EDITORIAL COMMENTS

ON THE DEGRADATION OF THE CONSTITUTIONAL ENVIRONMENT OF THE UNITED NATIONS

I.

Manipulating constituent instruments of international organizations in order selectively to punish unpopular member states is not a new phenomenon. Of the states that resorted to war in violation of their obligations under the Covenant of the League of Nations—Japan, Italy, the Soviet Union—only one, the Soviet Union, was expelled from the League when on November 30, 1939 it invaded Finland. On December 14, 1939, the Council, by virtue of Article 16(4) of the Covenant, found "that by its act, the Union of Soviet Socialist Republics has placed itself outside the League of Nations. It follows that the Union of Soviet Socialist Republics is no longer a Member of the League."[1] However, the specific voting rule in Article 16(4) was not complied with on this occasion.[2] While the League insisted "on a strict application of the unanimity requirement; . . . in a period of moral indignation, niceties of procedure are not likely to be observed."[3] But where was moral indignation when Japan attacked China, and Italy attacked Ethiopia, and Germany attacked Poland and thus started World War II? The members of the League and the members of the United Nations now seem to be moved to moral indignation only in selected cases, which deprives indignation of its moral basis. Insofar as the expulsion of the Soviet Union is concerned, a more persuasive explanation has been given by the historian of the League F. P. Walters:

> If no move had been made to submit to the League the issues which had led to war between Germany and Poland, France, and Britain, what result could be expected from its intervention in this new conflict? But the Soviet aggression had loosed a storm of anger from one end of the world to the other. All those States whose policy had been affected by fear and hatred of Communism denounced the perfidy of Stalin in language which none of them used about Hitler.[4]

Thus, the drive to score an ideological victory prevailed over the traditional concern for constitutional propriety. However, coming as it did in the final phase of the League, it could not produce any lasting harm and did not prevent

[1] 20 LEAGUE OF NATIONS O.J. 506 (1939).

[2] *See* Gross, *Was the Soviet Union Expelled from the League of Nations?*, 39 AJIL 35, 42 (1945). For a contrary view, Nathan Feinberg, *L'Exclusion d'un Membre de la Société des Nations et le principe de l'unanimité*, in STUDIES IN INTERNATIONAL LAW. WITH SPECIAL REFERENCE TO THE ARAB-ISRAEL CONFLICT 3 (Jerusalem 1979). *See also* Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1387–91 (1964).

[3] Sohn, *supra* note 2, at 1390.

[4] 2 F. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 804–05 (1952).

the forging of the Grand Alliance including the Soviet Union, against Hitler, which was transformed into the United Nations.

In the United Nations strong antagonisms developed in the 1960's as groups of states, many of which only recently had been admitted to membership, set out to impose their views on a dissenting minority of individual states such as Portugal over the colonial question and South Africa over the question of Namibia and apartheid.[5] More recently in the context of the Middle East problem, Israel became the target of intense attempts to isolate, suspend, or expel it. The earlier incidents are of no particular consequence except the patently unconstitutional "suspension" of South Africa from the General Assembly in 1974. Departing from the so-called Hambro formula according to which South Africa was permitted to sit in the Assembly from 1970 to 1973, although the credentials of its representative were rejected, a conniving President of the Assembly, Ambassador A. Bouteflika (Algeria), disregarding precedent and the opinion of the Legal Counsel of the United Nations,[6] gave a ruling interpreting the rejection of credentials as follows:

> On the basis of the consistency with which the General Assembly has regularly refused to accept the credentials of the delegation of South Africa, one may legitimately infer that the General Assembly would in the same way reject the credentials of any other delegation authorized by the Government of the Republic of South Africa to represent it, which is tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.[7]

The representative of the United States, Mr. Scali, challenged the ruling on the ground that it violated Articles 5 and 6 of the Charter, dealing respectively with suspension and expulsion. In the circumstances, the result was predictable: by a vote of 91 to 22 with 19 abstentions, the ruling was upheld.[8]

[5] Sohn, *supra* note 2, at 1409–16; *see* pp. 1412–16 concerning the forced withdrawal of South Africa from the ILO in 1964.

[6] Scope of "credentials" in rule 27 of the rules of procedure of the General Assembly: statement by the Legal Counsel to the President of the General Assembly at his request, UN Doc. A/8160 (Nov. 11, 1970), *reprinted in* 1970 UN JURIDICAL Y.B. 169. The relevant part of the opinion is as follows:

> Should the General Assembly, where there is no question of rival claimants, reject credentials satisfying the requirements of rule 27 for the purpose of excluding a Member State from participation in its meetings, this would have the effect of suspending a Member State from the exercise of the rights and privileges of membership in a manner not foreseen by the Charter. . . . The participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership. Suspension of this right through the rejection of credentials would not satisfy the foregoing requirements and would therefore be contrary to the Charter.

Id. at 170–71, para. 6. The Legal Counsel distinguished the case of Hungary from 1956 to 1963 and the case of South Africa in 1970, as in both cases the representation of these members was seated and exercised rights of membership. *Id.* at 170, para 5. He also distinguished the cases of the Congo in 1960, Yemen in 1961, and China. *Ibid.*, para. 4.

[7] UN Doc. A/PV.2281, at 76 (Nov. 12, 1974).

[8] *Id.* at 71–86. The scenario for this meeting of the Assembly might have been written by Professor Sohn. Using an "imaginative" interpretation, he suggested that exclusion of a recalcitrant member might be achieved through a challenge of the credentials on the ground that the

This is not the place to consider further the constitutionality of the exclusion of South Africa from the General Assembly. As the Legal Counsel pointed out, "participation in the meetings of the General Assembly is quite clearly one of the important rights and privileges of membership."[9] It is solidly anchored in Article 9 of the Charter.[10] South Africa was, and continues to be, a member of the United Nations. There is no rival government, and no manipulation of the rules of procedure can prevail over the explicit terms of the Charter without serious degradation of the Organization and the rule of law.[11]

The credentials issue relates to the question whether the delegates are properly authorized—Rule 27 of the Rules of Procedure of the General Assembly—to represent the government, and not to the question whether the government of the member represents the people of the state or a particular ideology. The Charter does not require a representative or democratic form of government as a condition of admission to the United Nations, nor does loss or lack of a representative or democratic character constitute a ground for suspension or expulsion of members.

