General enjoys by the terms of Article 99 of the Charter the authority to seize the Security Council, in dramatic circumstances that rarely are found in the proceedings of the Court, not merely of questions of international law within the scope of his activities, but of "any matter which in his opinion may threaten the maintenance of international peace and security." If the Secretary-General can be endowed with that politically delicate right in the area of international affairs which trenches upon the most vital interests of states, why should it be thought that the General Assembly would be unwilling to afford him the less sensitive authority to request advisory opinions of the Court? Indeed, experience of almost 40 years shows that no Secretary-General has used his authority under Article 99 lightly or excessively or in any manner that has run counter to the interests of the United Nations. On the contrary, the Secretaries-General have demonstrated extreme, perhaps excessive, caution in invoking Article 99. There is no reason to believe that, if the Secretary-General were accorded the authority to request advisory opinions of the Court, he would exercise the authority incautiously. It may of course be argued that, since recourse by the Secretary-General to the Court would be less vivid and visible than recourse to the Security Council, the Secretary-General would be likelier to request advisory opinions, some of which could raise delicate international questions. That may be. The question then comes to whether the advantages of authorizing the Secretary-General to request advisory opinions outweigh any risks. There may be room for difference of view over the answer to that question. But it is believed that, on balance, the undoubted advantages outweigh the questionable risks.

Statesmen and international lawyers of the distinction of Philip Jessup[16] and C. Wilfred Jenks[17] have supported authorizing the Secretary-General to request advisory opinions of the Court. The possibility has been aired in analyses of scholars and discussed in authoritative United Nations circles, but it has not been squarely addressed by the General Assembly. The time may have come for placing the question on the General Assembly's agenda.

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CORRESPONDENCE

TO THE EDITOR IN CHIEF:

Professor Malvina Halberstam's thoughtful and well-researched Note, *Excluding Israel from the General Assembly by a Rejection of its Credentials,* in your January 1984 issue (at p. 179), touches, inter alia, on my earlier study of the credentials issue and its relation to chapter II (Membership) of the Charter, first appearing in 3 *Hastings Constitutional Law Quarterly* 19 (1976) and then

[16] Jessup, *supra* note 11.

[17] C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 195 (1964).

* Judge of the International Court of Justice. This Note is a revised version of a paper in *Essays in International Law in Honour of Judge Manfred Lachs* (J. Makarczyk ed. 1984). The views expressed are those of the author and do not engage the responsibility of the Court.

published, in revised form, in my monograph, *The World Court and the Contemporary International Law-Making Process* (1979), at p. 142 *et seq.*

Although my study involved a historical survey of United Nations practice in this general area from the original, Founding Fathers' session in San Francisco in 1945, its more immediate focus, and occasion, was General Assembly Resolution 3206 of September 30, 1974, adopting, by 98 votes to 23, with 14 abstentions, the first report of the Credentials Committee rejecting the delegation named by the Republic of South Africa for the 1974 annual session of the General Assembly.

It is often forgotten that this particular General Assembly resolution was accompanied by a further resolution, No. 3207, adopted by 125 votes to 1, with 9 abstentions, requesting that the Security Council review the relationship between the United Nations and South Africa in the light of what that resolution styled as South Africa's constant violation of the Charter and of the Universal Declaration of Human Rights. The Security Council, however, failed—because of the veto applied by three permanent members (France, Great Britain and the United States)—to adopt its own resolution, sponsored by Kenya, Mauritania, Iraq and the Federal Republic of Cameroon, recommending South Africa's expulsion from the United Nations because of its racial policies, its refusal to yield up Namibia in defiance of the International Court's Advisory Opinion of 1971, and its persistent violation of the United Nations-sanctioned boycott of the then white minority-controlled Rhodesia. As is well known, action by the General Assembly under Article 6 of the Charter to expel a member state that has "persistently violated the Principles contained in the present Charter" is legally predicated upon a prior "recommendation" by the Security Council.

Clearly, it was the obstruction of majority will in the General Assembly by the use, or misuse, of the big-power veto in the Security Council that led the General Assembly to search for alternative lawmaking modes for filling the gap so created in the effective operation of the Charter—very much as Western states (including Western permanent members of the Security Council) reacted, a generation earlier, to what they saw as the threat of willful Soviet use of the veto in the Security Council on the Korean War issue, by bypassing the Security Council altogether for peacekeeping purposes through the legal stratagem of the General Assembly-based Uniting for Peace Resolution.

The quest for such alternative lawmaking modes, if a vacuum should occur in the operation of the more normal legal problem-solving procedures, is inherent in the constitutional practice and competence of parliamentary bodies like the General Assembly, and accords with the best traditions of Western constitutionalism; though those taking such initiatives would do well to heed the ordinary canon of constitutional prudence that the rule you devise, today, to help your own case may be the one you have to live with, tomorrow, when it happens to work the other way.

