

Representation of Member States at the United Nations: Recent Challenges

Introduction

Government representation at the United Nations General Assembly is critically important to the international rule of law. It determines who will act for member states when exercising their equal voting rights in the main policymaking organ of the United Nations. In just the past year and a half, the United Nations has faced a noteworthy number of disputes over governmental representation before its organs. The Tatmadaw's toppling of civilian rule in Myanmar,¹ the Taliban takeover in Afghanistan, rival self-proclaimed governments in Libya, and coups in Chad, Mali, Guinea, and Sudan have raised the question of who should speak for each member state at the United Nations. Accreditation at the General Assembly also has ripple effects across the U.N. system and beyond, as international organizations, courts, and tribunals look to the practice of the General Assembly in deciding between competing claims to government representation. This *Insight* discusses how recent cases have challenged the accreditation system and examines their broader impacts across and beyond the U.N. system.

For all its substantial global implications, however, the representation procedure at the General Assembly is curiously ministerial. It begins, and in practice almost always ends, with the General Assembly's Credentials Committee. The Committee was established in 1947 to deal with technical matters of accreditation, including mainly to inspect authorizing documents presented by prospective delegates. Over time, however, the Committee has become the first mover in selecting the governments that will appear before the General Assembly. The Committee most recently contended with competing credentials sent by rival entities from both Myanmar and Afghanistan. In both cases, the

Committee deferred its decision and left in place the status quo, which in Myanmar's case meant accepting the credentials of delegates loyal to the National Unity Government.

This did not settle the matter for the U.N. as a whole, however. In pending proceedings under the Genocide Convention involving Myanmar, the International Court of Justice (ICJ) did not act on the National Unity Government's request in February 2022 that the Court recognize its agent over that of the Tatmadaw. The preliminary objections hearing later that month thus marked the first time that a different government represented the same member state before the General Assembly and the ICJ during the same Assembly session.

This *Insight* first sets out the history and procedure of the General Assembly's accreditation decisions. It then describes the impact that the General Assembly's decisions have on other international institutions.

History and Procedure of Accreditation and Representation at the General Assembly

The rules governing the Credentials Committee follow the early practice of the League of Nations, which sought to limit its review to inspection of letters of accreditation that delegates presented from their capitals.

At the start of its 1937 sessions, the League Assembly's Committee on Credentials explicitly ignored concerns of some members about whether Emperor Haile Selassie of Ethiopia "was exercising his legal title effectively enough to make" his delegate's credentials "perfectly in order."² The Committee expressly considered referring the question to the Permanent Court of International Justice (PCIJ), but recommended instead that the Assembly consider the credentials as sufficient "despite the doubt as to their regularity."³

By giving the Ethiopian delegation "the benefit of the doubt," the Committee effectively focused on the validity of a delegation's credentials before the Assembly (a question of *accreditation*), as opposed to a government's claim to represent a member state (a question of *representation*).⁴

Since the establishment of the U.N. Credentials Committee in 1947, the General Assembly's Rules of Procedure reflect a limited role for the Committee. Rule 27 instructs governments to submit "names and members" of their state's delegation to the Secretary-General within a week of the start of the General Assembly session. Per Rule 28, the

Assembly appoints a Credentials Committee at the beginning of each session to “examine the credentials of representatives and report without delay” to the Assembly.⁵

The Committee has nine members appointed by the Assembly on the proposal of the President, after consultations with “interested delegations.”⁶ China, Russia (or the Soviet Union before 1992), and the United States have always been members of the Credentials Committee, along with a balance of representatives from regional groups.⁷

In recent years, the Credentials Committee has met around early December to consider a memorandum from the Secretariat on the status of credentials it has received.⁸ The Committee meets in closed-door sessions: it does not permit non-members to attend its meetings, including delegates of member states whose credentials are under review.⁹ The Committee then submits a report to the General Assembly recommending that it accept the reviewed credentials, which the General Assembly typically endorses without debate or amendment. As OLA opined in 1973, the Committee may meet at any time during the session to consider credentials that the Secretariat had not received in time for the first meeting or to consider questions within its jurisdiction, either *sua sponte* or at the General Assembly’s request.¹⁰

Per Rule 29 of the Rules of Procedure, if a member state objects to a representative’s credentials, the representative will be seated provisionally until the Credentials Committee has reported and the General Assembly has made its decision.

Credentials, Representation, and Recognition

As Rosalyn Higgins explained in a seminal analysis, the General Assembly quickly found it “hard to maintain” the distinction between “disputes over credentials” and “those disputes which go farther.”¹¹ The distinction broke down at the 1950 session, when member states pressured the Credentials Committee to recognize delegates from the People’s Republic of China over those of the Republic of China. In a memorandum on legal aspects of the “Chinese question” requested by the Secretary-General, OLA did not address the question as one of accreditation, instead focusing on the distinction between *representation* and *recognition*.¹² OLA clarified that “representation” is determined by a “vote of each competent organ on the credentials of the purported representatives,” and that the General Assembly has adopted procedures for designating a member state’s representative to that organ, but that the United Nations has no authority to bestow “collective recognition” that would override “individual act[s]” of member states.¹³

The memorandum then considered the legal criteria for “representation” at the United Nations. Having found inappropriate the “principle of numerical preponderance of *recognition*” (i.e., determination of representation by a majority of member states unilaterally *recognizing* a certain government) OLA reasoned that “the proper principle can be derived by analogy from Article 4 of the Charter”—which requires that an applicant for membership must be able and willing to carry out the obligations of membership.¹⁴ It concluded that “obligations of membership can be carried out only by governments which in fact possess the power to do so,” meaning “an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.”¹⁵