When the General Assembly on March 2, 1981 resumed its 35th session for the sole purpose of tackling the question of Namibia, a West European, Rüdiger von Wechmar (FRG), was in the chair. As the Government of the Federal Republic had voted against President Bouteflika's ruling in 1974, one

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government was not a "true" but a totalitarian government or a foreign puppet. This method could be applied even to expel a permanent member of the Security Council, if necessary under the 1950 Uniting for Peace Resolution of the General Assembly. Sohn, *supra* note 2, at 1422–23 & n.202. However, the device to invoke a presidential ruling in order to override the Charter was invented by the United States and applied in the question of Laos. *See* Gross, *The Question of Laos and the Double Veto in the Security Council,* 54 AJIL 118, 127 (1960).

[9] *Supra* note 6.

[10] Article 9 reads: "1. The General Assembly shall consist of all the Members of the United Nations. 2. Each Member shall have not more than five representatives in the General Assembly."

[11] Concerning the legality of the "suspension" of South Africa, see Jhabvala, *The Credentials Approach to Representation Questions in the U.N. General Assembly,* 7 CAL. W. INT'L L.J. 615 (1977); and Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations,* 25 INT'L & COMP. L.Q. 351 (1976). Jhabvala concluded, at p. 637: "the decision on South Africa was legal." Ciobanu concluded, at p. 380:

> [T]he General Assembly properly exercised its power to inquire into the representation of South Africa in the United Nations, and that its decision of September 30, 1974, to reject the credentials of the delegation appointed by the Government of that State was valid. The same cannot be said of its interpretation of that decision, at the 2281st meeting on November 12 of the same year. . . .

See also McWhinney, *Credentials of State Delegations to the U.N. General Assembly: A New Approach to Effectuation of Self-Determination for Southern Africa,* 3 HASTINGS CONST. L.Q. 19 (1976). Approving the ruling concerning South Africa, McWhinney said:

> In considering the issue of representation, the General Assembly and its Credentials Committee may properly be guided by new international law principles, such as the principle of the self-determination of peoples, developed or extended since the adoption of the Charter, and also, *inter alia,* by relevant World Court opinions, such as the 1971 ruling on the Namibia question.

Id. at 34 (footnotes omitted). It is beyond the scope of this paper to examine the reasoning that led Jhabvala, Ciobanu, and McWhinney to their respective conclusions.

might have expected President von Wechmar to make at least an effort to revive the Hambro formula.[12] However, for reasons that hardly seem convincing, the President chose to play the game according to the rules of the Third World rather than the rules of the General Assembly and the rules of the Charter.[13]

II.

In the cases discussed above, the opponents of unconstitutional proceedings were content to register their reasoned protest but took no further action to stop the degradation of the constitutional foundations of the United Nations. Such verbal protests have been without avail. When Israel became the target of prevailing majorities, the United States manifested its protest in words as well as in deeds.

[12] On that occasion, speaking for his Government, Baron von Wechmar referred to the opinion of the Legal Counsel of Nov. 11, 1970, *supra* note 6, and declared:

> In the opinion of my Government, the credentials of the South African delegation met the requirements of article 27 of the rules of procedure; therefore there were and continue to be no legal grounds for excluding the South African delegation from the General Assembly. . . . We can only hope that this dangerous precedent will remain the only case of its kind, and that the Organization will find its way back to the strict observance of its rules.

UN Doc. A/PV. 2281, at 93–95 (Nov. 12, 1974). As a matter of fact, he not only repeated the dangerous precedent but made it worse by declaring even before the Credentials Committee had made its report on South Africa's credentials: "I shall not recognize requests for participation in this debate until the General Assembly receives a report from the Credentials Committee." UN Doc. A/35/PV.102 (Mar. 2, 1981). The request to which he referred was apparently made by South Africa under Rule 71 of the Assembly's Rules of Procedure: "During the discussion of any matter, a representative may rise to a point of order, and the point of order shall be immediately decided by the President in accordance with the rules of procedure." This incident is summarized in 18 UN MONTHLY CHRON., April 1981, at 7.

[13] The discussion at the 102d plenary meeting is summarized in 18 UN MONTHLY CHRON., April 1981, at 5–8. The President's explanation is on p. 7. Among those who opposed the Assembly action were the Netherlands on behalf of the 10 members of the EEC; Canada; Austria; Turkey; Iceland on behalf of Denmark, Finland, Norway, and Sweden; the United Kingdom; the Federal Republic of Germany; New Zealand; France; Chile; Australia; and the United States. The United States was reported as saying:

> On so fundamental a question as the rights of membership, the passing of time had not given the Assembly a better legal basis for doing in 1981 what it did improperly in 1974. No one has shown that South Africa's credentials failed to meet the requirements of the rules of procedure. To refuse to consider those credentials as required by the rules was to use the guise of credentials to try to accomplish a suspension that lay beyond the powers of the General Assembly.

Id. at 6. In the view of the Federal Republic of Germany, "[i]t was inconsistent with the provisions of the Charter to evaluate the legitimacy and policy of Governments which issued such credentials." *Id.* at 8. France "felt that an organization which did not respect its fundamental laws rendered itself vulnerable." *Ibid.* Chile

> was sorry that it had to stray from the majority of the Latin American countries and its friends from Asia and Africa, but it firmly believed that the sole hope for respect for the small and medium-sized countries was support for the rules of law—and that was the principle which guided Chile in its vote.

Ibid.

