to the authorities purporting to be the representative and legitimate government of Cambodia, yet one occasioned by a procedural decision to defer a decision as to which of the two rival delegations professing to represent Cambodia in the United Nations is to be accredited.⁵ The silence of the Charter on the highly political matter of representation has thus once again reverberated in the corridors of power, as the echo of the procedural decision underscores its substantive nature.

The issue of representation is substantively political because it arises whenever there is a challenge to the authority of a government. That challenge can be either internal (*i.e.*, emanating from a situation of competing authorities within the State), or external, when the legitimacy of a government is challenged from sources outside the country, (*i.e.*, governments of other States), but in both cases it questions the legitimacy of the government concerned.⁶ The legitimacy of a government, in turn, arguably rests both on its ability to control effectively the territory and receive habitual obedience from the bulk of the population and on the perception that the control it exercises and the obedience it receives signify that its order is worthy of acceptance and thus of recognition.⁷ Whereas effective control and routine obedience present variables open to a relatively objective verification process, the perception of the worthiness of a political order is a far more subjective standard. Never-

practice, the decisions adopted by these organs and conferences always conform to the attitude adopted by the General Assembly in dealing with questions concerning representation and credentials. *See also infra* text accompanying note 28.

5. *See supra* note 3.

6. An internal challenge concerns the situation in which two or more authorities, each claiming to be the lawful government of a member State, issue documents accrediting a delegation to the United Nations. In order to determine which delegation's credentials to accept, it must first be determined which of them is entitled to issue documents of accreditation on behalf of that State. However, the accreditation process has also been used to challenge the legitimacy of a government and its right to represent a member State in the United Nations even when no other rival government or authority exists. Thus, for example, following the 1956 Soviet invasion of Hungary, the legitimacy of the credentials of that State's representation was challenged in the United Nations by the West. *See* Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the United Nations General Assembly*, 7 CAL. W. INT'L L.J. 615, 621-22 (1977); *See also infra* note 72. For further discussion concerning the types of challenges to the representative nature of an authority purporting to be the legitimate government of a Member State of the United Nations, see *infra* text accompanying notes 14-15. Similarly, the legitimacy of the government of South Africa was challenged by the majority of the member States of the United Nations. In that case, the Assembly voted to reject the credentials of the South African delegation and to bar the delegation from participating in its work. *See also infra* text accompanying note 25.

7. J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (T. McCarthy trans., 1979), *quoted in* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 709 (1988).

theless, subjectivity is not tantamount to arbitrariness, and it is possible to construct yard-sticks for assessing the worthiness of a government.

The use of rules of procedure to provide solutions to substantive problems is not a phenomenon unique to the international legal system. In the context of the institutional framework of the United Nations, the silence of the Charter on matters of representation, arguably necessitates resort to other available means, including procedural rules, to enable the Organization to relate to developments in the international arena.⁸ It is true that the application of procedural rules to substantive problems may not provide for a smooth legal ride, but it does not necessarily follow that the procedural tires are flat and cannot reach their destination safely: if there is a legal framework which provides for fairly determinate rules and, if said rules are applied in a manner that is coherent and consistent, they can persuasively claim to offer a legitimate solution to the problem of legitimacy of governments described above.

But can the legal arena for the political contests be thus characterized? In attempting to answer this question, section II proceeds to outline the contours of the legal framework. The three challenges to the legitimacy of the Cambodian government offer an interesting perspective regarding the manner in which the rules within the legal framework have been applied over time in the Organization and are the focus of section III. The context of this discussion further allows for a comparative analysis with other cases where the United Nations was called upon to validate the legitimacy of alleged governments of Member States. This analytical review of practice allows for an assessment, in the concluding section, of the procedural resolution: is it but a legal mantle, designed to cover the nakedness of power-politics,⁹ and achieving that objective with as much success as the Emperor's new clothes, or is it a legitimate, even if imperfect, solution? Can it be improved?

8. According to Jhabvala,

[a]lthough the Charter is silent on this contingency [e.g., questions of rival governmental representations] and, in this sense has a 'gap', it cannot ignore such developments. The United Nations, being not only an important part of the international diplomatic scene, but also being composed of sovereign equal member-states, and being an arena where legal and political battles are waged, should develop procedures and rules to deal with this 'gap' within its constitutional framework.

Jhabvala, *supra* note 6, at 618.

9. Brierly's description of international law as no more than "an attorney's mantle artfully displayed on the shoulders of arbitrary power" may well apply to the procedural resolution of the accreditation question. J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 13 (quoting Sir Alfred Zimmermann), *quoted in* Franck, *supra* note 7, at 706.

II. THE LEGAL FRAMEWORK

There are three aspects of States' participation in the political organs of the United Nations: membership of States, representation of governments and credentials of delegates.¹⁰ The first aspect is regulated by relevant provisions in the Charter of the United Nations as well as by procedural rules;¹¹ the second aspect is regulated by rules of procedure;¹² and the third representation aspect is unregulated in either the Charter or the rules of procedure.¹³

Theoretically, the silence of the Charter on the question of representation may be construed in two ways: either there is no *lacuna* and that which appears unregulated, in substance does express a legal regime wherein the United Nations is not empowered to pronounce on the

10. See, e.g., R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 151 (1963).

11. See *Rules of Procedure*, *supra* note 1. See also *Rules of Procedure*, *supra* note 1, at 29-30, comprising Rules 134 through 138, and dealing with the admission of new members to the United Nations.

12. Rules 27 through 29 of the Rules of Procedure entitled "Credentials" provide as follows:

Rule 27: Submission of credentials

The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the date fixed for the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

Rule 28: Credentials Committee

A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.

Rule 29: Provisional admission to a session

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

Rules of Procedure, *supra* note 1, at 6-7.

13. This aspect of representation of governments, however, involving a decision as to the legitimacy of an authority purporting to be the government of a Member State of the United Nations has arisen several times in the history of the Organization, as is detailed below. Since the United Nations is composed of sovereign Member States and provides the arena where political, legal and procedural battles are waged, there is a need for a legal regime to regulate the decision on the legitimacy of such an authority. Without such a regime, the substantively political issue of representation is dealt with in the same manner and by the same rules governing the procedural and formal issue of credentials, to the detriment of the ability of the Organization to deal with both issues satisfactorily. On the relations between approval of credentials of a representative by the General Assembly and the legitimacy of the government issuing the credentials, see, for example, H. KELSEN, *THE LAW OF THE UNITED NATIONS*, 947 (1964).

representational rights of governments, or, there is a *lacuna* which cannot be tolerated and has to be filled. Ironically, while the first approach rests on an expansive view of law, as it deems that nothing is ever beyond law's reach, its application in practice has an effect as restrictive as it is unsatisfactory: it deprives the Organization of the ability to respond to challenges to the representational rights of governments. As such challenges do arise in practice and require a determination on the part of the United Nations, lest it loses its viability to react to important developments, the second approach has been overwhelmingly embraced, and the main effort had been directed at devising ways and means for bridging the gap.¹⁴ This effort has produced a legal regime designed to deal with problems of representation.¹⁵

Our analysis suggests that a legal regime governing questions of representation has to relate to the following elements: (i) definition of the problem: the type of challenges to representation to which the regime applies; (ii) determination of the best available means within the existing institutional framework for resolving challenges to representation; (iii) articulation of the criteria to be applied in making a decision; (iv) choice of the appropriate forum for decision-making; and, (v) delimitation of the type of actions to be taken and the consequences to be emanating therefrom. A determination of each of these elements affects the rest. The remaining part of this Section offers an analysis of each of these elements, as well as of the manner in which they are interrelated.

As regards the definition of the problem, two types of challenges to the representative authority of a purported government may arise: an internal challenge emanating from a situation of competing authorities each claiming to be the legitimate agent for the State, and an external challenge to the legitimacy of a sole authority.¹⁶ The latter may be divided into two subcategories: 1) doubting the very existence of the objective prerequisites of the authority, and 2) questioning its subjective qualifications.¹⁷ Each and every type of challenge raises the issue of

14. The need for the distinction between credentials and representation and the subsequent need to fill the lacuna, was initially brought up by Cuba in the context of the Chinese representation problem. For Cuba's letter to the Secretary-General stating, *inter alia*, that "the distinction between credentials and representation is an undeniable legal and political reality," see U.N. GAOR, Annexes, Agenda Item 61, U.N. Doc. A.1308 (1950). Thereafter, there have been several attempts to devise a legal regime. See, e.g., *Letter Dated 8 March 1950 from Secretary-General to President of Security Council Transmitting a Memo on Legal Aspects of Problems of Representation in United Nations*, U.N. SCOR, 5th Sess., Supp. Jan.-May 1950, U.N. Doc. S/1466 (1950) [hereinafter *Secretary General Letter*]; *Recognition by the United Nations of the Representative of a Member State*, G.A. Res. 396(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (1950); *Statement by Legal Counsel*, *supra* note 1.

15. *Id.*

16. See *supra* note 6.

17. See *supra* note 7. This is so because legitimacy is based on both the objective cri-

representation and arguably all have to be determined by the application of identical criteria,¹⁸ but only the internal challenge arises directly in the context of the accreditation process.¹⁹ One consequence of this categorization is that both the means and the forum best suited to deal with representation issues should be able to encompass all types of challenges to representation.

Within the institutional framework of the United Nations, the means best suited for resolving the problem as defined above would have been an amendment to the Charter, supplemented by an amendment to the rules of procedure of both the Security Council and the General Assembly.²⁰ Such an amendment could have encompassed all types of challenges to representation, related accordingly to the other relevant aspects of the issue, including the substantive criteria for the determination of each type of challenge and an indication of the appropriate forum to apply said criteria. Such an amendment could have further eliminated the risk of a legal regime wherein procedural rules are extended to respond to substantive political issues in a manner that may contravene the basic principles of the Charter, ranging from intervention in the domestic affairs of States to the separation of powers between the Security Council and the General Assembly. Alas, this potentially most comprehensive, determinate and coherent option is yet to be translated into a reality in the institutional life of the United Nations.²¹

terion of the governments' ability to exercise effective control over the territory and enjoy habitual obedience from the bulk of the population and the subjective criterion involving the perception of the worthiness of its control over the land and the people.

18. Jhabvala, *supra* note 6, at 630.

19. Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 AM. J. INT'L L. 179, 183 (1984).

20. Jhabvala, *supra* note 6, at 619.

21. It should be noted, however, that the Charter may be construed as providing a legal guidance for dealing with questions of representation whereby the Security Council is empowered to determine, in the context of its discussion on matters affecting peace and security, that a government does not exist or, perhaps, even that it is not otherwise legitimate. Thus, for example, in the case of Somalia, the position of the Security Council is that no government is currently functioning in Somalia. See, for example, S.C. Res. 897, U.N. SCOR, 3334th mtg., U.N. Doc. S/Res/897 (1994) and S.C. Res. 954, 49th Sess., U.N. SCOR, 49th Sess., 3447th mtg., U.N. Doc. S/Res/954 (1994), in which the Security Council referred to "exceptional circumstances, including, in particular, the absence of a government in Somalia." See also S.C. Res. 865, U.N. SCOR, 48th Sess., 3280th mtg. at 2, U.N. Doc. S/Res/865 (1993), in which the Security Council noted with great concern "the absence of law enforcement and judicial authorities and institutions in the country as a whole." As a result, there is no government which can represent Somalia in the United Nations, and credentials issued by authorities claiming to represent Somalia would not be accepted by the Secretariat. Such determination by the Security Council, however, while affecting representation, is incidental to the main issue before the Security Council and cannot be construed as representing a legal regime designed specifically to deal with matters of representation.

A second best alternative in terms of normativity would have been an amendment to the rules of procedure. In practice, however, the means adopted as the vehicle articulating the legal regime to be applied to the question of representation was a General Assembly resolution.²² Consequently, the legal regime thus established was constrained *ab initio* by that which is within the competence of the General Assembly to decide upon in light of the principles and provisions of the Charter.²³ Indeed, the General Assembly seems to have been cognizant of this constraint when it limited the applicability of the regime established in its resolution to "whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes a matter of controversy in the United Nations."²⁴ It follows that the legal regime that was being established to regulate representation questions was consciously limited to one type of challenge to the representative authority of a government, that emanating from within. This limitation was further emphasized by the Legal Counsel of the United Nations in his statement on the "scope of 'Credentials' in Rule 27 of the Rules of Procedure of the General Assembly." Here the point was made that the rejection of credentials of a

22. G.A. Res. 396(V), *supra* note 14, at 24-25. The operative parts of the General Assembly resolution read as follows:

1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;
2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;
3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;
4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;
5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate.

23. The legally binding nature of the General Assembly's resolutions in general, and in this context in particular, has been amply discussed elsewhere. *See, e.g.*, Christopher C. Joyner, *UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981); B. Sloan, *General Assembly Resolutions Revisited (Forty Years Later)* 58 BRIT. Y.B. INT'L L. 39 (1987); P.C. Szasz, *General Law-Making Processes*, in 1 UNITED NATIONS LEGAL ORDER 35, 62-67 (Oscar Schachter & Christopher C. Joyner eds., 1995).

24. *See* G.A. Res. 396(V), *supra* note 14, at para. 1.

delegate of a government where there are no rival claimants is outside the scope of Rule 27 of the Rules of Procedure and would, in effect, violate the Charter.²⁵ This conclusion remains valid today despite the existence of various instances where external challenges to the legitimacy of governments have been raised in the context of examining the credentials of their delegates by the General Assembly.²⁶ This is so because the only common denominator of that practice is that it has been as inconsistent as it has been contested. Such a practice lacks the essential characteristics of a legal regime.²⁷

25. The statement by the Legal Counsel on the "Scope of Credentials in Rule 27 of the Rules of Procedure of the General Assembly," which was submitted to the President of the General Assembly at its request, separates the issue of credentials to an international organization from that of recognition of a government of a Member State. It further distinguishes between cases where there are rival claimants and where there are no such rivals and asserts that,

[s]hould 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 . . . [T]he 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 . . . be contrary to the Charter.

Statement by the Legal Counsel, supra note 1. This statement by the Legal Counsel has been criticized by Jhabvala, *supra* note 6, at 633-35.

26. Thus, for example, the South African government representatives were prevented from representing that country in the General Assembly in 1974 and 1981 by a rejection of their credentials by a majority in the General Assembly. Consequently, South Africa found itself in a position similar to that of a Member State suspended from the exercise of the rights and privileges of membership under Article 5 of the Charter. On the South African question and the rejection of South Africa's credentials, see, Abbott et al., *The De-credentialization of South Africa*, 16 HARV. INT'L L.J. 576 (1975); Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT'L & COMP. L.Q. 351 (1976); Gerhard Erasmus, *The Rejection of Credentials: A Proper Exercise of General Assembly Powers or Suspension by Stealth?*, S. AFR. Y.B. INT'L L. 40 (1981); Jhabvala, *supra* note 6, at 633; E. McWhinney, *Credentials of State Delegations to the UN General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa*, 3 HASTINGS CONST. L.Q. 19 (1976); M.E. Muller, *Discussions and Resolutions on South Africa in the United Nations - 1979*, 5 S. AFR. Y.B. INT'L L. 164 (1979). A similar, albeit unsuccessful attempt was made in 1982 to exclude Israel from participating in the United Nations through the accreditation process. See Halberstam, *supra* note 19.