This is not the place in which to canvass, in detail, the application of the permanent members' veto (on both sides, East and West) in regard to chapter II (Membership) of the Charter. Suffice it to say, in retrospect, that it became, over the years, one of the politically most abused chapters of the Charter, whose unfortunate consequences for the United Nations as a whole and its claims to universality were only partially palliated by rather cynical inter-bloc "package deals" like the one in the fall of 1955, which, quite belatedly, conceded UN membership to 16 states (among these Albania, Austria, Bulgaria,

Finland, Hungary, Ireland, Italy, Jordan, Portugal, Romania and Spain). The attempts to find ways legally to circumvent the threat of big-power veto in regard to applications by states for admission to the United Nations, which had occupied a great deal of the creative energies of middle-rank Western states during the early years of the United Nations, must be regarded as having become effectively blocked with the International Court's Advisory Opinion of 1950 on *Competence of the General Assembly for the Admission of a State to the United Nations* (1950 *ICJ Reports* 4), rendered as that ruling was only over one of Judge Alvarez's most celebrated dissenting opinions. The search for other modes of legally vindicating the UN Charter against the Government of South Africa, once France, Britain and the United States had vetoed the attempt to apply the expulsion procedures envisaged under Article 6 of the Charter, becomes fully understandable in this light, though the actual mode chosen—application of the credentials rules in their substantive, as distinct from their purely procedural, aspects—would still have to be justified in legal terms.

In the particular case involved in General Assembly Resolution 3206 of September 30, 1974, Western-trained constitutional lawyers may feel no particular difficulty in finding affirmative legal justification for the action taken. Influenced in considerable part by the new, postwar jurisprudence of tribunals like the United States Supreme Court and the West German Federal Constitutional Court, our legal systems are beginning to accept as legally axiomatic that parliamentary, legislative-style institutions, if they are to claim constitutional legitimacy for themselves and their acts, must be genuinely representative and constituted by fair and open political processes. In 1961, Conservative Prime Minister John Diefenbaker and Foreign Minister Howard Green of Canada took the lead, at the Commonwealth Prime Ministers' Meeting, in excluding the Republic of South Africa from the Commonwealth association. Their argument was that a government like that of South Africa that represented only a tiny, all-white minority, in a multinational state the overwhelming majority of whose members were black and totally unrepresented (together with the significant Asiatic, and "coloured," i.e., mixed blood, minorities), could not meet even the minimum constitutional credentials for membership in the Commonwealth. That is surely the ultimate legal rationale of General Assembly Resolution 3206.

I would agree, however, with what I take to be one of the main thrusts of Professor Halberstam's argument, that the case of the Republic of South Africa is likely to remain legally *sui generis,* as resting on the special sociological facts of its own unique multiracial state—namely, a white minority Government that has been able, through its monopoly of the military-police power, to maintain its political dominion, over the years, over its nonwhite majorities who remain altogether excluded from the ordinary constitutional-political processes. It is not a universal legal precedent capable of application, without more, to other plural-national, consociational states (including many Western states) that are now part of the UN family of states. For remedy against abuses, or alleged abuses, committed by such other plural-national states against their own national minorities, other legal principles and other sections of the Charter seem legally more apt and relevant. It is this increased feeling for what Justice Frankfurter used to call constitutional "roles and missions"—an element in the new political sophistication and constitutional good judgment displayed by very many states among the current Third World majority in the General Assembly—that accounts for the perceptible trend, over the last several annual sessions of the General Assembly and of various UN specialized

agencies, away from any attempt at blanket application of the 1974 South African credentials precedent to other situations where the special South African fact-setting is manifestly not replicated.

Finally, as I noted in my 1976 and 1979 studies of the credentials issue as applied to South Africa, any decision of the General Assembly, acting upon the report of the Credentials Committee, to reject the credentials of a particular governmental delegation need not be a final, immediately operative decision, but could be a temporary one (with or without provisional seating of the governmental delegation concerned), and subject, in any case, to reexamination and review in the event of new evidence of a bona fide attempt to meet contemporary international law standards. The limited—so far only very limited and grudging—moves by the Government of South Africa to extend some form of separate political representation to its Asian minority, if judged bona fide and if also followed up by similar moves in regard to the black majority of the population and the "coloured" minority, could always form the basis of an application by the Government of South Africa for provisional readmission to the Commonwealth and for provisional acceptance of fresh credentials for the UN General Assembly. With an activist Secretary-General in Dr. Pérez de Cuéllar, who understands the skills of pragmatism and concrete problem solving, the United Nations might be in a position to nudge South Africa along the road to acceptance and application of the Charter-based principle of self-determination of peoples, in return for qualified ("on good behavior") reintegration into the UN community of states.