Thus, on November 21, 1974, the General Conference of UNESCO rejected an Israeli request to be included in UNESCO's European regional group. As a result, Israel became the only member of UNESCO excluded from its regional group. This action followed an earlier resolution in which the General Conference had condemned Israel for "its persistence in altering the historical features of the City of Jerusalem and by undertaking excavations which constitutes a danger to its monuments." The United States objected to this, saying:

> [T]he essential objective of this resolution is not . . . the preservation or protection of historical sites and monuments. Whatever the claimed intentions of those who sponsored it might be, the resolution in fact imposes a completely unjustified sanction upon a Member State of this Organization for reasons that seem to us to be largely motivated by political considerations.[14]

The Congress on December 30, 1974 voted to withhold the American contribution to the budget of UNESCO.[15] This "counter-sanction" was effective. The General Conference of UNESCO admitted Israel to the European regional group in 1976 and Congress lifted the financial embargo.[16]

A different and stronger sanction was applied by the United States against the International Labour Organisation. It is apparent from the formal notice of intention to withdraw from the ILO given by Secretary of State Henry Kissinger to the Director-General on November 5, 1975 that an accumulation of grievances rather than a single incident motivated it. They were grouped under four heads: (1) the erosion of tripartite representation, which has a long history; (2) selective concern for human rights, which is found to an even greater degree in the United Nations; (3) disregard of due process, of which "[t]he most blatant example was the 1973 [International Labour] Conference's treatment of Israel";[17] and (4) the increasing politicization of the Organisation.[18] The admission of the PLO to participation in the General Conference of the ILO may well have been regarded as a significant illustration

[14] 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 45. For a rebuttal of the alleged danger to monuments, see statement of the American Jewish Congress *quoted in* F. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 550 (1977). Concerning the exclusion of Israel from the European Group, it was reported that "[a]ccording to one UNESCO official, 'the Arab and Socialist-bloc countries did a full time job' in gathering their support, and non-left-leaning African delegations had voiced resentment about anti-Israeli pressures, 'with much talk of blackmail,' " N.Y. Times, Nov. 22, 1974, §1, at 6, *quoted in* Lang, *UNESCO and Israel,* 16 HARV. INT'L L.J. 676, 681 (1975).

[15] 1974 DIGEST, *supra* note 14, at 47.

[16] 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 49–50. President Ford on Dec. 29, 1976 informed the Congress "that sufficient progress had been made at the recently concluded UNESCO General Conference toward reversing the anti-Israel actions of the 1974 conference to justify a resumption of U.S. funding." *Id.* at 50. It may be noted that the United States National Commission for UNESCO, in a statement approved on Dec. 5, 1974, opposed the withholding of funds for UNESCO. 1974 DIGEST, *supra* note 14, at 46–47.

[17] Alford, *The Prospective Withdrawal of the United States from the International Labor Organization: Rationales and Implications,* 17 HARV. INT'L L.J. 623, 630 (1976).

[18] 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 70–73.

of politicization.[19] However, more or most important may have been the condemnation of Israel by the General Conference in 1974 for "racist" practices in the West Bank in utter disregard of the procedures for which the ILO was justly highly respected.[20]

Pursuant to the notice, President Carter terminated United States membership in the ILO on November 1, 1977, and the reasons for this step, including condemnation of members without due process, were outlined by the Secretary of Labor, F. Ray Marshall.[21] Three years later, on February 18, 1980, after remedial action was taken by the ILO, the United States resumed membership.[22]

In the wake of the destruction of an Iraqi nuclear installation by Israel, the International Atomic Energy Agency suspended Israel from membership in a manner that provides another example of the degradation of the constitution of a specialized agency and its rules of procedure.

The Security Council on June 19, 1981 adopted Resolution 487 (1981) in which, after referring to Article 2(4) of the Charter, it:

> 1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct;
>
> 2. *Calls upon* Israel to refrain in the future from any such acts or threats thereof;
>
> 3. *Further considers* that the said attack constitutes a serious threat to the entire IAEA safeguards régime which is the foundation of the non-proliferation Treaty;
>
> 4. *Fully recognizes* the inalienable sovereign right of Iraq, and all other States, especially the developing countries, to establish programmes of technological and nuclear development to develop their economy and industry for peaceful purposes in accordance with their present and future needs and consistent with the internationally accepted objectives of preventing nuclear-weapons proliferation;

[19] F. KIRGIS, *supra* note 14, at 207. A particularly ugly incident of politicization of the ILO by the United States occurred in 1970 in connection with the appointment of a Soviet citizen as Assistant Director-General. *See* Schwebel, *The United States Assaults the I.L.O.*, 65 AJIL 136 (1971). On that occasion the U.S. Congress voted to block payment of assessment due to the ILO.

[20] Alford, *supra* note 17, at 630–31. At the same time, the General Conference also discarded standard procedure in condemning Chile for its labor practices.

[21] 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 39–40.

[22] Nash, Contemporary Practice of the United States Relating to International Law, 75 AJIL 363 (1981). In announcing on November 13, 1980 that the United States would rejoin the ILO, President Carter stated:

> Since [the U.S. withdrawal], a majority of the ILO members—governments, workers, and employers—have successfully joined together to return the ILO to its original purposes. Through their efforts, steps have been taken to strengthen the independence of employer and worker delegates, undertake investigations of human rights violations in a number of countries, including the Soviet Union, reinforce the principle of due process, and generally reduce the level of politicization in the ILO.

Ibid.