27. Thus, for example, the decision of the majority of the General Assembly to prevent the participation of South Africa in its work at the 29th session was not consistent with the previous practice of that body in the years 1970 to 1974, in which South Africa continued to participate under the 1970-ruling from E. Hambro, the Norwegian President of the General Assembly, even after the delegation's credentials had been rejected. See *supra* note 25. The previous practice of the Assembly so far does not demonstrate an *opinio juris* of its members as to the legal effect of the rejection, or even the challenge, of the credentials of a delegation. Instead, "[g]enerally speaking, member States have adopted one stand or the other according to the circumstances of individual cases, and it

The General Assembly, having thus undertaken to establish a legal regime governing challenges to representation stemming from the existence of more than one authority claiming to be the government of a member State, proceeded to articulate the criteria by which a decision will be made. According to paragraph 1 of resolution 396 (V), such questions shall be considered "in light of the Purposes and the Principles of the Charter and the circumstances of each case."²⁸ The indeterminate nature of this standard, achieved after more concrete proposals, ranging from a detailed articulation of the objective test²⁹ to the enumeration of yard-sticks for the evaluation of the subjective aspect of legitimacy³⁰ have been rejected.³¹ This indicates that member States have opted for a political, rather than a principled, decision.³² Indeed, the resolution stands in stark opposition to a 1950 memorandum of the Secretary-General on "the Legal Aspects of the Problem of Representation in the United Nations."³³ This memorandum suggested that the decision on representation should favour the claimant which exercises

seems that in making their decisions they were motivated by political, rather than legal, considerations." See Ciobanu, *supra* note 26, at 368. Ciobanu further observes that, not only is the practice far from settled or undisputed, but 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 or the General Assembly, representatives of States have advocated the power . . . [to inquire into the matter of representation] and denied it in another." *Id.* at 367. Accordingly, such inconsistent practice cannot be said to provide for a legal regime.

28. See G.A. Res. 396(V), *supra* note 14.

29. Thus, for example,

[a] British proposal had recommended that 'the right of a government to represent the Member State' in the United Nations be recognized if it 'exercises effective control and authority over all or nearly all the national territory, . . . in such a way that this control, authority and obedience appear to be of a permanent character.'

See Jhabvala, *supra* note 6, at 631 (citing U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 6, 8, U.N. Doc. A/1308 (1950)).

30. It is also worth noting that, pursuant to a proposal by Cuba, representation questions [would] be decided in the light of (1) effective authority over the national territory, (2) the general consent of the population, (3) ability and willingness to achieve the purposes of the Charter, to observe its principles, and to fulfill international obligations of the state, and (4) respect for human rights and fundamental freedoms.

Id. (citing U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 5, U.N. Doc. A/1308 (1950)). Also see the recommendations of the subcommittee, to which the question of the representation of a Member State had been referred, "that 'effective control over the territory,' general acceptance by the population, willingness to accept Charter responsibilities, and the extent to which the authority in question had been established through 'internal processes in the Member State' be 'among the factors to be taken into consideration.'" *Id.* at 631-32.

31. Jhabvala, *supra* note 6, at 630-35.

32. *Id.*

33. Secretary General Letter, *supra* note 14.

effective control over the territory and enjoys habitual obedience by the bulk of the population.³⁴ This document thus proposed to limit the decision to the objective component of the legitimacy of an authority claiming to represent a member State and competent to issue credentials. The resolution of the General Assembly, however, is otherwise predisposed. The indeterminacy of its standard does allow for flexibility, but forfeits the very objective of establishing criteria for decision-making that can be viewed as legitimate.

Nevertheless, there are several limits to the free reign of politics in determining questions of representation inherent in both the definition of the subject-matter and in the competence of the organs establishing the legal regime. The authority of the General Assembly is limited by the normative superiority of the provisions and principles of the Charter, as indeed is acknowledged in resolution 396 (V). It follows that the Charter's delineation of powers between the General Assembly and the Security Council, as well as the principle enshrined in Article 2(7) of the Charter safeguarding the domestic jurisdiction of States from intervention by the United Nations, would operate to limit its capacity to determine the issue of representation.³⁵ Furthermore, the consequence of defining the subject-matter as relating exclusively to an internal challenge to the legitimacy of a purported government, was that whatever substantive criteria were to apply, their application would be limited to the need to decide between rival authorities.³⁶ That need arises, as a matter of course, during the accreditation process which requires a determination on representation.³⁷ This process is governed by existing Rules of Procedure, which thus present a further limitation on the decision-making process.³⁸ Indeed, the genesis of the General Assembly's resolution 396(V) points to the link between the subject-matter and accreditation,³⁹ and the above-mentioned statement of the

34. *Id.*

35. See Marc B. Dorfman, et al., *United Nations 28th Session, Notes: Cambodian Representation*, 15 HARV. INT'L L.J. 495, 498-500 (1974).

36. See G.A. Res. 396(V), *supra* note 14, at para. 1 (referring to the situation in which "more than one authority claims to be the government entitled to represent a Member State in the United Nations.").

37. See *supra* note 12 for Rules 28-29 of the rules of Procedure of the General Assembly. The issue of the appropriate forum for the determination of representation questions is discussed *infra* text accompanying notes 44-65.

38. *Id.*

39. General Assembly Resolution 396(V) is the offspring of the Chinese representation question. At the request of the Cuban representative, the question of recognition by the United Nations of the representation of a government was placed in the agenda of the 5th session of the General Assembly. In his letter, the Cuban representative explained that,

[t]he item proposed to the General Assembly's consideration does not refer only to the formal problem of credentials, but to the problem that arises with regard to the legality of the representation of a Member

Legal Counsel regarding the scope of Article 27 of the Rules of Procedure further emphasized the limiting effect of this link.⁴⁰ The Legal Counsel's statement defined "credentials" as "a document issued by the Head of State or Government or by the Minister of Foreign Affairs designating the persons entitled to represent that Member at a given session of the General Assembly," and proceeded to draw a distinction between the substantive issue concerning the status of a Government of a member State and the issue of credentials.⁴¹ It further affirmed the practice of piercing beyond the technical issue of credentials into the identity of the authority issuing them in instances involving rival claimants, and, in light of Article 5 of the Charter, limited that action only to such instances.⁴²

Implicit in the Legal Counsel's reference to the precedents of the Congo and Yemen, where the question as to which claimant represented the true government of a State arose in connection with the examination of credentials, was the acceptance of the objective criterion that had been employed in both instances to answer that question.⁴³ The preference accorded to the objective criterion is further underscored by the conspicuous absence of any reference to the General Assembly's resolution 396(V) in the statement of the Legal Counsel. The analysis of the Statement by the Legal Counsel thus suggests that it had attempted to strengthen the nexus between the internal challenge to the legitimacy of a government and the procedural aspect of accreditation of individuals and to weaken the link between that challenge and the substantive aspects of membership of a State. As resolution 396(V) adopted language quite reminiscent of the language of Article 4 of the Charter, the only conclusion that can be reached is that the Legal Counsel attempted subtly to limit recourse to the broadly subjective criteria of the resolution and to encourage resort to the narrower objective

State; that is when the United Nations has to decide which government has the right to represent that State in the Organization.

Recognition by the United Nations of the Representation of a Member State, U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 4, U.N. Doc. A/1308 (1950). Following consideration of and debate on this item by the *Ad Hoc* Political Committee of the General Assembly and a subcommittee, the Assembly adopted the report that was submitted to it by the *Ad Hoc* Political Committee which also included the draft that became General Assembly Resolution 396(V). See *supra* note 14. In the absence of guidelines both in the Charter and the Rules of Procedure in matters of rival claimants and contested representation, the Resolution was intended to fill the *lacuna*, but it contains only general, vague criteria for such determination.

40. See *Statement by the Legal Counsel*, *supra* note 1.

41. *Id.* at para. 3.

42. *Id.*

43. On the question of the Congo representation, see *infra* text accompanying notes 106-113; on the matter of the Yemen representation, see *infra* text accompanying notes 103-105.

criterion of effectiveness in resolving matters of representation.

The nexus between representation and accreditation is also apparent in the choice of the appropriate forum for determining which rival authority represents the State. The question of representation may come up before any of the organs of the United Nations or those of its Specialized Agencies. In order to prevent conflicting decisions, the General Assembly appointed itself as the organ whose determination of such questions "should be taken into account in other organs of the United Nations and in the Specialized Agencies."⁴⁴ In the General Assembly, the issue may arise as a separate agenda item in the Plenary Session,⁴⁵ or in a Special Committee appointed by the General Assembly to consider the matter, or in the Credentials Committee.⁴⁶ A decision taken by each such forum ultimately must decide between the comparative merits of the competing claims. However, the competence of the Credentials Committee is limited by the Rules of Procedure governing its consideration in ways in which the deliberations of the General Assembly or of a Special Committee created by the General Assembly are not.⁴⁷

The net result of the above is that if the decision is channeled to the Credentials Committee, the applicable standard should be limited to

44. See G.A. Res. 396(V), *supra* note 14, at para. 3. Indeed, in practice, such questions are referred to the General Assembly by both the Security Council and the Specialized Agencies.

45. The question of rival credentials and the legitimacy of the authority issuing them can be presented either as a credentials question at the annual review of credentials by the Credentials Committee or be considered under a separate agenda item by the General Assembly. The former has the advantage of providing an already existing forum which would consider the question as a procedural issue, rather than as a substantive question of representation which might be blocked by the restriction in Article 2(7) of the Charter concerning intervention in the domestic affairs of a member State. On the manner in which this issue was dealt with in the first phase of the representation of Cambodia, see *infra* text accompanying note 113. See also *Statement by the Legal Counsel, supra* note 1, at para. 4, which states that,

[w]hile the examination of credentials, both in the Credentials Committee and in the General Assembly, is a procedural matter limited to ascertaining that the requirements of Rule 27 have been satisfied, there have nevertheless been a few instances involving rival claimants where the question of which claimant represents the true government of the State has arisen as a substantive issue. This issue of representation may, as in the case of the Republic of Congo (Leopoldville) at the fifteenth session and Yemen at the sixteenth session, be considered in connection with the examination of credentials, or it may, as in the case of China, be dealt with both in connection with credentials and as a separate agenda item.

46. See *Statement by the Legal Counsel, supra* note 1, at para. 4.

47. This is so because the only relevant rules of procedure, i.e., those concerning credentials, apply to the Credentials Committee and not to the General Assembly or its Special Committee. Accordingly, the deliberations of those latter organs are not limited by those procedural rules.

the objective aspect of the legitimacy issue, inquiring into the comparative effectiveness of the claimants.⁴⁸ If, however, the issue comes up before the General Assembly or before a Special Committee, the more vague criteria of resolution 396(V) are likely to be employed. While the concept of legitimacy does encompass both objective and subjective aspects, the application of the objective criteria does not necessarily yield the same result as the application of the subjective standard. This is so because, analytically, a claimant may be both effective and worthy of the obedience it commands; it may be either effective or worthy of obedience and it may be neither. While it is possible to minimize the potential for conflicting results by a clear determination of the components comprising the subjective standards, resolution 396(V) did not make this determination.

The final element in the construction of a legal regime to govern the question of representation concerns the delimitation of the types of action that may be taken and the consequences emanating therefrom. Here, the governing rules are the following: if a problem of representation is raised in the context of the Credentials Committee, the Committee may decide that a claimant authority is a representative government and approve the credentials of its delegates. The Committee may also decide that the claimant authority is not a representative government and reject the credentials of its delegates, or it may decide to defer its decision.⁴⁹ Having determined the matter in any of these ways, the Committee reports its decision to the General Assembly and includes in its report a draft resolution.⁵⁰ The General Assembly proceeds to resolve whether to approve the report as is, to amend it, or to reject it.⁵¹ The Committee does not, however, resolve on matters of representation that have come before the Credentials Committee prior to the latter's submission of its report.⁵² A similar process occurs if and when a Special Committee is entrusted with deliberating a matter of representation.⁵³ Finally, the General Assembly may discuss representation as a special item on its agenda and, in this case, its determination is not contingent upon submission of a report by the Credentials Committee.⁵⁴

The consequence of a decision to accept the representative nature of an authority is that the credentials issued by said authority entitle its delegates to represent the State in the organs of the United Nations and its Specialized Agencies, according to the particular specifications

48. On the components of "legitimacy," see *supra* text accompanying notes 6-7.

49. See Dorfman, *supra* note 35, at 501-02. For the practice of the Credentials committee, see also Rules 28 and 29 of the *Rules of Procedure*, *supra* note 12.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Rules of Procedure*, *supra* note 12, at Rules 28 and 29.

54. *Id.*

of the credentials.⁵⁵ The result of a negative decision on representation is that the State will not be represented in the United Nations system.⁵⁶ Pending a decision, and pursuant to Rule 29 of the Rules of Procedure of the General Assembly, the delegates whose participation has been challenged continue to represent the State on a provisional basis.⁵⁷ It follows that a decision not to decide at a particular point in time, often motivated by a wish to await for the conclusion of a domestic battle, itself expresses a choice which favors the incumbent authority.⁵⁸ If, however, the delegates whose participation is challenged have not been fully and specifically authorized prior to the challenge to represent the State in all organs of the United Nations, no representative of the State may be seated provisionally pursuant to United Nations practice.⁵⁹ The practical result in this latter circumstance is identical to that emanating from a negative decision on the representational nature of the authority purporting to be a government, though the symbolic significance of each decision may be quite distinct.⁶⁰ In summary, it appears that the legal framework established for resolving the issue of representation provided for the following: 1) it defined the issue as one emanating from an internal challenge and did not give guidance for dealing with external challenges; 2) it was set up in the form of a General Assembly resolution and was thus inherently limited in both scope and substance by the normative superiority of the Charter; and 3) it determined that the most appropriate forum for deciding the issue is the General Assembly, inclusive of its relevant committees.⁶¹

55. *Id.*

56. *Id.*

57. See *Rules of Procedure*, *supra* note 1. For the text of the Rule, see *supra* note 12.

58. The incumbent delegate continues to participate so long as no determination is made on challenged credentials. While such participation is indeed provisional, it is nevertheless the candidate that continues to represent the State and not the delegate of the rival government.

59. This is, for example, the case of Prince Sisowath Sirirath, whose credentials had been signed in 1993 by King Norodom Sihanouk, and who had been for the following four years Cambodia's Permanent Representative to the United Nations. Prince Sisowath Sirirath was one of the supporters of the former First Prime Minister, Prince Ranariddh. Pursuant to his credentials, Prince Sisowath Sirirath was accredited only to the United Nations, which in United Nations usage means that he was not *per se* accredited to sessions of the General Assembly. He could not, therefore, automatically benefit from the application of Rule 29 of the Rules of Procedure in his case and be seated provisionally at the 52nd session of the General Assembly. See *Representation of a Member State in Organs of the United Nations - Requirement of Full Powers under the Rules of Procedure of the Principal Organs of the United Nations - Designation in the Credentials of Permanent Representatives of the Organs before which they are authorized to act*, 1977 U.N. Jurid. Y.B. 191, U.N. Doc. ST/LEG.SER.C/15.

60. This is so because a negative decision, unlike a deferment of a decision, in effect, delegitimizes the previous government and confers legitimacy on the new government.