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Malvina Halberstam replies:

I am very grateful to Professor McWhinney for his kind comments about my Note, *Excluding Israel from the General Assembly by a Rejection of its Credentials,* which appeared in the January issue. The background he sets forth concerning General Assembly and Security Council resolutions on South Africa is, of course, correct. I also understand his, and others', desire to justify the General Assembly's position on South Africa. However, "hard cases make bad law."

My objection is to the implication that "the obstruction of majority will in the General Assembly by the use, or misuse, of the big-power veto in the Security Council" is a legal justification for the General Assembly to take action that the Security Council has refused to take as a result of a negative vote by one or more of the permanent members, on a matter on which the Charter specifically requires an affirmative vote by the Security Council, including all the permanent members. The purpose of giving the permanent members the veto power in the Security Council and requiring Security Council action on important matters was precisely to permit those states to obstruct majority will; otherwise, the veto power would have been unnecessary. Whether one considers majority rule an ideal or not, it is clearly not the basis of the UN Charter, which vests most powers in the Security Council and gives the five permanent members veto power.

While circumventing the specific requirements of the Charter may seem desirable from the perspective of the East or of the West, depending on the circumstances, or from a liberal-idealistic perspective, as in the case of South Africa, an approach to Charter interpretation that condones the General Assembly's assertion of substantially greater powers than those provided in

the Charter could, in the long run, prove very damaging. There is, of course, the danger, noted by McWhinney, that "the rule you devise, today, to help your own case may be the one you have to live with, tomorrow, when it happens to work the other way"; a danger of which we should be particularly cognizant since only a small minority of the states voting in the General Assembly share our democratic heritage and ideals. There is also another, more far-reaching danger. Most states are very reluctant to enter into treaties that infringe on their sovereignty. It is doubtful, for example, that the major powers would have ratified the UN Charter had it vested power for important decision making in the General Assembly, by majority vote, rather than in the Security Council, where they had a veto. If international law is interpreted to permit the General Assembly to circumvent the limitations on its authority imposed by the Charter, notwithstanding that states would not have ratified the Charter in the absence of those limitations, states will become even more reluctant to enter into treaties establishing legislative-type institutions, fearing that any limitations on an institution's authority provided by its constitutive instrument will be disregarded once the institution has been established.

Finally, even if one were willing to disregard the specific provisions of the Charter in favor of the position urged by McWhinney, that "legislative-style institutions, if they are to claim constitutional legitimacy for themselves and their acts, must be genuinely representative and constituted by fair and open political processes," decision by majority vote in the General Assembly does not satisfy these criteria. Since states with populations numbering in the hundreds of millions have the same one vote in the General Assembly as states with populations of several thousand and since only a minority of UN members have freely elected governments, a majority vote in the General Assembly cannot be considered either as "genuinely representative" or as "constituted by fair and open political processes."

Given the fundamental character of *pacta sunt servanda* as a principle of international law, the highly politicized atmosphere of the General Assembly, and the danger that the General Assembly's usurpation of authority portends for the establishment of other international institutions having legislative authority, I believe legal scholars should reject attempts by the General Assembly to exercise powers not granted it by the Charter (as did the International Court of Justice), even if in a particular instance the result may seem desirable.

TO THE EDITOR IN CHIEF:

July 6, 1984

Readers of Professor Partsch's article in the April 1984 issue of the *Journal* (*Remnants of War as a Legal Problem in the Light of the Libyan Case*) may wish to be aware of the report of the United Nations Secretary-General to the General Assembly, dated October 19, 1983, entitled "Problem of Remnants of War" (UN Doc. A/38/383). The report transmits a study prepared by a group of high-level experts and United Nations observers at a meeting convened in Geneva from July 25 to 28, 1983 by the Executive Director of the United Nations Environment Programme, Dr. Mostafa K. Tolba, acting pursuant to General Assembly Resolution 37/215 of December 20, 1982.

The meeting of experts considered various aspects of the problem presented by explosive remnants of war, including legal aspects. Studies of the legal aspects were prepared for the Geneva meeting by Jozef Goldblat, Senior Research Fellow, Stockholm International Peace Research Institute, and Professor Edward Gordon of Union University (United States), respectively, and are reflected in the report (paras. 52–63). It may be worth noting that, in discussing legal issues, the report begins by observing that "[t]he legal aspects of material remnants of war are complex and subject to widely differing interpretations."

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