> 5. *Calls upon* Israel urgently to place its nuclear facilities under IAEA safeguards;
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> 6. *Considers* that Iraq is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel. . . .[23]

The General Conference of the IAEA at its 25th session adopted a resolution, GC (xxv) Res. 381, on September 26, 1981, in which it decided by a vote of 51 to 8 with 27 abstentions to consider at its next session the suspension of Israel if it failed to comply with the Security Council resolution.[24] The Agency's Statute provides for suspension of a member by a two-thirds majority vote of the General Conference upon the recommendation of the Board of Governors.[25]

The draft resolution for suspension of Israel, submitted at the next session, invoked, *inter alia,* the "persistent violation of the Statute and the purposes and principles of the Charter of the United Nations"[26] and Israel's failure to comply with Security Council Resolution 487 (1981).[27] As the United States representative, Mr. Davis, pointed out, there had been no recommendation from the Board of Governors,[28] and the Israeli "attack did not violate any specific Article of the Statute or any agreement entered into pursuant to the Statute. Nor could a one-time action qualify as 'persistent'."[29] Israel maintained that "[t]here could be no greater damage to the international nonproliferation regime than a politicized IAEA"[30] and that

> [t]o invoke Security Council resolution 487 or any other resolution as grounds for considering the suspension of Israel's rights and privileges of membership was both artificial and illegal. If such political requirements existed, many States represented at the Conference, in particular Iraq, would be in violation of the Statute and therefore subject to suspension.[31]

The United States representative recalled that "[h]is government had consistently opposed proposals to expel or suspend Israel illegally in the past, and continued to do so"; that "[t]he Agency's Statute gave no mandate to attempt to enforce resolutions of the Security Council or other United Nations organizations"; that "[b]ecause the Security Council had not imposed sanctions, suspension by the Agency would run counter to the considered judgment of

[23] UN Doc. S/RES/487 (1981), *reprinted in* 75 AJIL 724–25 (1981).

[24] UN Press Release WS/1043, Oct. 2, 1981, at 6–7.

[25] Article XIX(B) reads:

> A member which has persistently violated the provisions of this Statute or of any agreement entered by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two-thirds majority of the members present and voting upon recommendation by the Board of Governors.

8 UST 1093, TIAS No. 3873, 276 UNTS 3.

[26] IAEA Doc. GC(XXVI)/OR.245, para. 5 (Oct. 4, 1982) (Tunisia).

[27] *Id.*, para. 19 (Zambia).

[28] *Id.*, para. 12.

[29] *Id.*, para. 9.

[30] *Id.*, para. 28.

[31] *Id.*, para. 27.

the United Nations organ specifically charged with responsibility for the maintenance of international peace and security"; that "after 30 years marked by military action in virtually every region of the globe, no Member State had ever been suspended"; and concluded that "the suspension of Israel from any United Nations body would jeopardize continued United States support for that body and would have grave consequences for its continued participation in it. The illegal suspension of Members would be the dangerous first step toward the unravelling of the whole United Nations system."[32]

In the roll-call vote on the draft resolution to suspend Israel, "[t]here were 43 votes in favour and 27 against, with 16 abstentions. The required two-thirds majority being 47, the draft resolution was rejected."[33]

The reasons for the opposing votes were stated by the United States before, and for the abstentions, by Venezuela after the vote.[34] Since the substantive flaws of the defeated draft resolution could not be excised, its proponents fell back upon the credentials route which has worked so well in the case of South Africa, both in the United Nations and in the International Atomic Energy Agency.[35] At the subsequent meeting, September 24, 1982, the delegate of Iraq recalled that in the Credentials Committee seven delegates had rejected Israel's credentials and six had accepted them. He therefore proposed to amend the operative paragraph of the draft resolution of the committee by adding the words "with the exception of the credentials presented by Israel," on the ground that Iraq "refused to consider Israel to be the legal representative of that region," meaning the Golan Heights, Jerusalem, the West Bank, and the Gaza Strip.[36]

The representative of the United States argued that the rejection of the credentials "would constitute a violation of Article V[37] to the extent that it would be equivalent to suspending the privileges and rights of a Member," and that suspension required a two-thirds majority. He "deplored the attempt to impose policital sanctions on Israel on the occasion of a purely technical question, namely that of determining whether delegations' credentials conformed with the rules laid down" and issued this warning:

> His delegation wished it to be clearly understood that, in the event of de facto suspension of the exercise by Israel of the rights and privileges of membership, which would be illegal, it would withdraw from the current session of the General Conference and that the Government of the United States would reconsider its participation in the Agency's work.[38]

[32] *Id.*, paras. 8, 10, 11, 13, 14.

[33] *Id.*, para. 41. The opposing votes were cast mainly by Western states; the abstentions came from a cross-section of groups other than the socialist and Arab blocs.

[34] *Id.*, para. 42.

[35] *See* IAEA Doc. GC(XXIII) (Dec. 16, 1979).

[36] IAEA Doc. GC(XXVI)/OR.246, para. 16 (Oct. 13, 1982).

[37] The text of Article V(A) reads: "A General Conference consisting of all members shall meet in regular annual session. . . ." Paragraph B reads: "At such sessions, each member shall be represented by one delegate who may be accompanied by alternates and by advisers. . . ." IAEA Statute, *supra* note 25. There is no provision in the Statute for the expulsion of a member.

[38] IAEA Doc. GC(XXVI)/OR.246, *supra* note 36, paras. 17, 18.

The result of the roll-call vote on the amendment proposed by the delegation of Iraq was as follows: "There were 40 votes in favour and 40 against, with 6 abstentions. In accordance with Rule 78 of the Rules of Procedure, the amendment proposed by the delegation of Iraq was not adopted."[39]

What followed was somewhat like the theater of the absurd such as has rarely, if ever, been witnessed at a diplomatic conference. The key roles were played by the President, Mr. Siazon (the Philippines), and Mr. Herron, the Director of the Legal Division of the Agency. As reported, the representative of Madagascar "explained that he had been present at the time of the vote and that he wished his vote to be recorded. His delegation voted 'yes'."[40]

At the request of the President, Mr. Herron

> recalled that a similar situation had occurred at a meeting of the Board the previous year. One Governor had returned to the room *before* the end of the ballot. His advice on that occasion had been that the Governor's vote should be recorded, so as not to deprive a delegation of its sovereign right to vote and in accordance with the principle of international law whereby a defect of form—in that case the late recording of a representative's vote—should not invalidate substance, in other words the vote of the representative in question. In the United Nations Organization, the practice was also based on the desire not to deprive a delegation of its right to vote. The vote of the Malagasy delegation should, therefore, be recorded.[41]

The representative of the United States observed, correctly it is believed, that "the present situation was different because the results of the vote had already been announced," and that "the recording of an additional vote amounted to a reconsideration of the ballot which had already taken place,

[39] *Id.*, para. 25. [40] *Id.*, para. 26.