61. See *supra* text accompanying notes 46-47.

The most relevant committee in both theory and practice is the Credentials Committee and thus the link between the representative nature of a government and the credentials of its individual delegates was strengthened, whereas the link between the representational nature of a government and the membership of the State it purports to represent was weakened. The net result of the above was that the means most likely to determine the issue of representation were procedural and a further limitation on the decision-making process thus emanated from the existing Rules of Procedure which govern the deliberations of the Credentials Committee. However, the substantive criteria according to which the determination was to be made were inconsistent with the procedural means adopted and, potentially, with the substantive provisions of the Charter and the institutional structure of the United Nations.⁶² Decisions on representation made "in light of the Principles and Purposes of the Charter and the circumstances of each case"⁶³ are bound to generate more political heat than legal light. Indeed, the impregnation of existing procedural rules with political seeds tends to produce rather androgynous off-springs and more problems than solutions. In lieu of clarifying the decision-making process, the standard articulated in resolution 396(V) further confused the relative positions of the components of the "unholy trinity" of membership (States), representation (governments) and accreditation (individuals) and, in the process influenced the composition of the Credentials Committee and rendered it contentious.⁶⁴

The legal framework thus appears to be somewhat short of achieving its objective. Insofar as the very purpose of establishing a legal regime is to provide such guidance, it is our understanding, to paraphrase Gertrude Stein, that the General Assembly has undertaken to over-

62. See *supra* text accompanying notes 35-42.

63. See *supra* text accompanying note 23.

64. In accordance with Rule 28 of the Rules of Procedure, the Credentials Committee consists of nine members appointed at the beginning of each session by the General Assembly on the proposal of the President. *Rules of Procedure, supra* note 1, at 6. Rule 28 does not mention any geographical distribution. However, for more than twenty years, the Committee has traditionally consisted of representatives from China, the Russian Federation/USSR, the United States, two Member States each from Africa and Latin America, and one Member State each from Asia and from Western Europe. During the 51st session, the President of the Assembly, Mr. Razali Ismail, Permanent Representative of Malaysia to the United Nations, had questioned what he termed the permanent membership on the Committee of China, the Russian Federation and the United States, and the absence from the Committee of representatives of Arab States. Nevertheless, the membership of the Credentials Committee for the 52nd session of the General Assembly was comprised of representatives from countries of the same geographical regions and consisted of representatives from the following Member States: Argentina, Barbados, Bhutan, Cote d'Ivoire, Norway, Russian Federation, United States of America and Zambia. See U.N. GAOR, Cred. Comm., 52d Sess., Agenda Item 3, U.N. Doc. A/52/719 (1997).

throw its undertaking.⁶⁵ Nevertheless, a legal framework, imperfect as it was, had been established. It remains to be determined whether the practice of the United Nations has enhanced principled consistency or political expediency, and whether it has augmented or diminished the United Nations' ability to command respect for the validation it bestows on governments. It is into the review of this practice, through the prism of the question of Cambodia's representation, that we now turn.

III. THE REPRESENTATION OF CAMBODIA

It was once observed that the people of Crete make more history than they can consume.⁶⁶ That observation holds true of many other countries and peoples and the story of Cambodia is one such case. In the context of the United Nations' validation of representative governments, Cambodia is thus far the only State the representative authority of which was challenged from within on three occasions.⁶⁷ The analytical review of these challenges, interwoven with other cases for comparative purposes, thus offers a comprehensive perspective for the study of the practice of the United Nations as it relates to matters of representation involving rival claimants.

A. *First Challenge - 1973*

The roots of the 1973 challenge to the representative nature of the government of Cambodia were grounded in a coup staged by the then Prime Minister, General Lon Nol, against the then Head of State, Prince Sihanouk.⁶⁸ Economic discontent and political disquiet generated by hostility towards the presence of the North Vietnamese and Viet-Kong troops in the Eastern provinces of the country weakened the Prince's hold over the country and prompted the American-backed General to use the opportunity of the Prince's absence from the country to oust him as Head of State on March 18, 1970. The action was unanimously endorsed by the National Assembly and the symbolic seal of the new order was the change of the name of the State to "The Khmer Republic."⁶⁹ The new government issued the credentials of its delegates to the United Nations.⁷⁰ They met with no challenge, were accepted by

65. One of Ms. Stein's famous quips was: "I understand you undertake to overthrow my undertaking." BARNES & NOBLE, BOOK OF QUOTATIONS, 201 (R.I. Fitzhenry ed., 1987).

66. "SAKI" (H.H. MUNRO), THE CHRONICLES OF CLOVIS (1911).

67. The first challenge to the representative authority of the Cambodian Government occurred in 1973 and is analyzed.

68. For a factual account, see Dorfman, *supra* note 35, at 496-97.

69. *Id.* at 495; John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971).

70. G.A. Res. 2636 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 6, U.N. Doc. A/8028

the Credentials Committee and endorsed by the General Assembly.⁷¹

This acceptance of the credentials issued by a new government which came into being following a radical change of regime reflected common practice in the United Nations. In all previous such instances, including cases where the new government clearly owed its being to the armed intervention of a foreign power, the government was regarded as the legitimate authority of the State. This practice underscores the preference given to the objective criterion of effective control over other conceivable considerations.⁷² The situation when there is an internal

(1970), revised by U.N. Doc. A/8028/Corr. 1.

71. *Id.*

72. Following a coup d'état in Czechoslovakia in 1948 and in Cuba in 1959, the new governments sent their delegates to the United Nations and, as there was no internal challenge to their legitimacy, the delegates were accredited as a matter of course. See, e.g., *Resolutions Adopted by the General Assembly: Verification of Credentials*, U.N. GAOR, 3d Sess., Res., pt. I, U.N. Doc. A/810 (1948). In the case of Czechoslovakia, the Security Council, following a Chilean initiative, did adopt a resolution inviting the ousted Permanent Representative of Czechoslovakia to participate in its deliberation. It did so under Rule 39 of its Rules of Procedure, which concerns the Security Council's right to invite members of the Secretariat or other persons to supply it with information in the examination of matters within the Council's competence. See *Provisional Rules of Procedure of the Security Council*, U.N. Doc. S/96/Rev.7 (1982). Accordingly, no issue of representation was further raised. See U.N. SCOR, 3d Sess., No. 36-51, 268th mtg., at 106-110 (1948). Note further that the same practice continued in later years, as illustrated, by the acceptance of the credentials of the delegates of Chile's Pinochet Government in 1973. Indeed, even when the new government owed its power and was in effect set up by a foreign State, subject to snide comments made by States on the opposite side of the political fence, the credentials issued by these governments were normally accepted by the Organization without much ado about representation. This was evidenced in the cases of Afghanistan following the armed intervention by the Soviet Union. For the case of Afghanistan, see U.N. GAOR, Cred. Comm., 35th Sess., Annexes, Agenda Item 3, addendum 1, 2, U.N. Doc. A/35/484 (1980). For the case of Grenada, following the armed intervention by the United States in 1983, see U.N. GAOR, Cred. Comm., 35th Sess., Agenda Item 3, addendum 1, U.N. Doc. A/39/574/Add.1 (1984), which was approved by the Assembly in G.A. Res. 39/3B (1983). Note also that, in the case of Panama following the 1989 fall of Noriega, the Security Council met at the end of 1989 to discuss the situation and was requested by representatives of both the new government and the previous government to be invited to the discussion. The Secretary-General reported that he was not in a position to assess the factual situation. See U.N. SCOR, 44th Sess., at 3, U.N. Doc. S/21047 (1989). The issue was resolved when both claimants gave up being heard. See U.N. SCOR, 44th Sess., U.N. Doc. S/PV.2902 (1989). The General Assembly took no action on the report of the Credentials Committee in its 45th session and, by its Decision 45/55 taken at its 72nd plenary meeting on December 21, 1990, it decided to retain item 3(b) in its agenda. Item 3(b) concerned the report of the Credentials Committee. For the report of the Credentials Committee, see U.N. GAOR, Cred. Comm., 45th Sess., Annexes, Agenda Item 3, U.N. Doc. A/45/674 (1990). For the Assembly decision, see U.N. GAOR, 45th Sess., vol. I, Supp. No. 49A, U.N. Doc. A/45/49 (1990). The only exception to be noted in this context concerns the challenge to the credentials issued by the Government of Kadar, established with the support of the Soviet armed forces in Hungary in 1956. Beginning at the eleventh session of the General Assembly and for seven years thereafter, the representative nature of the Kadar government was challenged by Chile. In each instance the General Assembly de-

challenge to the legitimacy of a revolutionary regime is, however, far less clear.

Such a challenge was presented to the government of Lon Nol when, on May 5, 1970, the ousted Prince Sihanouk announced from his Peking refuge, the formation of a rival government, the Royal Government of National Union in Cambodia (hereinafter RGNUC).⁷³ The situation on the ground at the time was unclear. General Lon Nol, assisted by both South Vietnam and the United States was attempting to drive the North Vietnamese troops from the Eastern provinces of Cambodia.⁷⁴ The latter joined forces with native Khmer forces in a fight against Lon Nol's army and it was on their allegiance that Prince Sihanouk relied in forming RGNUC. While it was clear that Lon Nol controlled the capital, whereas the Prince remained in Peking, it was also evident that both sides controlled substantial portions of the country and that neither could claim effective control over all the territory much less habitual obedience on the part of the bulk of the population.⁷⁵ It was against this background that the Secretary-General received a letter, dated October 8, 1973, from Prince Sihanouk, requesting that an additional item, providing for the "restoration of the lawful rights of the Royal Government of the National Union in Cambodia in the United Nations"⁷⁶ be included on the agenda of the twenty-eighth session of the General Assembly. The letter was accompanied by a draft resolution proposing the substitution of a RGNUC's delegation for the delegation of the Khmer Republic in the General Assembly.⁷⁷ The General Assembly was thus faced with two rival claimants each purporting to be the legitimate representative of a Member State.

cided to defer a decision on the regularity of the Hungarian credentials. Pursuant to Rule 29 of the General Assembly's Rules of Procedure the representatives of the Hungarian government continued to participate in the work of the Assembly on a provisional basis. See U.N. GAOR, 17th Sess., 1202d plen. mtg., Agenda Item 3, U.N. Doc. A/PV.1202 (1961); U.N. GAOR, 15th Sess., 995th plen. mtg., Agenda Item 3, at 498-504, U.N. Doc. A/PV.995 (1960); U.N. GAOR, 14th Sess., 852d plen. mtg., Agenda Item 3, at 710-14, U.N. Doc. A/PV.852 (1959); U.N. GAOR, 13th Sess., 792d plen. mtg., Agenda Item 3, at 608-14, U.N. Doc. A/PV.792 (1958); U.N. GAOR, 12th Sess., 726th plen. mtg., Agenda Item 3, at 561-77, U.N. Doc. A/PV.726 at 561 (1957); U.N. GAOR, 11th Sess., 658th plen. mtg., Agenda Item 3, at 1186, U.N. Doc. A/PV.658 at 1186 (1957). While the Hungarian case deviates from common practice, the result in this case, as well as in all above-mentioned cases, was that a government that came into being in a radical fashion was accepted as the legitimate authority representing the State. This includes a government which owed its being to foreign military intervention but against which there was no internal challenge.

73. See *supra* note 30.

74. *Id.*

75. *Id.*

76. *Letter Dated 8 Oct. 1973 from Members . . . to the Secretary-General*, U.N. GAOR, 28th Sess., Annexes, Agenda Item 106, addendum pt. 1, U.N. Doc. A/9195 (1978).

77. *Id.*

This was not the first time in the history of the United Nations that an internal challenge to representation was raised. Indeed, the question of representation in a somewhat subtler form, had come up already before the League of Nations.⁷⁸ But was the practice engaged in by the United Nations consistent enough to allow for a prediction on the decision the General Assembly would make? Was it possible to discern a pattern in that practice?

The international organization's practice regarding representation began with the 1935 Italian invasion and consequent annexation of Ethiopia, a fellow-member of the League of Nations.⁷⁹ When the Credentials Committee of the League of Nations met, it expressed its doubt as to the order of the credentials issued by Haile Selassie, the Emperor of Ethiopia, noting that he was no longer the effective authority in control of the State, that his government was not in the capital and that, at the time he had issued the credentials to his delegates, he was residing in another country.⁸⁰ Nevertheless, in view of documents stating that the Selassie government functioned in part of the country, the Committee resolved to give the delegation "the benefit of the doubt" and accepted its credentials.⁸¹ The underlying rationale for this decision seems, however, to have emanated from a mixture of guilt and a political desire to condemn the Italian aggression.

The legal grounds for such condemnation had their origins in the Stimson Doctrine, born as a reaction to the 1931 Japanese invasion of Manchuria, and announcing that the United States would not recognize territorial gains achieved in contravention of the 1928 Pact of Paris.⁸² The Stimson doctrine was subsequently adopted as a collective policy by the League of Nations and a resolution of the League's Assembly of March 11, 1932, required States not to recognize any "situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris."⁸³ That resolu-

78. The question which had come before the League of Nations concerned the representation of Ethiopia and is discussed *infra* text accompanying notes 79-87. The reference to the subtler form of challenge stems from the fact that Italy, which had invaded, occupied and annexed Ethiopia, made it known that while it would not challenge the credentials issued by the ousted Emperor, it would nevertheless regard their acceptance as a reason for not sending its own delegates. See Hersch Lauterpacht, *The Credentials of the Abyssinian Delegation to the Seventeenth Assembly of the League of Nations*, 18 BRIT. Y.B. INT'L L. 184 (1937).

79. For a description of the League of Nation's actions, see Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT'L L. 614 (1937).

80. *Id.*

81. See Lauterpacht, *supra* note 78, at 185 (quoting League of Nations Doc. A.41.1936 (1936)).

82. See *The General Treaty for the Renunciation of War (Kellog-Briand Pact)*, August 27, 1928, 94 L.N.T.S. 57.

83. See, e.g., LEAGUE OF NATIONS O.J. Spec. Supp. 101, at 8; W.W. Willoughby, *Far*

tion was subsequently reiterated in various declarations.⁸⁴

Since the Italian invasion of Ethiopia was clearly in contravention of Article 10 of the Covenant of the League of Nations, as well as of the Pact of Paris, the Italian conquest created a "situation" that was not to be recognized.⁸⁵ The absence of any reference to the policy of collective non-recognition of this situation in the decision of the Credentials Committee is quite conspicuous, but it does not follow that the decision was not influenced by that policy. It is quite possible that the Committee refrained from relating to the policy because such a substantive determination was bound to be considered outside the scope of its procedural function. Further, this omission expresses the *Zeitgeist* and the heralding of the meek acceptance of the policy of appeasement that was soon to become the hallmark of the political discourse at that time. In fact, in 1938 the United Kingdom requested that the Secretary-General include on the agenda of the forthcoming session of the League's Council an item pertaining to the situation in Ethiopia due to the anomalous situation created by the fact that five of the members of the Council recognized the sovereignty of Italy over Ethiopia.⁸⁶ Later that year Ethiopia withdrew from participating in the proceedings of the Assembly.⁸⁷

Taken from the Cambodian perspective, the Ethiopian precedent seems to have offered Prince Sihanouk some grounds for claiming authority over at least part of the country, despite his and his government's absence from the country and lack of control over the capital. The significance of the Ethiopian precedent is, however, broader, and rests on the following: it initiated the practice whereby the Credentials Committee inquires into the issue of representation and it exposed the tension between substantive questions of policy and procedural matters and the artificiality in the attempt to squeeze the former into the straight-jacket of the latter. Furthermore, while acknowledging the importance of effective control as the relevant test for representation, the decision of the Credentials Committee, in effect, refused to allow brute force to take over principle.⁸⁸ However, the Committee did not

Eastern Policies of the United States, 84 AM. J. INT'L L. Supp., 193, 197 (1940).

84. *Id.*

85. For an analysis of the resolution of the Assembly of the League in the context of collective non-recognition, see JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS*, 32-35 (1987).

86. 19 LEAGUE OF NATIONS O.J. 535 (1939). Haile Selassie reacted by requesting to be present in the Council's deliberations indicating that he would transmit the credentials of his delegates in due course and the Council approved this request.

87. 17 LEAGUE OF NATIONS O.J. 658 (1937), cited in BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 56 (1996).

88. See CONFORTI, *supra* note 87, at 56.

consider itself competent to thus rationalize its decision.⁸⁹ Thus, a dialectical stage was set: will further practice favor the objective or the subjective components of legitimacy? How will the procedural nature of a determination by the Credentials Committee affect this choice? Which direction was preferable in terms of the credibility of the validating organization? It remains for the United Nations to deal with these questions.

The United Nations was confronted for the first time with the need to determine which authority is the legitimate government of a member State in 1950 when the question of Chinese representation arose.⁹⁰ This remained a vexing problem until 1971.⁹¹ This case is *sui generis* in many ways ranging from the geopolitical magnitude of China, to its permanent seat in the Security Council, and to the issue of membership.⁹² Therefore, its value as a precedent should be construed carefully. The intricate web of political and legal maneuvers with respect to the question of Chinese representation is beyond the scope of this paper and has been discussed extensively elsewhere.⁹³ For our purposes, three issues were significant with relation to the issue of Chinese representation: 1) the classification of the representation problem; 2) the criteria applied; and 3) the lessons learned insofar as the credibility of the United Nations was concerned.

With regard to classification, the problem was dealt with initially as a procedural matter under the applicable Rules of Procedure of the relevant organs of the United Nations.⁹⁴ For a change to be effected, the problem was then classified as an "important question" requiring a two-thirds majority vote of the members present and voting. The problem was then reclassified as an unimportant question.⁹⁵ Underlying these classifications and ensuing procedural tactics lay attempts to deal with the issue as a substantive matter and counter-attempts, sponsored

89. As is evidenced in the discrepancy between the rationale and language of its deliberation against its substantive decision. See *supra* note 71.

90. See generally ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 152-158 (1963); Herbert W. Briggs, *Chinese Representation in the United Nations*, 6 INT'L ORG. 192 (1952); L.C. Green, *Representation Versus Membership: The Chinese Precedent in the United Nations*, 10 CAN. Y.B. INT'L L. 102 (1972); H. Arthur Steiner, *Communist China in the World Community*, 533 INT'L CONCILIATION 389 (1961); Quincy Wright, *The Chinese Recognition Problem*, 49 AM. J. INT'L L. 320 (1955).

91. *Id.*

92. *Id.*

93. *Id.*

94. See Ciobanu, *supra* note 26, at 362.

95. See G.A. Res. 2025 (XX), 20 U.N. GAOR, 20th Sess., Supp. No. 14, at 2, U.N. Doc. A/6014 (1965); G.A. Res. 1668 (XVI), U.N. GAOR, 16th Sess., Supp. No. 17, at 66, U.N. Doc. A/5100 (1961).

by the United States, to classify the issue as a procedural matter.⁹⁶

The political clout of the United States was responsible for the failure to recognize the government of the People's Republic of China as "the only legitimate representative of China" until 1971.⁹⁷ Significantly, support for this position was steadily, albeit gradually, dissipating, and the argument pertaining to the link between representation and effective government persistently advanced.⁹⁸ Indeed, the enormity of the divergence between the reality of the Communist government in China effectively controlling one-fourth of the world population and the symbolic non-validation of this reality by the United Nations could hardly have contributed to the viability of the latter.⁹⁹ Viewed from the perspective of the 1973 Cambodian problem, it would appear that while Prince Sihanouk had the Chinese precedent in mind when he requested the inclusion of the issue as a separate item on the agenda of the General Assembly, no doubt wishing to emphasize the subjective aspect of legitimacy, he must have also been mindful of the main lesson to be drawn from the Chinese case: the importance of being earnest in the appreciation of the level of effective control exercised by a claimant authority for the sake of both the people and the United Nations.

The lesson learned from the Chinese representation question was already evident in the 1962 case of Yemen. The facts of this case bore close similarities to the 1973 case of Cambodia. Forces headed by Brigadier El-Sallal and assisted by Egyptian troops overthrew the monarchical government of the Imam.¹⁰⁰ At the time the revolutionary authority issued credentials for its delegates to the General Assembly, the battle on the ground was yet to be concluded: the revolutionary forces were in control of most of the territory, including the capital, and enjoyed the support of large segments of the population.¹⁰¹ However, the Imam forces, supported by Saudi Arabia, continued to control a small portion of the territory and enjoyed the allegiance of some segments of the population.¹⁰² The Credentials Committee decided, without much ado, to accept the credentials issued by the revolutionary gov-

96. See *Annual Report of the Secretary-General on the Work of the Organization*, 1965-66, U.N. GAOR, XXI, Supp. 1, U.N. Soc. A/6301, at 35-37.

97. G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971). The resolution was then adopted by the Security Council and by the various Specialized Agencies. See *Questions Relating to Asia and the Far East: Representation of China in United Nations*, 1971 U.N. Y.B. 126, U.N. Sales No. E.73.I.1.

98. *Id.*

99. See, e.g., T.M. Franck, *supra* note 7, at 738-39.

100. See generally J. CORTADA, *THE YEMEN CRISIS* (1962). See also, Dorfman, *supra* note 35, at 510.

101. *Id.*

102. *Id.*

ernment.¹⁰³ This decision indicated a strong, if implicit, preference for the objective component of legitimacy: an authority which controls most of the territory, including the capital, is validated as the representative government of a member State. It is quite conceivable that the decision of the Credentials Committee may have been facilitated by the absence of a formal competing claim by the government of the Imam. However, this could not have been the decisive factor, especially in view of the accepted preference for established governments in inconclusive cases, a preference expressed a mere four years earlier in the case of Iraq.¹⁰⁴ The report of the Credentials Committee, recommending the acceptance of the credentials issued by El-Sallal, was approved by the General Assembly though not without a fairly heated debate pointing, *inter-alia*, to both the subjective component of legitimacy and to the inconclusiveness of the effective control of the revolutionary government.¹⁰⁵

The Yemen case attested to a further development in the manner in which the Credentials Committee related to the issue of representation: in 1962, the Committee expressed its willingness to lift the veil of credentials to assess the effective control of the authority issuing them, a step it was unwilling to take two years earlier when confronted with rival sets of credentials from the Congo (Leopoldville).¹⁰⁶ That case arose when the then Head of State, Kasa-Vubu, and the then Prime Minister, Lumumba, had mutually ousted each other, shortly after Congo was admitted to the United Nations and before its government was represented in the United Nations. The Security Council was the first organ to be confronted with the rival claimants, each appointing a different delegation and requesting to participate in its proceedings.¹⁰⁷ Having

103. U.N. GAOR, Cred. Comm., 17th Sess., Annexes, Agenda Item 3, at 2, U.N. Doc. A/5392 (1962).

104. In 1958, Iraq was radically transformed from a monarchy into a republic. The new government appointed its delegates to the political organs of the United Nations. Much like in the Yemen case, there was no internal challenge to the credentials issued by the revolutionary government, but the delegates of the old regime continued to participate for several weeks after the issuance of credentials to the delegates of the new government in the sessions of the Security Council of which Iraq was at the time a member. Unlike the Yemen case, the temporal discrepancy between the fact of control and the validation of the government exercising it in the case of Iraq, worked to support the government established prior to the revolutionary change. See U.N. SCOR, 13th Sess., 838th mtg., U.N. Doc. S/PV.838 (1958); U.N. SCOR, 13th Sess., 834th mtg., U.N. Doc. S/PV.834 (1958); U.N. SCOR, 13th Sess., 827th mtg., U.N. Doc. S/PV.827 (1958).

105. For the debate, see G.A. Res. 1871, U.N. GAOR, 17th Sess., Supp. No.17, at 1, U.N. Doc A/5217 (1962).

106. See U.N. Doc. A/4579 (1960). For a general factual account of the troubled birth of the Congolese Republic, leading eventually to the United Nations Operation in the Congo (ONUC), see THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING, 215-22 (2d ed. 1990).

107. *Statement by the President*, U.N. SCOR, 15th Sess., 899th mtg. at 2, U.N. Doc. S/PV.899 (1960).

rejected a Polish proposal to accept the credentials of the Prime Minister Lumumba, the Security Council did not accept any of the credentials, and did not allow any representative of the Congo to participate in its deliberations.¹⁰⁸

Thereafter, the General Assembly referred the matter to the Credentials Committee, and the latter, awaiting clarification of the situation, did not report back until mid November 1960.¹⁰⁹ At that time the Credentials Committee recommended that the credentials issued by Kasa-Vubu be accepted.¹¹⁰ While this postponement indicates that due regard was paid to the effectiveness of the representative authority, the Committee refrained from delivering a substantive assessment of the situation.¹¹¹ The Committee also refused to pass judgment on the contention of the Prime Minister that the Kasa-Vubu government was contravening the Congolese constitution, because it did not want its actions to be construed as "an intervention in the domestic affairs of the Congo."¹¹² The Credentials Committee thus accepted the credentials issued by the Head of State on the formal grounds that they were issued by the primary organ empowered to accredit delegates according to the language of Rule 27 of the Rules of Procedure of the General Assembly.¹¹³ The General Assembly approved the report of the Committee, despite a minority opposition which claimed that, from the point of view of effectiveness, no decision should be taken at the time.¹¹⁴

The above analysis thus leads to the following conclusions regarding the practice of the Organization on matters of representation by 1973: first, issues concerning representation were dealt with primarily, though not exclusively, by the Credentials Committee; second, the Committee was increasingly willing to not only assess the representative nature of the authority issuing credentials but to admit that such assessment was undertaken; third, the assessment was made according to the standard of effective control; fourth, while this standard seems susceptible to a fairly objective determination, the credentials process itself remained political. The net result was that whenever the factual situation surrounding the newly formed government either remained, or was presented as inconclusive, the representation determination was

108. *Id.*

109. U.N. GAOR, Cred. Comm., 15th Sess., Annexes, Agenda Item 3, U.N. Doc A/4578 (1960), U.N. Doc A/4579 (1960).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. The minority position, much like the majority position, was politically motivated and the opinions were divided against the great divide of the Cold War. Eventually, the Kasa-Vubu government did establish its effective control over the Congo. G.A. Res. 1498, U.N. GAOR, 15th Sess., Supp. No. 16, vol. I, at 2, U.N. Doc. A/4684 (1960).

made according to the political support each of the rival parties was able to mobilize. In that sense, the legal regime did seem increasingly to be but a transparent robe adorning the muscles of the body-politic.

Nevertheless, practice indicates that the mere existence of a legal regime did impose rules by which the political contest for representation was to be fought. Both parties in the 1973 Cambodian case mastered these rules. RGNUC's request that the matter be considered as a separate item on the agenda of the General Assembly, and the Khmer Republic's preference that the matter be relegated to the Credentials Committee can both be seen as procedural maneuvers designed to enhance the respective positions of the rival claimants. The Khmer Republic preferred a discussion in the Credentials Committee since it stood to benefit from a formal reading of the Rules of Procedure governing the deliberations of the Committee, as well as from the Committee's employment of the effective control test to determine legitimacy. The effective control test consists of the arguments that: 1) the issue of representation is procedural and was determined when the Committee first approved the credentials of its delegation; 2) that any other course would contravene the Rules of Procedure and amount to an intervention in the domestic affairs of the Khmer Republic, a matter clearly beyond the scope or the powers of the Credentials Committee; and 3) that a claimant absent from the capital and the country cannot be said to exercise effective control.¹¹⁵ These factors all explain why General Lon Nol wanted the issue to be determined by the Credentials Committee and why Prince Sihanouk found it more advantageous to have the General Assembly discuss it.

In the General Assembly, unencumbered by said Rules of Procedure, RGNUC wished to further accentuate the criteria of resolution 396(V) at the expense of the more restrictive application of the effectiveness standard in an attempt to point out that the General Assembly cannot sanction foreign intervention and that to do so would amount to an unacceptable endorsement of an intervention in the domestic affairs of a member State and a reward for foreign aggression.¹¹⁶

The General Assembly agreed with RGNUC's request, but decided to postpone its consideration of the matter until its twenty-ninth session.¹¹⁷ This decision was due to a procedural maneuver by the supporters of Lon Nol, led by the United States, attempting to channel the matter to the Credentials Committee.¹¹⁸ Not surprisingly, in its report

115. See Dorfman, *supra* note 35, at 511-12.

116. See *id.* at 498-99.

117. U.N. GAOR, 28th Sess., 2191st plen. mtg., vol. III, Agenda Item 106, U.N. Doc. A/PV. 2191, at 96 (1973).

118. Pursuant to the Rules of Procedure, the matter was in effect transferred to the Credentials Committee, because it would be considered there as a matter of course at the

of December 12, 1978, the Credentials Committee recommended the acceptance of the credentials issued by the Khmer Republic.¹¹⁹ The report of the Committee was then approved by the General Assembly.¹²⁰ In its twenty-ninth session, the General Assembly decided to wait for the report of the Secretary-General on his efforts to resolve the dispute, and thus did not take any further action on the matter before the submission of the Secretary General's report.¹²¹ This postponement, too, was orchestrated by the Khmer Republic and its supporters, resulting in continued representation of Cambodia in the General Assembly by the delegates of the Khmer Republic.¹²²

Civil war continued to ravage the country, and a year later the Government of General Lon Nol was defeated and replaced by a Khmer Rouge government adorned by Prince Sihanouk as its Head.¹²³ The thirtieth session of the General Assembly accepted the representatives of the new government to the seat of the newly renamed Cambodia, which was soon to be baptized yet again as "Democratic Kampuchea."¹²⁴ While the fields of Cambodia were turning into graveyards, the delegates of that government continued to represent Democratic Kampu-

beginning of the 29th Session.

119. U.N. GAOR, Cred. Comm., 28th Sess., Agenda Item No. 3, Annexes XXVIII, addendum pt. 1, U.N. Doc. A/9179 (1973), *revised in A/9179/Corr. 1*. The debate in the Committee testifies to the importance of mastering the procedural game: supporters of the Khmer Republic argued that the Rules of Procedure confine the Committee to a determination of whether the requirements of Rule 27 have been met, that the representative nature of a government is a domestic matter and that the claim to effective control advanced by RGNUC is defied by its absence from the country. See *id.* at 2-3 for arguments advanced by the US, Japan, Nicaragua, Greece and Uruguay. Supporters of RGNUC (China, Senegal, Tanzania) refrained from relating to the criterion of effectiveness. *Id.* Instead they argued that there is nothing in Rule 27 to prevent the Committee from determining the representative nature of an authority issuing credentials; that the procedural channeling of the matter to the Credentials Committee should obscure neither its substance nor the position of the majority of States favouring RGNUC as is indicated by the initial vote to consider the matter as a separate item on the agenda, and that the Lon Nol government does not represent the people of Cambodia and therefore to allow it to represent them is an intervention in the domestic affairs of Cambodia, a point further underscored by its reliance on foreign troops. *Id.*

120. A motion to amend the report and substitute the credentials of RGNUC for those of the Khmer Republic failed. See U.N. GAOR, 28th Sess. 2204th plen. mtg., U.N. Doc. A/PV. 2204, at 76-77 (1973).

121. See G.A. Res. 3238 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, Agenda Item 25, at 5, U.N. Doc. A/9631 (1975).

122. This was in accordance with Rule 29 of the Rules of Procedure which provides for the provisional seating of a representative until the General Assembly reaches its decision on the matter. For the text of Rule 29, see *supra* note 12.

123. See *The United Nations and Cambodia 1991-1995*, in 2 THE UNITED NATIONS BLUE BOOK SERIES 5 (1995).

124. G.A. Res. 3367 A & B, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (1975).

chea in the General Assembly in an uncontested manner until 1979.¹²⁵

B. *Second Challenge - 1979*

"What's in a Name?", asks Juliet. "That which we call a rose by any other name would smell as sweet."¹²⁶ Alas, in the case of Cambodia, a.k.a. the Khmer Republic (1973), a.k.a. Democratic Kampuchea (1974), a.k.a. the People's Republic of Kampuchea (1979), no sweet smell of roses lingered over the killing fields, and in the country which was called by so many names, people were dying in a bloody civil war.