[41] *Id.*, para. 27 (emphasis supplied). The legal expert apparently could not distinguish between registering a vote before or after the announcement of the result of the ballot. The delegate of the Netherlands asked the Director of the Legal Division twice "up to what time a delegation could still have its vote recorded after the closure of a ballot," *id.*, paras. 30, 38, only to be told *after* the Iraqi amendment had been adopted that his question "was purely academic." *Id.*, para. 39. Changes in a recorded vote are often requested and noted in the record of the meeting, but no changes in the announced result of the ballot are made. S. BAILEY, THE GENERAL ASSEMBLY OF THE UNITED NATIONS: A STUDY OF PROCEDURE AND PRACTICE 151 (rev. ed. 1964). In connection with the principles of international law regarding defects of form invoked by Mr. Herron, the Judgment (Jurisdiction) of Aug. 30, 1924 in the case of the *Mavrommatis Palestine Concessions* (Greece v. Great Britain) comes to mind. The Permanent Court of International Justice, referring to defects in the Greek Application, declared: "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." 1924 PCIJ, ser. A, No. 2, at 34. This statement was quoted with approval by the ICJ in the Case Concerning the Northern Cameroons, 1963 ICJ REP. 15, 28 (Judgment of Dec. 2). In his separate opinion in the *Barcelona Traction* case, Judge Wellington Koo put the point more explicitly, saying: "International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law." Barcelona Traction, Light & Power Co., Ltd. (Preliminary Objections), 1964 ICJ REP. 6, 60–61, para. 32 (Judgment of July 24). However, it is not clear how those statements could relate to voting in the IAEA. *See also* the statement by the United States delegate, *infra* note 48, at 9.

and a decision to hold a fresh ballot required a two-thirds majority."[42] But as the ballot had shown, the advocates of the "*de facto*" suspension did not have the votes to follow the *de jure* road. The President, after noting that "whichever way the decision went, the rights of one State would be affected," decided to affect the right of Israel rather than the "rights" of Madagascar and to follow, without being aware of it, the Bouteflika way by declaring "that the vote of the Malagasy delegation was valid."[43]

The delegate of the United States challenged the President's ruling and by a vote of 37 to 40, with 9 abstentions, "[t]he appeal against the President's ruling was rejected."[44] As a consequence, the result of the first ballot was amended as follows: "In accordance with the President's ruling, the amendment proposed by the delegation of Iraq to the draft resolution . . . was adopted by 41 votes to 40, with 6 abstentions," and thus once again the law was defeated.[45]

The amended resolution was put to the vote and declared adopted by 41 to 39, with 5 abstentions.[46] The British delegate observed that "he was disquieted by the use of procedural means to achieve political ends, by the ruling of the President and by the opinion given by the Director of the Legal Division. . . . In the circumstances, his delegation could not participate further in the General Conference and was obliged to leave."[47] The United States delegate

> declared that he deplored the President's ruling and was appalled by the opinion rendered by the Director of the Legal Division. The credentials of the delegation of Israel should be accepted as they were absolutely in accordance with the established rules. An item such as the examination of delegates' credentials must not be used as a pretext for re-opening a debate which had already been closed by the decision of the General Conference to reject a draft resolution on the suspension of Israel from the exercise of the privileges and rights of membership. The extent to which the Agency has become politicized, as evidenced by the resolution just adopted, was wholly unacceptable to his Government. The Agency had been founded as a technical body to promote the peaceful uses of atomic energy. Instead, it has become a forum for political debates. The persistent abuse of the United Nations system for the pursuit of political vendettas was an exceptionally dangerous course. The politicization of the Agency must cease. In the circumstances, his delegation must withdraw from the General Conference. His Government would reassess its policy regarding United States support for and participation in the IAEA and its activities.[48]

[42] IAEA Doc. GC(XXVI)/OR.246, *supra* note 36, para. 28. *See also* the observation of the British delegate, *id.*, para. 44, and of the French delegate, *id.*, para. 49.

[43] *Id.*, para. 31.

[44] *Id.*, paras. 32, 36.

[45] *Id.*, para. 37.

[46] *Id.*, para. 43. The total vote on the ruling was 86, and 85 on the amended resolution. Mexico abstained on the ruling but voted for the resolution. Ecuador and Venezuela abstained on the ruling but voted against the resolution. Sri Lanka abstained on the ruling and did not participate in the vote on the resolution.

[47] *Id.*, para. 44. The delegate of Italy also declared that he "was obliged to leave the meeting." *Id.*, para. 48.

[48] *Id.*, para. 45. Views critical of the proceedings were also expressed by Japan, Canada, France, Australia, Denmark, Ireland, Greece, and Chile. *Id.*, paras. 46, 47, 49, 50, 51, 53, 54, 55. It may

What effect the action of Great Britain, Italy, and the United States will have on the Agency, the specialized organizations, and the United Nations remains to be seen. The United States has decided to suspend payment of its dues to the Agency,[49] as it did in the case of UNESCO mentioned above. The legality of such financial countermeasures is doubtful despite the Goldberg reservation[50] and the failure of other members to pay their dues for peacekeeping operations.[51] There may be some truth in the old saw to fight fire with fire, but there may be some who will blame the politicization of international institutions on those who oppose it instead of on those who were and are its proponents.[52] In order to break this vicious circle one might consider referring the constitutionality of politicizing proposals or actions to the International Court of Justice, but it is unlikely that the majorities that are responsible for such actions would be willing to vote in favor of a request for an advisory opinion. Still less promising in spite of its apparent attractiveness is the proposal to establish the compulsory jurisdiction of the Court by means of a declaration by the United States pursuant, presumably, to Article 36(2) of the Statute of the Court, that the United States accepts such jurisdiction "in all legal disputes hereafter arising concerning the interpretation or ap-

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be noted that McWhinney would not have approved of the President's ruling on the case. For "infringements of the Charter or rejections of General Assembly or Security Council resolutions, not directly related to the issue of the representativeness of the delegation seeking accreditation, do not, prima facie, seem to bear upon decisions of the General Assembly and its Credentials Committee in this context." McWhinney, *supra* note 11, at 34.

[49] *See* Miller, *Head of World Arms Agency Sees Peril in U.S. Curbs,* N.Y. Times, Oct. 26, 1982, at A3. The dues amount to $8.5 million, about 26% of the budget. In the same article, Dr. Hans Blix, Director General of the Agency, was reported as saying that a prolonged reassesssment "could cripple" the operations of the Agency. Mr. Gerard C. Smith, a former representative of the United States, stated on his own behalf and on behalf of three other former representatives to the IAEA that they opposed withdrawal from the Agency and refusal (after the current suspension) to pay the assessed contributions. On the other hand, they deplored "the patently illegal action" taken at the General Conference. *Id.* at A29.

[50] *See* Schwebel, *supra* note 19, at 140 n.26. The reservation was made by Ambassador Goldberg on Aug. 16, 1965 in the UN Special Committee on Peacekeeping Operations. He made it

> crystal clear that if any Member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the Organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so. There can be no double standard among the Members of the Organization.

UN Doc. A/AC.121/PV.15, at 8–10 (1965), *reprinted in* 60 AJIL 106 (1966).

[51] *See* Nossiter, *U.N. Chief Chides U.S. on Funds,* N.Y. Times, Jan. 4, 1983, at A2. According to Nossiter, the United States owes the UN $612,000 "because Congress has forbidden the use of any funds for the Palestine Liberation Organization and the South-West Africa People's Organization."

[52] For a sample of views, see Maynes, *American Policies in the United Nations,* in U.S. POLICY IN INTERNATIONAL INSTITUTIONS: DEFINING REASONABLE OPTIONS IN AN UNREASONABLE WORLD 403 (S. M. Finger & J. R. Harbert eds. 1978); Ad Hoc Group on United States Policy Toward the United Nations, *A New U.S. Policy Toward the United Nations,* in *id.* at 449; and Klutznick, *American Goals in a Changing United Nations,* in *id.* at 464. *See also* Lyons, Baldwin, & McNemar, *The Politicization Issue in the UN Specialized Agencies,* in THE CHANGING UN: OPTIONS FOR THE UNITED STATES 81 (David A. Kay ed. 1977).

plication of the Charter of the United Nations."[53] One may doubt the need for such a declaration additional to that made by the United States on August 14, 1946.[54] It provides for the compulsory jurisdiction of the Court "in all legal disputes hereafter arising concerning (a) the interpretation of a treaty." It is well established that the Charter is a multilateral treaty and therefore the proposed declaration would do nothing more than clarify, if that were necessary, the range of the term "treaty" in the original declaration. Moreover, the members who are pressing for illegal acts in and out of the United Nations have not accepted and are not likely to accept the compulsory jurisdiction of the Court. Even if the United States could find a willing adversary, and even if the Court would give a judgment, which is doubtful on grounds of standing,[55] its impact on the practice of the United Nations is even more doubtful for the reasons developed by Dr. Ciobanu.

Be that as it may, the reaction of the United States to the illegal proceedings in the IAEA may well have produced a sobering effect[56] on the attempts to expel Israel at the first part of the 37th session of the General Assembly, from September 21 to December 21, 1982.[57] While the session was in progress, Secretary of State George P. Shultz was reported to have "warned that the United States will walk out of any United Nations body that expels Israel, and will halt its contribution to that unit."[58] It may well be that what was afoot was not an attempt at "expulsion," which pursuant to Article 6 would require a prior recommendation of the Security Council, but at a challenge to the credentials of Israel followed by a "Bouteflika" ruling that might deprive Israel, contrary to Article 9 of the Charter, of its right to participate in the work of the General Assembly.[59] Whatever the aim and the strategy may have

[53] Sohn, *Enabling the United States to Contest "Illegal" United Nations Acts,* 69 AJIL 852 (1975); the trial balloon launched by Professor Sohn was promptly deflated by Dan Ciobanu in *Could the Use of the Contentious Procedure of the International Court of Justice Have Any Significant Impact upon the Practice of the United Nations? A Reply to Professor Louis B. Sohn,* 70 AJIL 328 (1976).

[54] 1946–1947 ICJ Y.B. 217–18.

[55] *See* South West Africa Cases, Second Phase, 1966 ICJ REP. 6, 42, para. 73, and 51, para. 99 (Judgment of July 18).

[56] Since the United States walked out from the General Conference of the IAEA, President Reagan signed on Dec. 21, 1982, Pub. L. No. 97-377, which provides in section 159 for suspension of funds to the Agency until its Board of Governors certifies that Israel may fully participate in the Agency. In his address to the General Assembly on Sept. 30, 1982, Secretary of State Shultz referred to the IAEA and said: "As our action last week in Vienna should make clear, we will not accept attempts to politicize—and, therefore, emasculate—such vital institutions." DEP'T STATE BULL., No. 2068, November 1982, at 1, 9.

[57] The writer has been informed that the United States reaction in the IAEA also had a sobering effect on the International Telecommunication Union, whose Plenipotentiary Conference, in October 1982, was faced with similar maneuvers concerning Israel and which were thereupon promptly shelved.