In December 1978, the Khmer Rouge government of Democratic Kampuchea, headed by Pol Pot, was overthrown.¹²⁷ Over 100,000 Vietnamese troops, invaded the country and installed a new governing authority, headed by Heng Samrin, under the name "Kampuchean People's Revolutionary Council." The new government took control of the capital and most of the countryside, while the ousted government continued to control a small area near the Thai border.¹²⁸ Both the government of Democratic Kampuchea and the Government of the People's Republic of Kampuchea claimed to be the representative authority of the State.¹²⁹ Like the case of the Congo,¹³⁰ the question as to which of the rival claimants represented Kampuchea was first faced by the Security Council.¹³¹ On January 3, 1979, the representative of Democratic Kampuchea requested that the Security Council hold an urgent meeting on the situation to "condemn the Vietnamese aggression and to take such measures. . .to ensure that Vietnam ceases its aggression and respects the independence, sovereignty and territorial integrity of Democratic Kampuchea."¹³² On January 9, 1979, the Permanent Representative of Vietnam transmitted to the President of the Security Council a telegram from Heng Samrin informing him that the Kampuchean People's Revolutionary Council is performing the functions of a government in Kampuchea, that the government of the "Pol Pot clique" had ceased to exist and that therefore meeting with a representative of that pur-

125. As evidenced by the Reports of the Credentials Committee between the 30th and 34th sessions, see U.N.GAOR, 33rd Sess., Annexes, Agenda Item 3, U.N. Doc. A/33/350 and U.N. Doc. A/33/Add.1 (1978/1979); U.N. GAOR, 32nd Sess., Annexes, Agenda Item 3, U.N. Doc. A/32/336 and U.N. Doc. A/32/Add.1 (1977); U.N. GAOR 31st Sess., Annexes, Agenda Item 3, U.N. Doc. A/31/308 and U.N. Doc. A/31/Add.1 (1976); and U.N. GAOR, 30th Sess., Annexes, Agenda Item 3, U.N. Doc. A/10270 and Add.1 (1975).

126. WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET*, act II, sc. 1.

127. FREDERIC L. KIRGIS, *INTERNATIONAL ORGANIZATIONS*, 181ff. (1993); C. Warbrick, *Kampuchea: Representation and Recognition*, 30 INT'L COMP. L.Q. 234, 234 (1981).

128. *Id.*

129. *Id.*

130. *See supra* text accompanying notes 106-114.

131. U.N. SCOR, 34th Sess., Supp., Jan.-Mar. 1979, U.N. Doc. S/13003 (1979).

132. *Id.*

ported government is a "flagrant intervention in the political affairs of the Kampuchean people and a violation of the principles of the Charter."¹³³ Pursuant to Article 31 of the Charter, the delegates of both claimants requested to participate in the debate in the Security Council.¹³⁴

The Security Council concerned itself first with the determination of the agenda and then with the question of representation.¹³⁵ Predictably, the representatives of the Soviet Union and of Czechoslovakia argued that the item should be deleted from the agenda as its inclusion was requested by a regime no longer in control of the state.¹³⁶ To do otherwise, it was contended, would be an intervention in the domestic affairs of the People's Republic of Kampuchea.¹³⁷ Equally predictable was the position held by China that: 1) a foreign armed aggression by Vietnam against Democratic Kampuchea is not a matter of internal affairs, but one which requires the intervention of the Security Council; and 2) the temporary setback suffered by the government of Democratic Kampuchea due to foreign aggression has no effect on its legal status, and as the representative of that government, was duly accredited to the General Assembly during its thirty-third session, he retains this status.¹³⁸ The agenda was adopted without a vote and the Security Council turned to debate the question of representation under Rule 37 of its Provisional Rules of Procedure.¹³⁹

In this context, and pursuant to Rule 15 of its Provisional Rules of Procedure, the Security Council requested that the Secretary General report on the credentials of the two delegations.¹⁴⁰ The Secretary-General's report stated that the credentials issued by the government of Democratic Kampuchea were considered to be in order as they had been approved by the General Assembly at its thirty-third session.¹⁴¹ The Security Council approved this report without a vote and invited the delegate of Democratic Kampuchea to participate in its discussion.¹⁴² In the resumed session of the General Assembly, the credentials of the delegate of Democratic Kampuchea were not formally challenged and

133. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, at 1, U.N. Doc. S/13013 (1979).

134. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13019 (1979). *See also* U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13021 (1979).

135. U.N. SCOR, 34th Sess., 2108th mtg., U.N. Doc. S/PV.2108-2112 (1979).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. U.N. SCOR, 34th Sess., Supp., Jan-Mar. 1979, U.N. Doc. S/13021 (1979). *See also* G.A. Res. 33/9 A, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/33/350, which approved the report of the Credentials Committee. U.N. GAOR, 33d Sess., Annexes, Agenda Item 3, U.N. Doc. A/33/50/Rev.1 (1978).

141. *Id.*

142. *Id.*

consequently he continued to represent the State in the General Assembly. Several States, however, reserved their position on the question of Kampuchea's representation.¹⁴³ This matter was bound to emerge as a major issue in the thirty-fourth session of the General Assembly.

The United Nations was thus caught between the hammer and the anvil. Recognizing Heng Samrin's government meant the application of the test of effectiveness, while at the same time, legitimizing the result of a continuous armed intervention. Conversely, recognizing the Pol Pot government meant defying the test of reality, and at the same time legitimizing a regime which by all accounts was unworthy of recognition. In this case, the choice between principle and expediency was not tantamount to a choice between good and evil but between two evils.

When the thirty-fourth session of the General Assembly opened officially on September 18, 1979, the seat of Kampuchea was indicated by a plate marked "Democratic Kampuchea" and on it sat the representative of that government.¹⁴⁴ However, the government of the People's Republic of Kampuchea also issued credentials to a delegation headed by its Minister of Foreign Affairs, Hun Sen and, at the request of the Permanent Representative of Vietnam, the issuance of these credentials was circulated as an official document of the General Assembly under item 3 of its Provisional Agenda referring to credentials of representatives to the thirty fourth session.¹⁴⁵ It was thus clear that the new government was planning to base its claim on the legal test of effectiveness. Indeed, at the end of the second plenary meeting of the General Assembly, the representative of Vietnam requested that the General Assembly "refuse to authorize the Pol Pot . . . clique illegally to occupy Kampuchea's seat in this Assembly and immediately restore the seat to the People's Revolutionary Council of Kampuchea."¹⁴⁶ Having been presented with a challenge, the President of the General Assembly, acting under Rule 29 of the Rules of Procedure, referred the matter to the Credentials Committee, asking it to report back to the Assembly on September 21, 1979.¹⁴⁷

The Credentials Committee met and reported back recommending the acceptance of the credentials issued by Democratic Kampuchea.¹⁴⁸ Viewed from the perspective of both the legal regime and its own practice, this decision is surprising as it clearly does not reflect the principle of effectiveness. The minority view in the Committee, argued the case of

143. *Id.*

144. U.N. GAOR, 34th Sess., U.N. Doc. A/34/472 (1979).

145. *Id.*

146. U.N. GAOR, 34th Sess., 2d plen. mtg., at 6, U.N. Doc. A/34/PV.2 (1979).

147. *Id.*

148. U.N. GAOR, 34th Sess., Annexes, Agenda Item 3, U.N. Doc. A/34/500 (1979). The recommendation was reached by a vote of 6 to 3. *Id.*

Heng Samrin's government on the legal ground of effective control.¹⁴⁹ The majority retorted that that government's very existence was a violation of law, that as a matter of principle aggression should not be rewarded; and that delegates of a government already accredited continue to be accredited in subsequent sessions, even if the government is no longer effective, until a "superior claim" is advanced by another government, and a claim by a puppet government is by no means superior.¹⁵⁰

When the General Assembly met to consider the matter, it had before it three texts: the draft resolution of the Credentials Committee; a new proposal sponsored by Bulgaria and other Socialist States whereby the Assembly was to disregard the report and invite the representatives of the People's Republic of Kampuchea to take their seat as representatives of the legitimate government of that country;¹⁵¹ and an amendment to the draft resolution of the Credentials Committee, proposed by India and several African States, proposing that the General Assembly suspend its consideration of the report.¹⁵² The effect of this proposal would have been to leave the Kampuchean seat vacant,¹⁵³ a solution which had a great appeal to states which were reluctant to regard as legitimate either claimant.¹⁵⁴

The appeal of the Indian proposal was enhanced by the fact that it was advanced in the form of an amendment.¹⁵⁵ According to Rules 90 and 91 of the Rules of Procedure of the General Assembly, an amendment is to be voted on prior to a vote on the text proposed to be

149. U.N. GAOR, 34th Sess., 4th plen. mtg., U.N. Doc. A/34/PV.4 (1979).

150. This was the argument of the United States. *See id.* For the report of the Credentials Committee of 20 September 1979, see U.N. GAOR, 34th Sess., Annexes, Agenda Item 3, U.N. Doc. A/34/500 (1979).

151. U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.2 (1979).

152. The Indian proposal was designed to leave the seat of Kampuchea vacant, a result achieved a couple of weeks prior to the opening session of the General Assembly, in the sixth summit conference of the non-aligned group held in Cuba. There, Cuba proposed that the delegation of Pol Pot would be expelled and the delegation of Heng Samrin invited instead. Some other States, mainly from South-East Asia, refused to recognize a government which came to power - and held its power - as a result of foreign aggression. The conference settled on a compromise solution whereby until a report of a special committee was submitted to the 1981 scheduled meeting of the Foreign Ministers of the non-aligned group, Kampuchea's seat will remain vacant. This solution was accepted precisely because states felt uncomfortable protecting, in the name of principle, an unprincipled regime as the government of Pol Pot had been. For the text of the Indian proposal, see U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.3 (1979); *see also* U.N. GAOR, 34th Sess., U.N. Doc. A/34/L.3/Add.1 (1979).

153. *Id.*

154. *Id.*

155. U.N. GAOR, 34th Sess., 4th plen. mtg., Agenda Items 3 and 8, at 101, U.N. Doc. A/34/PV.4 (1979).

amended.¹⁵⁶ This order of voting is often considered to be advantageous to the amendment, and South East Asian States, insisting on the need to delegitimize power seized as a result of armed aggression, feared that an outcome that would fall short of this delegitimization would be secure.¹⁵⁷ Thus, the South East Asian States resorted to a procedural maneuver designed to ensure that the text of the Credentials Committee would be voted upon first. They proposed that the Legal Counsel render an opinion as to whether the Indian proposal is indeed an amendment.¹⁵⁸ This proposal was contested, put to a vote and approved.¹⁵⁹ The Legal Counsel opined that past practice of the General Assembly indicates that its understanding of what constitutes an amendment is quite flexible and that, therefore, regarding the Indian proposal as an amendment falls well within that practice.¹⁶⁰

Nevertheless, a proposal may be considered an amendment if it adds to, deletes from, or revises part of a proposal, but not when it advances a new proposal.¹⁶¹ In this sense, the Indian proposition constituted in fact a new proposal.¹⁶² The General Assembly then voted to consider the Indian amendment as a new proposal, whereupon the Indian representative moved to propose that the Indian proposal be given priority over other proposals in the voting.¹⁶³ At this stage the Bulgarian representative removed his proposal, and the Assembly proceeded to reject the Indian motion to prioritize its proposal and approved the draft resolution of the Credentials Committee.¹⁶⁴

From the 1979 resolution until 1989, the General Assembly continued to ignore the representative nature of the government of the People's Republic of Kampuchea, which was eventually led by Prime Minister Hun Sen, and to accept the credentials of the delegates of Democratic Kampuchea.¹⁶⁵ Each time the credentials of the delegates of Democratic Kamupchea were challenged, the President of the General Assembly referred the matter to the Credentials Committee.¹⁶⁶

156. *Id.*

157. See Warbrick, *supra* note 127, at 240. See also *supra* note 152.

158. *Id.*

159. *Id.*

160. See Warbrick, *supra* note 127, at 240. See also *supra* note 152.

161. *Id.*

162. *Id.*

163. G.A. Res. 34/2, 34th Sess., U.N. GAOR, Supp. No. 46, at 12, U.N. Doc. A/34/46 (1979).

164. *Id.*

165. Democratic Kampuchea had evolved into a coalition comprising the Khmer Rouge led by Pol Pot, a neutral faction led by Prince Sihanouk, and a noncommunist faction led by Son Sann. See KIRGIS, *supra* note 127, at 183.

166. See, e.g., U.N. GAOR, 44th Sess., U.N. Doc. A/44/PV.32 (1989); U.N. GAOR, 43d Sess., U.N. Doc. A/43/PV.33 (1988); U.N. GAOR, 42d Sess., U.N. Doc. A/42/PV.36 (1987); U.N. GAOR, 39th Sess., U.N. Doc. A/38/PV.32 (1984); U.N. GAOR, 37th Sess., U.N. Doc.

The Committee considered the credentials in connection with other credentials, and recommended their acceptance. In each session of the General Assembly, an amendment was moved to approve the Committee's report "except with regard to the credentials of Democratic Kampuchea." Each time this amendment was rejected.¹⁶⁷

The United Nations thus refused to recognize a government imposed from outside and sustained by the presence of foreign troops, but exercised effective control over most of the country, and did validate a government which operated from outside the territory of the country and had little to recommend in terms of the subjective aspect of legitimacy. This result deviated from the legal prescription as well as from past practice and further failed to secure the supremacy of principle over politics or the viability of the United Nations. It is true that in the case of Ethiopia, a similar determination was made to accept the credentials of a government that was no longer exercising effective control over the country, but that decision was grounded in considerations of principle, law, and morality, that were mostly absent from the case of Cambodia.¹⁶⁸

Other governments installed as a result of armed intervention in the affairs of member States have been recognized as representative, and their credentials accepted.¹⁶⁹ Thus, it was difficult to justify the decision not to recognize the credentials of Democratic Kampuchea on the grounds of a new rule whereby a government thus installed is denied recognition. It was further quite problematic to base the legitimacy accorded to a government headed by Pol Pot on moral grounds, and indeed no such attempt was ever made.¹⁷⁰ Finally, the continued recognition of the representative status of the government of Democratic Kampuchea indicates that the test of effectiveness which has been hitherto favoured by both rule and practice, and to the application of which the Credentials Committee was ostensibly confined, was discarded.

Viewed from the perspective of the legal regime, the inescapable conclusion from all this is that only the proviso of the criteria for determination incorporated in resolution 396(V), providing that questions of representation shall be considered in the light of "the circumstances

A/37/PV.43 (1982); U.N. GAOR, 37th Sess., U.N. Doc. A/37/PV.42 (1982).

167. *Id.*

168. *See supra* text accompanying notes 78-87.

169. One example is the government of Afghanistan installed by the Soviet Union in 1980. For the report of the Credentials Committee see U.N. GAOR, 35th Sess., Annexes, Agenda Item 3, U.N. Doc. A/35/484 (1980); *Id.* at addendum pt. 1; *Id.* at addendum pt. 2.

170. During Pol Pot's regime approximately 1 million Cambodians perished. *See The United Nations and Cambodia 1991-1995*, in 2 THE UNITED NATIONS BLUE BOOK SERIES, *supra* note 123, at 5.

of each case," could serve as a basis for the decision regarding representation.¹⁷¹ This basis is quite obviously political, not legal. The net result of the previously mentioned representation problems was that the United Nations could claim neither a legal, nor a moral, nor a political victory. It was thus hardly surprising that a gap was created between the validating process in the United Nations, the real world, and the ability of the United Nations to function effectively in this world.¹⁷² Consequently, the United Nations' own claim to legitimacy, in conferring legitimacy on governments, was damaged.

C. *Third Challenge - 1997*

The government of Hun Sen, supported by the military presence of Vietnam, continued to control Cambodia for a decade.¹⁷³ Throughout this period, the delegation of the coalition of the three opposition factions headed by Pol Pot, Prince Sihanouk and Son Sann, continued to represent Cambodia in the General Assembly.¹⁷⁴ In 1989, the Vietnamese announced their withdrawal from Cambodia.¹⁷⁵ In 1990, a framework for a political settlement in Cambodia was agreed upon between the permanent members of the Security Council and the rival Cambodian parties.¹⁷⁶ A Supreme National Council, consisting of said parties, was formed pursuant to this settlement.¹⁷⁷ The main function of the Supreme National Council was to lead the country to free elections, with the support of the United Nations.¹⁷⁸ That year the Supreme National Council could not agree on the composition of Cambodia's delegation to the United Nations and consequently the Cambodian seat in the General Assembly remained vacant.¹⁷⁹ A year later, the Supreme National Council agreed that Prince Sihanouk would lead the Cambodian delegation.¹⁸⁰

The United Nations' intensive engagement in the peace efforts in Cambodia began in earnest with the 1991 Paris Peace Agreement.¹⁸¹

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

172. All relief and humanitarian activities the United Nations wished to undertake in Cambodia required negotiation with the government it did not validate, but whose goodwill and assistance were required. *See generally* Franck, *supra* note 7 (discussing the circumstances surrounding nation-states compliance with international law).

173. KIRGIS, *supra* note 127, at 184.

174. *Id.*

175. *Id.*

176. *Id.*

177. KIRGIS, *supra* note 127, at 184.

178. *Id.*

179. *Id.*

180. *Id.*

181. U.N. GAOR, 48th Sess., Supp. No. 1, at 50, U.N. Doc. A/48/1 (1993).

By 1992, the four parties had delegated to the United Nations all necessary powers to implement the accord.¹⁸² The resulting peace-keeping operation, the United Nations Transitional Authority in Cambodia (UNTAC), faced a formidable task: rebuilding the torn country on democratic underpinnings. The civilian facet of UNTAC's mandate called for promoting human rights, organizing and conducting free and fair elections, maintaining law and order, overseeing civil administration, repatriating refugees and rehabilitating essential infrastructure.¹⁸³ In addition to these civilian functions, UNTAC had military tasks ranging from the supervision of the cease-fire to the demobilization and disarming of over 200,000 armed forces and militia.¹⁸⁴ In May 1993, 90% of the electorate went to the polling booths to elect a government, and UNTAC became the jewel in the crown of United Nations peace-keeping operations.¹⁸⁵

The elections resulted in the formation of a fragile coalition government, led by Prince Ranariddh, son of Sihanouk, who won the elections, as First Prime Minister, and by Hun Sen, who had enough real power to threaten the result of the elections, as Second Prime Minister.¹⁸⁶ It was a moment where a glimmer of hope seemed to have lightened the Cambodian nightmare. This was not to last long. On July 5, 1997, the Cambodian four-year flirt with democracy ended when the Second Prime Minister launched a successful coup d'etat against Prince Ranariddh, and replaced him as First Prime Minister with Mr. Ung Huot.¹⁸⁷ This action was endorsed by the Cambodian National Assem-

182. *Id.* at 51.

183. *Id.* at 50.

184. See Annex 1 of the 1991 Paris Peace Agreement, reproduced in *The United Nations and Cambodia 1991-1995*, in THE UNITED NATIONS BLUE BOOK, *supra* note 123, at 133.

185. At its height, by mid-1992, UNTAC numbered 21,000 military, police and civilian personnel. *Id.*

186. The internal Cambodian politics leading to what some observers have termed to be an inescapable consequence of a Siamese - twin government are beyond the scope of this paper. Suffice to note that the power-sharing formula whereby the Prince had political seniority, but Hun Sen remained with real power, did not augur well for the nascent democracy. Instability generated by the disintegration of the Khmer Rouge, and the first Prime Minister's negotiations with them as well as with Hun Sen's most vehement critic and opposition leader, Sam Rainsy, reached its critical point when Hun Sen decided to act in early July 1997. See *A Coup in Cambodia*, *ECONOMIST*, July 12, 1997, at 33; Anthony. Speath et al., *Haunted By Ghosts: A Coup Brings the Black Night of Despair Back to Tortured Cambodia*, *TIME*, July 21, 1997, at 48. On August 6, 1997, the Cambodian National Assembly voted to strip Prince Ranariddh of his parliamentary immunity and to elect Foreign Minister Ung Huot as the new First Prime Minister. The constitutionality of these proceedings is questionable under the Cambodian Constitution, but this is a matter that since the Congo precedent has been deemed irrelevant to a decision by the United Nations as regards matters of representation. *A Coup in Cambodia, supra.*

187. See *Press Conference by Prince Ranariddh of Cambodia*, PC/1997/09/17 (1997) [hereinafter *Ranariddh Conference*].

bly.¹⁸⁸ Soon thereafter the United Nations was faced yet again with the question of Cambodian representation.

When the Credentials Committee met on September 17, 1997, it had before it two sets of credentials for two delegations to represent the Royal Government of Cambodia at the fifty-second session of the General Assembly.¹⁸⁹ One set of credentials was signed on September 2 by King Sihanouk, the Head of State, presenting a delegation headed by the new First Prime Minister and Minister of Foreign Affairs and International Cooperation, Ung Huot. The other set of credentials was signed on August 25 by the exiled Prince Ranarridh and presenting a delegation headed by himself as First Prime Minister.¹⁹⁰ To complicate matters still, in a letter dated September 5, 1997 from King Norodom Sihanouk to the Representative of his son, Prince Norodom Ranarridh, the King stated that he continued to recognize the Prince as the legal First Prime Minister of Cambodia.¹⁹¹

Prior to the meeting of the Credentials Committee, and throughout most of July, August and early September, 1997, the respective positions of the parties were presented to the Security Council, to other Permanent Missions, to the United Nations, and to the Press.¹⁹² These positions rested on familiar grounds, fertilizing the political soil with factual and legal seeds. Prince Ranarridh, in exile, based his position against the legitimacy of the new government in Phnom Penh on several related arguments all pertaining to the subjective component of legitimacy. Prince Ranarridh emphasized that the government of which he was First Prime Minister was "born of free and fair elections organized and supervised by the United Nations" that was brought down by a "violent coup d'etat," and that "no elected government official anywhere on earth should be brought down by the force of arms."¹⁹³ Prince Ranarridh further stressed that Hun Sen's "bloody seizure of power is an affront to democracy and a flagrant violation of the 1991 Paris Peace Agreement." Urging the United Nations to withhold recognition from the "new puppet First Prime Minister," he stressed that the matter

188. *Id.*

189. *See Report of the Credentials Committee*, U.N. GAOR, 52nd Sess., at 4, U.N. Doc. A/52/719 (1997).

190. *Id.*

191. The King, the acknowledged symbol of unity in Cambodia, seems to have recognized Ung Huot as the *de facto* First Prime Minister, but continued to refer to his son as the legal First Prime Minister. *See, e.g., Ranariddh Conference, supra* note 187; *Press Conference by Cambodia*, PC/1997/09/12 (1997) [hereinafter *Cambodia Conference*]. In these communications, it is contended that the King was not exercising free choice when he signed the letters of credence at the request of Hun Sen.

192. U.N. GAOR, 51st Sess., at 2-3, U.N. Doc. SPRST/1997/37 (1997).

193. *Id.*

cannot be seen as “an internal affair of the Cambodian people.”¹⁹⁴

It was argued that the coup was but a violent indication of Hun Sen’s fears of being implicated in drug and terrorist activities, the trial of Pol Pot, and, most importantly, losing the elections scheduled for May 1998 in a free and fair political contest.¹⁹⁵ All these arguments stressed the connection between the democratically elected government of which the Prince was First Prime Minister, and the role of the international community, acting through the United Nations, in bringing about a democratically elected government at great financial cost and human sacrifice.¹⁹⁶ If the United Nations were now to recognize the legitimacy of Hun Sen’s government, all this effort would have come to naught and would be regarded as a waste since the United Nations could have done so long ago.¹⁹⁷ The refusal of the United Nations to recognize Hun Sen’s government, even prior to the 1993 elections, further supports the argument against legitimizing it now.

The contest for representation was taking place within the Cambodian Permanent Mission itself when the new government recalled the Permanent Representative of Cambodia, Prince Sisowath Sirirath home, and handed over the leadership of the Mission to his Deputy, Ambassador Ouch.¹⁹⁸ From a constitutional perspective, Prince Sirirath claimed that as he was appointed to his position as Permanent Representative by both the First and the Second Prime Ministers, he could not be recalled without the approval of the First Prime Minister,

194. *Id.* In this case also, the Security Council was the first organ to be faced with the question of Cambodian representation. The quotes in the text are taken from a letter dated July 18, 1997, from Prince Ranariddh to the President of the Security Council and transmitted a day later by Ambassador Sirirath, Cambodia’s Permanent Representative to the United Nations. The Prince was received by the President of the Security Council on July 10. For the presidential statement issued by the President of the Security Council, see *id.*

195. U.N. GAOR, 51st Sess., at 2-3, U.N. Doc. SPRST/1997/37 (1997).

196. *Id.*

197. *Id.*

198. The situation with the Permanent Mission of Cambodia to the United Nations was itself torn between the rival claimants: on August 2, all Permanent Representatives and Observers received a letter whereby they had been informed by Ambassador Ouch Borith, formerly the Deputy to the Permanent Representative, Sisowath Sirirath, that the latter had been recalled from his post as Ambassador Extraordinary and Plenipotentiary and as Permanent Representative. On August 4, they received a letter from Ambassador Sirirath, notifying them that the letter of August 2 was false, that his previous Deputy, Ambassador Ouch, had been relieved of his duties, having supported the coup and that he, Prince Sirirath, remains the legal Permanent Representative of the only legal first Prime Minister. Attached to this letter was a letter from Prince Ranariddh, dated July 24, and addressed to the Secretary-General, confirming Ambassador’s Sirirath’s position on the basis of the unconstitutionality of the coup. The letter is referenced as RC/MP/0483/97; see also *Cambodia Conference*, *supra* note 191.

Prince Ranariddh.¹⁹⁹ On July 21, the Permanent Mission of the Kingdom of Cambodia sent to all Permanent Representatives and Permanent Observers of the United Nations an appeal to refrain from recognizing the legitimacy of Ambassador Ouch, claiming that his appointment was but an illegal reward for having supported a "bloody Coup d'etat."²⁰⁰ On the same day, in a letter addressed to the Secretary-General and requesting that it be circulated as an official document under agenda items 109 and 110 of the fifty-first session of the General Assembly and of the Security Council, Prince Ranariddh rather pointed out that the situation in Cambodia is now characterized by "endless crimes of political harassment, intimidation and threat," and requested that an investigation into these charges be conducted by the Secretary-General's Special Representative on Human Rights in Cambodia.²⁰¹ This position was taken, *inter-alia*, to delegitimize both the claim of effective control and of the constitutionality of the actions undertaken by the new government.²⁰² The request that the issue be dealt with as a substantive issue in the Security Council and the General Assembly under items pertaining to self-determination and human rights indicate that Prince Ranariddh was preparing to ground his claim - and to counterattack the claim of his rival to be recognized as the legitimate representative of Cambodia - on the subjective element of legitimacy.

The position taken by Hun Sen was equally predictable, and emphasized the constitutionality of his government and its continuity, both internally and internationally, within the democratic framework.²⁰³ Hun Sen explained that what happened on July 5 was "sudden events," and not a coup. Hun Sen further claimed that these events were a direct result of provocation on the part of Prince Ranariddh whose forces shelled the capital and necessitated a counter attack by the government,²⁰⁴ and the government's action was "a necessary measure to solve the anarchy by the Ranariddh group."²⁰⁵ The Prince, it was stated, was acting as a war-lord rather than as a Prime Minister, was collaborating with Khmer Rouge forces despite the fact that the government was still fighting them; was building up armed forces loyal to him - not to the government; and was engaged in the illegal importation of weapons to arm his new soldiers. It follows that the govern-

199. *Id.*

200. *Id.*

201. U.N. GAOR, 51st Sess, U.N. Doc. A/51/947 (1997). U.N. GAOR, 51st Sess., U.N. Doc. S/1997/570 (1997). Agenda items 109 and 110 of the fifty-first session of the General Assembly refer to the rights of people to self determination and human rights questions.

202. *See supra* note 199.

203. *See Press Conference by Deputy Permanent Representative of Cambodia, PC/1997/08/19* (1997) [hereinafter *Deputy Conference 1*].

204. *Id.*

205. *Id.*

ment's success "liberated the people from the danger of returning to the Khmer Rouge's genocidal regime and paved the way for fair and free elections on May 28, 1998."²⁰⁶

Indeed, the government in Cambodia was not new: it was a continuation of the coalition of Cambodia, the outcome of the 1993 elections.²⁰⁷ The change in some functionaries was but "some small reshuffling of the government," quite common in most democratic governments.²⁰⁸ The constitutionality of the government was further confirmed when the National Assembly of Cambodia, decided in a "democratic, free and sovereign vote," to replace Prince Ranariddh with Ung Huot as First Prime Minister.²⁰⁹ The Royal Decree of August 7, which finalized the decision of the National Assembly, and was signed by the acting Head of State who had been granted full powers to do so by the Head of State, King Norodom Sihanouk, was equally valid.²¹⁰ Thus, despite the King's non-recognition of the legality of the new first Prime Minister, it was nevertheless maintained that while the King was free to hold his own opinion, that opinion lacked legal merits in view of the above-mentioned delegation of powers to the acting Head of State.²¹¹

Referring specifically to the representation of Cambodia in the United Nations, it was further claimed that both the recalling home of Ambassador Sirirath, and the nomination of a new Permanent Representative were perfectly within the power of the First Prime Minister, Ung Huot.²¹² The problems faced by the Cambodian Permanent Mission were thus a result of an "open rebellion" against the government by the former Permanent Representative who further defied the action of the acting Head of State to terminate his mission and return to Phnom Penh.²¹³ The international community should remember that while Cambodia has two Prime Ministers, it has only one government. That Government is "located in Phnom Penh, not in Aix-en-Provence, France,"²¹⁴ and is recognized by 185 member States.²¹⁵ Refusing to recognize the delegation, the government accredited would thus be "an unacceptable interference in the internal affairs of Cambodia."²¹⁶

206. *Id.*

207. *See Press Conference by Deputy Permanent Representative of Cambodia, PC/1997/09/18 (1997) [hereinafter Deputy Conference 2].*

208. *Id.*

209. *Id.*

210. *Id.*

211. *See Deputy Conference 1, supra note 203.*

212. *See Deputy Conference 2, supra note 207.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See Deputy Conference 2, supra note 207.*

Insofar as Cambodia's international relations are concerned, the government pointed out that it continues to be recognized by all member States, and maintains diplomatic relations with them. In addition, embassies, non-governmental organizations and United Nations programmes and funds such as UNDP and UNICEF, all continue to function normally in Cambodia, and the government continues to exercise effective control over the country and to abide by its international obligations in full respect of the Paris Peace Agreement and the outcome of the UN sponsored 1993 elections. Finally, the government reiterated its commitment to the 1998 elections and welcomed the United Nations as the coordinator of election-observers.²¹⁷ The implication of these arguments was that the withholding of validation of the government would have its symbolic effect collide with reality much to the detriment of the validating United Nations.

Before the issue of representation of Cambodia reached the Credentials Committee, the United Nations faced an embarrassing possibility: a show of force between the two rival delegations at the closing ceremony of the fifty-first session of the General Assembly, scheduled for September 15, 1997. Prince Sirirath was the currently accredited Permanent Representative of Cambodia to the United Nations, but the authority purporting to be the only government of Cambodia had recalled him back to Phnom Penh, a recall he claimed was lacking legal validity.²¹⁸ At the same time, Ung Huot, as the Cambodian Minister for Foreign Affairs and International Cooperation, was accredited as the Head of the Cambodian Delegation to the fifty-first session.²¹⁹ An appeal made by the President of the General Assembly to both parties yielded a compromise solution whereby neither was to attend the ceremony and both would await the resolution of the question by the Credentials Committee.²²⁰

The Credentials Committee met to consider the credentials of Cambodia on September 17, 1997. In light of past practice it could have followed various roads leading to different destinations. If the Committee took a technical stand, it could have accepted the credentials signed by King Sihanouk as Head of State. According to rule 27 of the Rules of Procedure of the General Assembly, the credentials of representatives

217. *Id.*

218. *See supra* note 199.