[58] Nossiter, *Iran Challenges Israel's Right to Seat at UN,* N.Y. Times, Oct. 26, 1982, at A15.

[59] It may be recalled that like Secretary Shultz, Resolution 214 (adopted by the U.S. Senate on July 18, 1975) refers to expulsion rather than to illegal suspension via the credentials route. The resolution states that the Senate

> looks with disfavor and concern over persistent attempts by some nations among the so-called nonalined nations of the Third World to expel Israel from membership in the United Nations;

been, the attempt was called off and the upshot was a letter to the President of the General Assembly, Imre Hollai (Hungary), in which 43 members, including the Soviet bloc and a majority of the Arab or Islamic Group, expressed their "reservation on the credentials of the delegation of Israel."[60]

This, however, may not be the end of the unconstitutional drive to "unseat" Israel. For the same group and its allies in the other groups have also been trying another approach, namely, to "de-legitimize" Israel by contending that it has failed to satisfy the conditions of membership laid down in Article 4(1) of the Charter. Aside from the question by dint of what authority the General Assembly may claim the right of "legitimizing" or "de-legitimizing" member states, reference may be made to General Assembly Resolution 37/123A, adopted on December 16, 1982 as part of the by now habitual omnibus resolution on "the situation in the Middle East," as evidence of this approach. After noting in the Preamble "that Israel's record and actions established conclusively that it is not a peace-loving Member State and that it has not carried out its obligations under the Charter of the United Nations," the Assembly, in operative paragraph 12, "[*d*]*etermines once more* that Israel's record and actions confirm that it has persistently violated the principles contained in the Charter and that it has carried out neither its obligations under the Charter nor its commitment under General Assembly resolution 273 (III) of 11 May 1949."[61] In operative paragraph 14, the Assembly "[*r*]*eiterates* its call to all Member States to cease forthwith, individually and collectively, all dealings with Israel in order totally to isolate it in all fields."[62]

The call for isolating Israel is not new. In the wake of the 1973 Yom Kippur War and an OPEC-imposed rise in oil prices, in other words, since the oil

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and . . . [t]hat if Israel is expelled from the United Nations the Senate will review all present United States commitments to the Third World nations involved in the expulsion, and will consider seriously the implication of continued membership in the United Nations under such circumstances.

1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 65. At the 1975 session of the General Assembly, Libya, Saudi Arabia, and Syria opposed unsuccessfully the acceptance of Israel's credentials. *Id.* at 66; and UN Doc. A/10270 (Sept. 29, 1975).

[60] Nossiter, *supra* note 58. UN Doc. A/37/563 (Oct. 22, 1982); six more members added their signatures, UN Doc. A/37/563/Add.1 (Oct. 25, 1982). For the Israeli response, see UN Doc. A/37/565 (Oct. 25, 1982).

[61] The same text appeared first in GA Res. ES-9/1 of Feb. 5, 1982. By virtue of Resolution 273 (III), the General Assembly, acting upon a recommendation of the Security Council, admitted Israel to membership in the United Nations. In the Preamble, Resolution 273 (III) refers to resolutions of Nov. 29, 1947 and Dec. 11, 1948. The former, numbered 181 (III), provides for the "Future Government of Palestine," and the latter, numbered 194 (III), is entitled "Palestine—Progress Report of the United States Mediator." The reference to these resolutions resulted from a lengthy discussion in the *Ad Hoc* Political Committee in the course of which delegates asked the representative of Israel, Aubrey Eban, to clarify the future policy of Israel concerning refugees, the status of Jerusalem, and other matters. Some delegates may have desired to obtain commitments. However, such efforts turned out to be without result other than the incorporation of references to the resolutions in question. *See* 3 UN GAOR, pt. II, *Ad Hoc* Political Comm. SR, at 179–360 (1949). *See also* Admission of a State to the United Nations, 1948 ICJ REP. 57 (Advisory Opinion of May 28). The Court found that the conditions prescribed in Article 4 of the Charter are of an "exhaustive character." *Id.* at 64.

[62] UN Press Release GA/6787, Jan. 4, 1983, at 56–58.

weapon entered international politics, many states, particularly in Africa, have broken diplomatic relations with Israel. The goal of paragraph 12, however, is nothing else but the exclusion of Israel from the United Nations. Constitutionally, this would require the application of Article 6 of the Charter, specifically a recommendation of the Security Council, which is not likely to be forthcoming. The Soviet and Arab blocs and their allies may have other tactics à la Bouteflika in mind and it will be interesting to see what they will be.

Resolution 37/123A was adopted by a vote of 87 to 23, with 31 abstentions; 16 members were recorded as absent.[63] The long-standing practice of the General Assembly to disregard abstentions in calculating the requisite majorities in Article 18, paragraphs 2 and 3 of the Charter has been based on the Rules of Procedure. Rule 86, entitled "Meaning of the phrase 'members present and voting' in Article 18 of the Charter," reads as follows: "For the purposes of these rules, the phrase 'members present and voting' means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting." This is not the place to argue that Rule 86 is not an interpretation but a constitutionally doubtful amendment of the Charter. It may have served a useful purpose when the membership was small and it seemed necessary to get on with the business of the Assembly. Nowadays, with a membership of 157 and a large corps of permanent delegations at the headquarters of the United Nations who prepare drafts of resolutions, line up supporters, and actively bargain for votes, there seems no reason why the adoption of resolutions should not be made a little more difficult and more in conformity with Article 18 of the Charter. This could be accomplished by simply eliminating Rule 86 and applying the text of Article 18. The abstaining members certainly participate in the vote and they are recorded accordingly, as are the members that are absent or did not participate in the vote.[64]

[63] *Id.* at 62.

[64] In this context it may be worthwhile to recall the reply by the United States to Resolution 2925 (XXVII) of Nov. 29, 1973, inviting member states to make proposals "for enhancing the effectiveness of the decisions and resolutions adopted by United Nations organs." The United States suggested that

> the General Assembly might consider modifying its rules so that adoption of resolutions would require an appropriate majority of *all* votes cast, counting those who abstain as present and voting. If this change were made, Assembly resolutions would better express the views of a majority of the Assembly, rather than as now on occasion, of a minority whose views prevailed because of a large number of abstentions.

1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 52–53 (emphasis in original). At the next session of the Assembly the representative of the United States said on Nov. 29, 1973 that

> recent voting patterns within the United Nations lead us to consider whether or not bloc voting is now too often being used in a manner which raises serious questions for the future effectiveness of this organization. One concern is with the inclination of many U.N. members to support one-sided or simplistic resolutions on complicated or contentious issues, resolutions which do not necessarily represent the weight of world opinion, and which, worse still, have not the slightest chance of being effectively implemented. The United Nations is not an instrument for wish fulfillment. Rather it should be a catalyst for effective action on world problems.

Id. at 54.

A return to the Charter would not prevent the adoption of partisan or ideologically motivated resolutions but would make their adoption more difficult. Resolution 37/123A would not have been adopted by the required two-thirds majority if the abstentions had been included. The total of votes cast was 140 and the required majority would have been 94, that is, 7 votes more than the 87 favorable votes. It may be of interest to recall that the infamous Resolution 3379 (XXX) of November 10, 1975, determining "that Zionism is a form of racism and racial discrimination," would not have been adopted if abstentions had been counted. The vote was 139 and the required majority 93.[65] One need have no illusion about stemming the tide towards majoritarianism in the General Assembly. The reform suggested here would merely put a bridle on it and stimulate the permanent delegations to work a little harder. However, it is well to bear in mind that the two-thirds majority requirement of Article 18(2) can be easily bypassed by the simple majority rule of Article 18(3) combined, if necessary, with a ruling of the President. It would therefore seem that if the United States and other members are serious about preserving the rule of law and preventing a further degradation of the constitutional environment of the United Nations and its agencies such as occurred last year in the IAEA, they will have to vote, regretfully perhaps, more often "with their feet," as the saying goes, and with their purse, and not merely with their voices or hands.

POSTSCRIPT

After finishing this paper, I was informed that in response to the question "Has any action been taken by the Board of Governors [of the IAEA] to certify Israeli participation in the Agency in conformance with the Kasten/McClure Amendment to the continuing resolution?",[66] the Department of State spokesman stated on February 22, 1983: "I understand . . . that action has been taken which will meet the provision of U.S. law known as the Kasten/McClure Amendment and permit the resumption of U.S. financial contributions."[67] This is further evidence of the effectiveness of the suggested "voting" method.

Moreover, on the same day, at the 600th meeting of the Board of Governors of the IAEA, the Director General, Dr. Blix,

> expressed his gratification that the United States Government, following its reassessment of the Agency's activities, had decided to resume its participation. He recalled that, in a letter of 14 October 1982 sent to all Members of the Board, he had described the factual and legal situation pertaining to Israel's position in the Agency—namely, that Israel remained a fully participating Member of the Agency.[68]

The delegate of India (Mr. Singh) seemed to express some reservation about

[65] *See* Gross, *The United Nations and the United States*, in VÖLKERRECHT UND RECHTSPHILOSOPHIE 403, 406 (P. Fischer, H. F. Köck, & A. Verdross eds. 1980) (footnote omitted).

[66] This amendment refers to the provision in Pub. L. No. 97-377 in note 56 *supra*.

[67] Dep't of State Press Guidance, Feb. 22, 1983, at 1–2.

[68] IAEA Doc. GOV/OR.600, at 3 (March 14, 1983).

the legal aspects of the matter, saying that "the Statute [of the Agency] clearly provided that a measure adopted by the General Conference could not be annulled by the Board of Governors."[69] The delegate of the United States (Mr. Kennedy), "after congratulating the Director General on his statement," referred to the decision of his Government to suspend its participation in the activities of the Agency, and warned that "all Member States would pay a high price if the viability and effectiveness of the Agency were threatened, as they had been, by a tendency to accord increasing importance to political issues extraneous to the Agency's work." Finally, he

> hoped that the organization would put behind it the unfortunate political wrangling of the recent past and return whole-heartedly to the mission conferred upon it by its Statute. The United States was thus prepared to renew its commitment to the Agency within the constraints of the country's laws, but that commitment would depend also on the degree to which other Member States were prepared to respect the principles set forth in the Statute.[70]

LEO GROSS

ISRAEL'S AIR STRIKE UPON THE IRAQI NUCLEAR REACTOR

It is curious that no commentary has appeared in this *Journal* regarding Israel's aerial strike upon the Iraqi nuclear reactor near Baghdad on the morning of June 7, 1981. Perhaps scholarly consensus accords simply with the Security Council resolution of June 19, 1981, which "*strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."[1] My limited purpose here is to suggest questions regarding any such simple conclusion, and to invite detailed and considered scholarly analysis of the situation.[2]

The starting point for any legal analysis is Article 2(4) of the Charter.[3] Was Israel's unannounced, premeditated aerial bombardment of the Iraqi reactor a "use of force against the territorial integrity or political independence" of Iraq? On what Professor Julius Stone has called the "extreme" view of 2(4), any unilateral employment of transboundary force not in self-defense against

[69] *Id.* at 11–12. [70] *Id.* at 12–14.

[1] UNSC Res. 487, 36 UN SCOR (2288th mtg.), UN Doc. S/RES/487 (1981), *reprinted in* 75 AJIL 724 (1981).

[2] *See* Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417 (1982). At the time of the attack, I took the position that the Israeli action was legal under international law, but that Israel owed monetary compensation to Iraq for the actual damage to the nuclear facility and for the four lives that were lost. *The Israeli Air Strike: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 85–88 (1981).

[3] Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."