219. For the report of the Credentials Committee, see U.N.GAOR, 51st Sess., Cred. Comm., U.N. Doc. A/51/548 (1996), and *id.* at addendum pt. 1. It was approved by the General Assembly in Resolution 51/9. G.A. Res. 51/9, U.N. GAOR, 51st Sess., Agenda Item 3(b), 43rd and 87th plen. mtgs., U.N. Doc. A/51/9 (1996).

220. *See Cambodia Conference, supra* note 191. Prince Sirirath stated that he agreed to the compromise out of respect for the President of the General Assembly but that his absence should not be construed as relinquishment on his part of his claim to be the Permanent Representative of Cambodia. *Id.*

can be issued either by the Head of State or Government, or by the Minister for Foreign Affairs.²²¹ The rule is silent on the relative worth of each in cases of competing claims, and this means that they are equal in value. Nevertheless, past practice indicates that the balance would have been tipped in favor of the credentials issued by the King. For example, in the case of the Congo, the Committee refrained from inquiring into the constitutionality of the letters of credence claiming that to have done so would have been an intervention in the domestic affairs of the Congo, and finally accepted the credentials issued by the Head of State and not the Prime Minister. The Committee based its decision on the formal grounds that the credentials were issued by the primary organ empowered to accredit delegates according to the language of rule 27.²²²

Another argument in support of accepting the credentials issued by the Head of State is based on the legal principle that a later document supersedes an earlier one, and because the letters of credence issued by the Prime Minister were dated August 25, 1997, whereas those signed by the Head of State were dated September 2, 1997, the latter supersedes the former. The same result could have been achieved on the basis of the test of effective control, as by that time it was clear that Hun Sen's government was in control of the country, and enjoyed the obedience of the population.²²³

Conversely, the Committee could have determined, without an inquiry into the Cambodian Constitution, that the letter, dated September 5, from King Sihanouk nullified the validity of his letter of credence of September 2, and indicated that the letter of credence was signed under some form of duress. The same result could have been achieved if the Committee followed the spirit, if not letter, of its decision regarding the representation of Democratic Kampuchea. In the present case there was no foreign intervention, but the government of Hun Sen and Ung Huot existed by virtue of a violent coup, and as a matter of principle, a government, the very existence of which is a testimony to a violation of the democratic framework achieved at great cost to the international community, should not be rewarded. This was the position of the United States, a position quite contrary to its insistence on the technical function of the Credentials Committee in the first round of the Cambodian representation question.²²⁴

221. See *supra* note 1.

222. See *supra* text accompanying notes 106-114.

223. See, e.g., B. Crossette, *Cambodian Says He May Bar U.N. From Vote If Denied Seat*, N.Y. TIMES, Oct. 1, 1997, at A10 (clarifying that Hun Sen exercises the effective, though not necessarily legitimate, control in Cambodia, an assessment which the fifteen following months validated).

224. See Anthony Goodman, *Cambodia's UN Seat Stays Vacant; Ruling Put Off*, (Sept. 19, 1997) <Reuters@http://www.infoseek.com>. See also U.S.: *Cambodia Should Not Get U.N. Seat*, (Sept. 17, 1997) <http://www.upi.com>.

This inconsistency merely underscores the fact that the legal straightjacket cannot constrain the political nature of the decision. It is true that the argument that an authority which came into power as a result of a violent coup should not be recognized as a legitimate government could have relied on both the second round of the Cambodian representation question and on the precedent of Ethiopia. Nevertheless, there is a crucial difference between these precedents and the 1997 Cambodia round: in the former cases, an armed intervention by a foreign government generated the coup and supported the new authority. This, however, was not the case in the coup undertaken by Hun Sen.

The third route which the Committee could, and indeed did, follow was to defer a decision. The decision not to decide could have been based on the Committee's conception of itself as a technical body which cannot enter into the political determination required and should thus await developments that would allow it to decide otherwise. Such a rationale was used by the Credentials Committee when it first considered the question of Congolese representation.²²⁵ Deferment of decision was also utilized by the Credentials Committee in 1996 when faced with the question of Afghanistan representation.²²⁶ In that case, there were two documents: a formal letter of credence signed by President Rabbani, as he had done the previous year, and a *note verbale* issued by the Ministry of Foreign Affairs in Kabul challenging the credentials issued by President Rabbani, but refraining from submitting alternative credentials.²²⁷ While the Committee could have decided that it was presented with only one set of credentials within the meaning of rule 27, it took a different course, and decided, both in its first meeting of October 23, 1996, and in its subsequent meeting of December 12, 1996, to defer a decision on the credentials of Afghanistan.²²⁸ The effect of the decision

225. See *supra* text accompanying notes 106-114.

226. At the 52nd Session of the Assembly, the Credentials Committee was informed by the Legal Counsel on December 5, 1997 that two communications had been received concerning the credentials of Afghanistan: one was signed by Professor Burhan-u-ddin Rabbani, "President of the Islamic State of Afghanistan," and presented a delegation headed by Dr. A. G. Ravan Farhadi who was identified as "Permanent Representative," and the other was signed by Alhaj Mull Mohammad Rabbani, "Head of the Government of the Islamic State of Afghanistan," and presented a delegation headed by Mr. Abdul Hakeem Mujahid who was identified as "Designate Permanent Representative." The Committee decided to defer a decision on the credentials of Afghanistan "on the understanding that the current representatives of Afghanistan accredited to the United Nations would continue to participate in the work of the General Assembly pursuant to the applicable rules of procedure of the Assembly." See U.N. GAOR, 52d. Sess., *supra* note 64, at paras. 9-10 (1997).

227. *Id.*

228. For the report of the Credentials Committee see U.N. GAOR 51st Sess., U.N. Doc. A/51/548 (1996) and *id.* at addendum pt. 1. It is interesting to note that, at the first meeting of the Committee, the representative of The Netherlands considered that, "the Government of Afghanistan which had submitted credentials for its representatives at the

was that, pursuant to rule 29 of the Rules of Procedure of the General Assembly, the delegates representing the Rabbani government would continue to represent Afghanistan on a provisional basis.²²⁹

Other cases that arose between the second and third challenges to Cambodian representation failed to allow for the development of a discernible pattern. Following are a number of examples of this pattern. First, in the case of Somalia, and pursuant to the Security Council's resolution to that effect, the United Nations determined that since there is no government in Somalia, no authority can represent it in the United Nations.²³⁰ Second, in the case of Burundi, despite a condemnation by the Security Council of the overthrow of the legitimate government and the constitutional order in that member State, the representatives of the revolutionary government were allowed to participate without challenge, in the work of the political organs of the United Nations.²³¹ Third, in the case of Sierra Leone, the Security Council's condemnation, through a series of Presidential Statements, of the military junta which overthrew the elected government of President Kabbah on May 25, 1997, seems to have had no aversive effect on the consideration,

50th Session of the Assembly was still the Government, and that therefore there was no reason not to accept the credentials as presented to the Secretary-General." This view was supported by the representative of the Russian Federation who, however, cautioned that, "although the decisions of the Committee were technical and not political in nature, the situation in Afghanistan was confused and any hasty decision by a United Nations body could be counterproductive." Eventually, the Committee accepted the compromise solution suggested by the Chairman of the Committee that, "on the understanding that the current representatives of Afghanistan could continue to participate fully in the work of the General Assembly," the proposal by the United States representative to defer the Committee's decision regarding the credentials of the representatives of Afghanistan was accepted. The decision of the Committee to defer its decision on the above understanding was approved by the General Assembly in Resolution 51/9 A and B, *id.*

229. See *supra* note 226.

230. See, e.g., S.C. Res. 897, U.N. SCOR, 49th Sess., 3334th mtg., *supra* note 22; *Report of the Secretary General of September 16*, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/715 (1997); *Report of the Secretary General of February 17*, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/135 (1997); *Report of the Secretary General of April 29*, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/325 (1996); *Report of the Secretary General of January 19*, U.N. SCOR, 51st Sess., U.N. Doc. S/1996/42 (1996); *Report of the Secretary General of March 28*, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/231 (1995); *Report of the Secretary General of January 6*, U.N. SCOR, 49th Sess., Supp. for Jan. - Mar., U.N. Doc. S/1994/12 (1994). Note that an absence of government in effect may be understood to mean that a Member State of the United Nations has ceased to qualify for membership inasmuch as Article 4 requires that Members of the United Nations be States and the existence of a government is a *sine qua non* condition for the existence of a State. This issue, however, is beyond the scope of this paper.

231. See S.C. Res. 1072, U.N. SCOR, 51st Sess., 3695th mtg., U.N. Doc. S/Res/1072 (1996). The credentials of the representatives of Burundi to the 52nd Session of the General Assembly were examined and accepted by the Credentials Committee at its meeting of 5 December 1997. See U.N. GAOR, Cred. Comm., 52d Sess., U.N. Doc. A/52/719, *supra* note 64, at paras. 7 and 11.

and subsequent acceptance, by the Credentials Committee of the credentials of the representatives of Sierra Leone.²³² The Chairman of the Armed Forces Revolutionary Council and Head of State, Major Koroma, notified the Secretary-General of the recall of the Permanent Representative of Sierra Leone, but the credentials of the Permanent Representative were not challenged in the General Assembly, and the communications from Major Koroma were not acted upon.

The Permanent Representative of Cambodia, Prince Sirirath referred to the precedents of both Sierra Leone and Afghanistan to support an outcome he deemed preferable. However, the rationale and circumstances of such precedents were different from the present case of Cambodia where there were two rival sets of credentials, and no condemnation was made by the Security Council.²³³

The effect of the decision to defer the consideration of the Cambodian credentials was that no credentials for any Cambodian representatives have been accepted and thus no one represents Cambodia in the General Assembly.²³⁴ This happened because the Permanent Representative, Prince Sirirath, was previously accredited only to the United Nations, but not to the General Assembly and could not, therefore, rely on the applicability of Rule 29 of the Rules of Procedure of the General Assembly to represent Cambodia on a provisional basis in that organ.²³⁵ The effect of this deferment was thus similar to the result in the case of the Congo, though for different reasons. In the Congo case, there was never any representative previously accredited to the United Nations.²³⁶ Conversely, in the case of Cambodia, the credentials of the previously accredited representative were not specific enough to allow for his pro-

232. See, *Security Council Calls on Military Junta in Sierra Leone to Take Steps for Unconditional Restoration of Democratically Elected Government*, SC/6408, S/PRST/1997/42 (1997); *Security Council Calls for Immediate and Unconditional Restoration of Constitutional Order in Sierra Leone*, SC/6394, S/PRST/1997/36 (1997); *Security Council Strongly Deplores Attempt to Overthrow Democratically Elected Government in Sierra Leone*, SC/6374, S/PRST/1997/29 (1997). For the decision of the Credentials Committee, see U.N. GAOR, Cred. Comm. 52d Sess., U.N. Doc. A/52/719, *supra* note 64.

233. *Cambodia Conference*, *supra* note 191.

234. Pursuant to the Organization's practice, if a delegate is not specifically accredited to the General Assembly, s/he cannot continue to represent the government on a provisional basis. See 1977 U.N. Jurid. Y.B., U.N. Doc. ST.LEG./SER.C/15, *supra* note 59.

235. Prince Sirirath's participation in the 51st Session was based on his inclusion in the list of the Cambodian delegation to that Session as deputy head of the delegation. See the report of the Credentials Committee for the 51st Session of the General Assembly, U.N. Doc. A/51/548, *supra* note 219. See also *id.* at addendum pt. 1. Note that in the Tenth Emergency and the Nineteenth Special Sessions of the General Assembly, held in April and June 1997, respectively, it was confirmed that those Permanent Representatives who did not have credentials authorizing them to represent their governments in all sessions of the General Assembly, needed to be specifically accredited to these sessions.

236. See text accompanying notes 106-114. See also Jhabvala, *supra* note 6, at 622.

visional participation in the General Assembly.²³⁷

The choice to defer a decision in the case of Cambodia seemed to make eminent political sense: the prime political objective was to facilitate a reconciliation process in Cambodia, and a decision on credentials at this stage might have hampered, rather than facilitated, this objective. Should reconciliation take place, an outcome members of ASEAN and other States were clearly trying to encourage, the door was always open for the rival parties to decide on a combined delegation. Choosing a combined delegation would have allowed Cambodia to be represented in the General Assembly on a provisional basis, pending a reconsideration by the Credentials Committee. Further, the elections, scheduled for May 1998, did provide a time-framework within which a reconciliation process could take place, and the commitment of the Phnom Penh government to free and fair elections supervised by the United Nations could be put to the test.²³⁸

The political sense of a particular decision, however, still has to reflect a principled process of decision-making in order to provide for a legitimate legal regime. Had such a regime existed, the election process in Cambodia, and perhaps its results, might have been different, and Cambodia would have been represented in the Fifty-second session of the General Assembly.²³⁹ A proposal for the creation of such a regime, institutionalizing the collective legitimization function of the United Nations is made in the final section.

IV. CONCLUDING COMMENTS AND A PROPOSAL: THE FABRIC OF THE PAST AND THE DESIGN FOR THE FUTURE

The discussion thus far leads to the conclusion that neither the legal framework nor the substantive content poured into it by the practice of the United Nations offer clear, consistent and coherent guidance for determining the legitimacy of representative governments in cases where said legitimacy is challenged. This conclusion indicates a state of

237. See *supra* note 235.

238. Cambodia's elections took place on Sunday July 26, 1998 and more than 90 percent of the country's 5.4 million registered voters took part. The voting went smoothly and international election observers reported that it was "almost entirely free of serious irregularities." See *Cambodians Counting Votes Amid Measured Optimism*, N.Y. TIMES, July 28, 1998, at A7.

239. The results of the elections gave the victory to Hun Sen, however, such victory was disputed by the opposition and primarily by Sam Rainsy, who denounced the election as "rife with fraud," though few independent observers shared that view. See *Cambodia's Voters Have Spoken, But Silence Doesn't Reign*, N.Y. TIMES, July 30, 1998, at A9. It should also be noted that no credentials were presented by Cambodia to the Secretary-General for the 53rd Session and thus the Cambodian seat remained vacant during that Session, too.

affairs that needs to be rectified if the United Nations is to play a viable role in conflict-resolution processes emanating from such challenges. Put differently, and responding to the question raised in the introductory section, the current legal regime appears to be but a legal mantle designed to cover the nakedness of the body-politic. Nude Emperors, however, do normally prefer to be clothed, even at a cost, and current exposure may well reflect a defect in design and in the choice of material. It is thus important to reassess their quality.

In resolving issues pertaining to the representative nature of governments, the United Nations is assuming a function of collective legitimization. In that sense, the hope, once expressed by Sir Hersch Lauterpacht,

that the political integration of the international community, which, in the long run, is the absolute condition of the full development of the potentialities of man and humanity in general, may, alongside other improvements, render possible the collectivization of the process of recognition as best in keeping with its nature and purpose²⁴⁰

has been realized. While Lauterpacht was referring to the recognition of States, not of governments, the legitimizing function of the United Nations is quite similar. In both cases, the United Nations is conceived of as a dispenser of a politically meaningful approval or disapproval of claims relating to the political, moral and legal justification of power. Indeed, while it remains debatable whether States have conferred on the United Nations the power to recognize States,²⁴¹ it does appear that they have endorsed its collective legitimization of governments, particularly in light of their reluctance to engage directly and individually in this process *vis-a-vis* other governments.²⁴²

240. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 78 (1947).

241. DUGARD, *supra* note 85. Professor Dugard's thesis is that the practice of the United Nations indicates that collective recognition of States through the Organization has become the common mode of operation. Note, however, that in order to justify this claim, the term "recognition" is limited only to its cognitive facet. *Id.*

242. For example, in 1977 the United States Department of State declared that its practice has been "to de-emphasize and avoid the use of recognition in cases of changes of governments and to concern . . . with the question of whether we wish to have diplomatic relations with the new governments. The Administration's policy is that the establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct our affairs with other governments directly." L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* 20 (1978). In 1980, the United Kingdom announced a similar policy. *See*, C.R. Symmons, *United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose By Another Name?*, *PUB. L.* 249 (1981). For criticism of this stand, *see*, M.J. Peterson, *Recognition of Governments Should Not Be Abolished*, 77 *AM. J. INT'L L.* 31 (1983). Note, however, that for governments reluctant to pursue a policy of individual recognition

It should also be noted that the United Nations has assumed legitimizing functions in various areas (*i.e.*, in the area of decolonization, even at a time when its ability to actually support its words with deeds was quite limited).²⁴³ As the above review indicates, however, the mere assumption by the United Nations of the function of collective legitimization does not in itself ensure that the legitimizing process works well. The coupling of these observations with new political realities that allow for a wider measure of action in support of judgment, indicate that the time has come to revisit the manner in which the United Nations bestows its collective legitimization function in the context of determining the representative nature of an authority purporting to be the government of a member State.

The legitimacy of governments was defined, for our purposes, as comprising relatively objective and subjective elements. The implication is that the search for legitimacy is a search for congruence between the fact of might and the principle of right; between power and authority. This search is based on the insight, derived from both theory and practice, that legitimacy and power are not antithetical; they are interdependent and indeed reinforce each other in much the same way that language requires both a grammar and a vocabulary if it is to allow for meaningful expression. If the United Nations is to discharge its collective legitimizing function in a meaningful way, it has to take account of this insight and to assess the facts of effective power in light of its legal, moral and political dimensions. It is in this manner that a correlation may be achieved between the content of the legitimizing standard and the identity of the collective agent applying the standard. Such correlation is required for the United Nations, as the collective legitimizing agent, to achieve its objective in this context in a manner that augments rather than undermines its viability.

It follows that neither the legitimizing standard nor the legitimizing agent should be positioned in a legal straightjacket any more than they should allow for the free reign of political exigencies. Rather, both should enable the development of rules that are capable of consistent application in practice in a manner that renders the law more respected and more worthy of respect. How, then, is the legal regime governing questions of representation to be reconstructed? How should the process of legitimization work?

Relatively recent developments in the European Community in the

of foreign governments, transferring that role to the United Nations and transforming the act of recognition from an individual to a collective act, is a rather attractive option. It is the reluctance of governments to give up the right to recognize new States on an individual basis which prevented the clear assumption of this function by the United Nations.

243. See, I.L. Claude Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

law and practice of recognition of States may be instructive in this context. On December 16, 1991, the European Community Foreign Ministers meeting in Brussels issued a "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union" [hereinafter Declaration on Guidelines].²⁴⁴ Accompanying this Declaration on Guidelines was a "Declaration on Yugoslavia."²⁴⁵ The basic tenets of the Declaration on Guidelines were four-fold. First, they expressed an intention to recognize the new States. Second, they replaced individual recognition with a collective recognition by the European Community. Third, they discarded the legal straightjacket, according to which recognition was but a formal statement of facts, and repositioned it in the realm of foreign policy.²⁴⁶ Fourth, they articulated conditions which States wishing to be recognized had to meet.²⁴⁷ The Declaration on Yugoslavia went further to design a method by which an application for recognition is to be submitted and considered.²⁴⁸

These developments were criticized for having bred instability. It was claimed that: 1) whereas the traditional criteria for recognition of statehood provided consistency and a defense against doubtful claims, the new stand by the European Community introduced "a new level of ad-hoc decision making that runs the risk of making recognition uncer-

244. *Focus*, Special Issue, Jan. 14, 1992, 92, reproduced in 4 EUR. J. INT'L L. 72 (1993).

245. 4 EUR. J. INT'L L., at 73.

246. In declaring that recognition is "subject to the normal standards of international practice and the political realities of each case." *Id.* at 72, Annex 1.

247. States wishing to be recognized had to constitute themselves on a democratic basis; accept appropriate international obligations; commit themselves in good faith to a peaceful process and to negotiations; respect the provisions of the Charter of the United Nations, the commitments subscribed to in the Final Act of Helsinki and the Charter of Paris, especially with regard to the rule of law, democracy and human rights; guarantee the rights of ethnic and national groups and minorities in accordance with the CSCE; respect the inviolability of frontiers that can only be changed by peaceful means and by common agreement; accept relevant commitments regarding disarmament, nuclear non-proliferation, security and regional stability; commit to settle by agreement, including, where appropriate by arbitration, all questions concerning state succession and regional disputes. The Guidelines further stated a policy of non recognition of entities which result from aggression. Finally, the Guidelines stated that account shall be taken of the effects of recognition on neighboring States. Further conditions pertained exclusively to the situation in Yugoslavia and, in addition to conditions in the Declaration on Guidelines, further conditioned recognition on acceptance of provisions laid down in the draft Convention under consideration by the Conference on Yugoslavia, especially those relating to human rights and the rights of national and ethnic groups as well as on continued support for the efforts of the Secretary-General, the Security Council and the Conference on Yugoslavia. See *Focus*, *supra* note 244.

248. A state seeking recognition had to submit an application by a certain date; the application was to be examined by the arbitration commission (the Badinter commission established on 27 August 1991) and the latter was to render a decision by a certain date. See *supra* note 245, at 74, Annexes, 2-4.

tain and unpredictable";²⁴⁹ 2) this risk was augmented by the value judgment inherent in the subjective nature of the conditions; and 3) indeed the application of the guidelines in practice was inconsistent, as for instance, in the decision to recognize Bosnia and Herzegovina despite the anarchic situation there, and the dependence of this entity on the presence of foreign troops, as opposed to the decision not to recognize the Republic of Macedonia despite the Commission's decision that it did satisfy all the requisite conditions.²⁵⁰ We believe that the criticism is unmerited. There is little reason, from both a legal and political perspective to lament the demise of the traditional requirements of statehood that were discarded long ago as being incompatible with the expectations of States as well as with modern practice.²⁵¹

The Guidelines did not change the nature of the recognition from a legal to a political decision. They simply admitted that it was a political decision, and sought to articulate standards to guide that decision to achieve a laudable objective: a principled, collective, foreign policy designed to facilitate peaceful resolutions of bloody conflicts.²⁵² In most cases, the criteria were applied consistently, and the decisions of arbitration commissions were accepted, the only exception being the case of the Republic of Macedonia.²⁵³ It is quite true that the overall objective was not always achieved, but it does not follow that this failure was due to the introduction of new guidelines for recognition or to the measure of flexibility they retained in order to allow for a perfectly legitimate use of recognition as a diplomatic tool.

249. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, in *Symposium: Recent Developments in the Practice of States Recognition*, 4 EUR. J. INT'L L., 36 (1993).

250. *Id.*

251. For a discussion, see DUGARD, *supra* note 85, at 78-89.

252. Even those critical of the recent practice of recognition adopted by the European Union admit that the adoption of conditions leading to recognition "is an attempt to introduce a greater moral dimension," and their criticism is directed more at the inconsistent implementation of the new recognition regime, and less at its substantive standards. See Rich, *supra* note 249, at 64; D. Turk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66 (1993).

253. In opinion number 6, the Commission found that the Republic of Macedonia satisfied all conditions and that the use of the name "Macedonia" did not imply any territorial claims against another State. The European Community met on January 15, 1992, but its members declined to extend recognition to the Republic of Macedonia. On May 2, the European Community stated that it shall be willing to extend recognition but "under a name that can be accepted by all parties concerned." See Rich, *supra* note 250. The President of the Republic of Macedonia declined to meet this condition on the grounds that it is both unprecedented and brings into question the "identity and dignity" of the people of the country. See Rich, *supra* note 249. The European Community, due to the *de facto* veto of Greece over its policy, did not extend recognition. See *id.* at 52. It should be noted that had the collective recognition function been assumed by the United Nations, the decision might have been different as Greece could not exercise the same relative power in the international arena.

The use of recognition, of either States or governments, as a diplomatic tool is not new. Its use as a collective means expressing a principled stand by the international community acting through the United Nations with respect to the legitimacy of an authority purporting to be the representative government of a member State may well be a welcome innovation. Its translation into a practical reality calls for a change in the legal regime applicable to this situation.

The elements comprising a legal regime governing questions of legitimate representation need not change. Their content, however, is in need of such change. The following is an initial proposal designed to serve as a basis for consideration of a new regime governing the collective legitimization process exercised by the United Nations in the context of determining the representative nature of governments.

(a) Definition of the problem: the type of challenges to representation to which the regime governing questions of legitimate representation applies: The regime should govern both internal and external challenges to the representative nature of a government. This should be the case because each and every type of challenge raises the issue of representation and a comprehensive legal regime should offer criteria applicable to the issue at hand in its entirety.

(b) Determination of the best available means within the existing institutional framework for resolving challenges as defined in (a) above: It is proposed that the most feasible means - as distinct from the absolute best means - within the institutional framework for resolving challenges to representation as defined in (a) above, are the Rules of Procedure of the General Assembly. The Rules, however, would have to be amended to allow for: 1) the definition of the problem of representation, 2) the articulation of the criteria relevant for its resolution, 3) the forum that would be entrusted with the application of those criteria, and 4) the detailing of its powers and procedure.

(c) Articulation of the criteria to be applied in making a decision: The criteria would have to be based on the following considerations: First, is the decision made in a fluid political context, and designed to bring certain political results, conducive to a better order. Second, does that better order have both objective and subjective characteristics such as: 1) encompassing effective control; 2) ensuring stability; 3) constitutionality; and 4) ensuring that power is exercised in a principled, rather than an arbitrary, manner in accordance with the goals of the international community. Third, is the decision confined to the normative hierarchy of the Charter, and cannot therefore contravene its provisions. Finally, the criteria should be determinate enough to encourage their consistent application and indicate in as clear a manner as possible the expectations of the international community. In light of these considerations, it seems to us that, in determining the issue of representation, the following requirements are to be met for an authority to be recog-

nized as a representative government of a member State:

(i) The authority purporting to be the representative government of a member State has effective control of the country. This requirement concerns the objective component of legitimacy. It is a necessary, yet insufficient, condition for recognition;

(ii) The authority meeting requirement (i) above was neither installed by the intervention of foreign troops nor is it maintained by the presence of such troops. This requirement expresses a positive development in the practice of the Organization and should be transformed from a trend into a principled stand;

(iii) The authority meeting requirements (i) and (ii) above was elected in free and democratic elections. In cases where the authority meeting these requirements has not assumed power as a result of free and democratic elections, its representative nature will not be recognized until and unless such elections take place. This requirement articulates an objective standard for the measurement of the subjective element of legitimacy of governments. It is not concerned with the result of the election, and does not prevent the recognition of an authority whose political platform is undemocratic as the representative government of a member State, but it does require that the people thus represented have been given a fair chance to articulate their preference.

These conditions express minimal requirements in terms of the goals of the international community. Unlike the European Community which represents governments that share a wide consensus on values and could therefore demand conformity to such values by new States seeking recognition from the European Community, the international community enjoys no such consensus. Had it existed, it would have been possible to articulate additional requirements. For instance, the international community could have required that an authority meeting conditions (i) - (iii) not engage in illegal acts in violation of peremptory norms of international law. This requirement would have ensured that the regime seeking legitimacy is not merely an organized power which was elected democratically, but that it exercises that power for making and executing decisions that good government entails.²⁵⁴ The reference to "good government" in this context would have remained minimal insofar as it would have had a negative content: a regime that violates norms having the character of *jus cogens*, a regime that obstructs the basic goals of the international community, is simply not a regime worthy of recognition. Such a requirement, alas, is not presently feasible because it is not determinate enough, and the lack of consensus surrounding the concept of *jus cogens* would have prevented a meaningful enumeration of such norms, on the one hand, and the con-

254. See J.E.S. FAWCETT, *THE LAW OF NATIONS* 38-39 (1968).

sistent application of the standard, on the other hand.²⁵⁵

Nevertheless, the conditions enumerated above present a step forward in allowing for a global alignment on the basis of principle, that takes politics into account while transcending specific factions. It allows for the expression, albeit modest, of a committed and collectivist stand with respect to the issue of representation, as well as, for the development of a politically fair and accountable organization of international relations in a manner that befits its present evolutionary stage. It further accords the issue of representation its proper outfit: it takes account of both the objective and the subjective components of legitimacy, but does so according to the measurements of the body-politic of the international community as is, rather than as it should be, in the eye of a particular beholder.

(d) Choice of the appropriate forum for decision-making: The definition of the problem, the identification of the best available means for the decision-making process, the articulation of the considerations on which the applicable criteria should be based as well as of the criteria themselves, indicate that the appropriate forum should not be the Credentials Committee, but rather a Special Committee of the General Assembly. Such a Committee would not be confined by the Rules of Procedure applicable to the Credentials Committee, and could be empowered to determine issues of representation as defined in (a) - (c) above. The composition of the Special Committee should reflect the political nature of the decision it is requested to make in the heterogeneous community of States.

(e) Delimitation of the type of actions to be taken and the consequences emanating therefrom: Here, there is no change from the existing regime. The Special Committee should be empowered to make a decision favorable to the challenging party, make a decision favorable to the challenged party, or to defer a decision pending the fulfillment of its substantive criteria. The decisions of the Special Committee would then be submitted to the decision of the General Assembly. As a decision on representation determines whether or not a member State will be represented in the United Nations, it is an important decision for the State concerned, for its people, for the authority purporting to be the government and for the international community acting through the United Nations. As such, questions of representation should be classified as an "important question" category within the meaning of article 18(3) of the Charter, and should be decided by a two-thirds majority of members present and voting.

If the proposed regime were applied to the latest round of Cambo-

255. For a discussion on the possibility of collective non-recognition of states and *ius cogens*, see DUGARD, *supra* note 85, at 132-170.

dia's representation debate, the resulting decision may have been the same as the one that was actually reached. Its message and impact, however, would have been quite different, as it would have expressed a principled, rather than an expedient, decision. If the international community is to emerge from the shadow-land of tactical maneuvers into the promised land of strategic vision, it has to become a community of principle.

The existence of a legal right to democratic governance may be debatable,²⁵⁶ but the need for the United Nations to assist peoples in achieving their aspirations is less so. The Charter of the United Nations begins with reference to "We the Peoples of the United Nations,"²⁵⁷ and proceeds to state that the peoples have resolved through their "respective Governments"²⁵⁸ to establish the United Nations to further their aims. A Government that betrays its people, as determined by the criteria and methodology proposed above, is not worthy of respect and consequently, of recognition. The United Nations as a collective legitimizing agent will be acting both within its powers and in a manner that remains true to its promise if it withholds legitimacy in such cases. Making this change may be a step in the development of a legal right to democratic governance but, perhaps more fundamentally, it is a condition for "the full development of the potentialities of man and humanity in general,"²⁵⁹ and an expression, an "inclusive vision" in a "world that remains divided by many and diverse interests and attributes."²⁶⁰ Such an expression remains the fundamental role of the United Nations.

256. See, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

257. See U.N. CHARTER Preamble.

258. *Id.*

259. LAUTERPACHT, *supra* text accompanying note 240.

260. *Renewing the United Nations: A Programme for Reform, Report of the Secretary-General*, U.N. GAOR, 51st Sess., U.N. Doc. A/51/950 (1997).