The General Assembly, too, took up the question of what criteria should be used to make “representation” determinations. The Assembly’s *Ad Hoc* Political Committee was tasked with the issue, and it considered but rejected enumerating specific criteria, including effective control over territory, general acceptance by the population, willingness to accept the member state’s obligations under the U.N. Charter, and compliance with internal processes in coming to power.¹⁶ In Resolution 396(V) of 1950, the General Assembly rejected explicit reference to effective control in favor of a flexible standard, stating that “the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.”¹⁷ It also recommended that the “attitude” the General Assembly adopts with respect to a particular representation dispute “should be taken into account in other organs of the United Nations and in the specialized agencies.”¹⁸

Any remaining support for drawing a distinction between the Committee’s original “credentialing” function and “representation” determinations evaporated during the debate over South Africa at the United Nations in 1974. The General Assembly, acting on a recommendation from the Credentials Committee, rejected the credentials of the Apartheid government’s delegates. The President of the General Assembly stated that the decision was “tantamount to saying in explicit terms that the General Assembly refuses to allow the delegation of South Africa to participate in its work.”¹⁹ The decision thus effectively barred South Africa from exercising its membership rights in circumstances where the Security Council and General Assembly had not taken steps formally to suspend it under Article 5 of the U.N. Charter. The President’s decision effectively disagreed with a 1970 OLA opinion—accepted by four successive Assembly Presidents—that the General Assembly could not so suspend South Africa’s participation by withdrawing its credentials absent action under Article 5.²⁰

Disputes over Credentials

Since then, the General Assembly has faced credentials disputes with some regularity. These have included the case of Haiti in 1997, where the Credentials Committee recommended continuing to recognize the government of President Jean-Bertrand Aristide even after it fell in a coup.²¹ Another example is Afghanistan following the Taliban's first takeover in 1996, when the Credentials Committee faced rival credentials from delegates of both the Taliban and exiled President Burhanuddin Rabbani. In that case, the Credentials Committee formally deferred its decision for four consecutive years.²² This had the effect of retaining the seat for the incumbent delegate, loyal to Rabbani, whose credentials were accepted at the start of the 1995–96 session.

The Committee again faced competing credentials during last year's session in the cases of Afghanistan and Myanmar. The question of who would speak for these states drew widespread media attention.²³ The Committee's report simply noted the adoption, without a vote, of the chair's proposal to "defer its decision on the credentials pertaining to the representatives of Myanmar and on the credentials pertaining to the representatives of Afghanistan to the seventy-sixth session of the General Assembly"—leaving in place the delegates loyal to the National Unity Government of Myanmar and to President Ashraf Ghani of Afghanistan, who also subsequently participated in the Eleventh Emergency Special Session of the General Assembly regarding the Russian invasion of Ukraine.²⁴

It is difficult to distill rules or principles on representation determinations from the Credentials Committee's recommendations given that its reports almost never provide reasons, no records of its meetings are published, and floor debates in the General Assembly over the Committee's reports are rare. Nonetheless, an examination of the underlying facts and the Committee's practice leads to the inference that, although effective control over the state's territory is often the starting point in credentialing decisions, it is not always determinative in cases of government upheaval. The Committee appears to apply a presumption of continuity from the prior session, while accounting for factors such as democratic legitimacy and commitment to human rights. Whatever factors the Committee might consider relevant, the nature of the criteria considered surely leave room for political considerations.

Reliance on the General Assembly Credentialing System by Other Institutions

Other international institutions, including courts and tribunals, look to the General Assembly for guidance on questions related to representation as a means to promote consistency. Resolution 396(V) acknowledges this coordination function for the United Nations, recommending "uniformity in the procedure applicable whenever more than one

authority claims to be the government entitled to represent a Member State in the United Nations” given that “difficulties may arise” and the “risk that conflicting decisions may be reached by its various organs.”²⁵ Outside the U.N. system, the Prosecutor of the International Criminal Court (ICC), for instance, advised in a 2014 determination that it defers to the General Assembly in assessing whether an entity has “full powers” to enter declarations accepting the Court’s jurisdiction under Article 12(3) of the Rome Statute.²⁶

What, then, are other institutions to do when the General Assembly defers its decision? Allowing both rival entities to participate is one option; some investor-state tribunals have taken this approach in hearing cases against Venezuela.²⁷ In some circumstances, institutions can wait for the General Assembly. Recently, the ICC Prosecutor appears to be taking this approach, as his office has not yet taken a position on the National Unity Government’s Article 12(3) declaration on behalf of Myanmar.

Sometimes, however, other institutions cannot wait, or choose not to. The ICJ recently encountered that situation at the preliminary objections hearing in *The Gambia v. Myanmar*, brought under the Genocide Convention. One week before the hearing, ousted civilian leaders from the National Unity Government—including Aung San Suu Kyi, who participated as Myanmar’s agent at the provisional measures stage—sought to appoint a new agent and withdraw Myanmar’s preliminary objections.²⁸ According to an announcement by the National Unity Government, the ICJ nevertheless continued its prior diplomatic correspondence with the Myanmar embassy to Belgium, where the ambassador had expressed loyalty to the military leadership.²⁹

At the hearing, a Tatmadaw minister appeared as agent, and the ICJ did not directly address the representation issue, at least in the public proceedings. President Joan Donoghue made only passing reference to it at the hearing, noting that “the parties to a contentious case before the Court are States, not particular governments.”³⁰ The Court’s judgment rejecting Myanmar’s preliminary objections was even more succinct, stating simply that Myanmar had replaced Suu Kyi as agent by letter dated April 12, 2021.³¹

In his declaration, Judge *ad hoc* Claus Kress (Myanmar’s appointee prior to the coup) cited the General Assembly’s resolution of June 18, 2021—which condemned the coup and referred to Suu Kyi and other members of the National Unity Government as “government officials” —and noted that the replacement of Myanmar’s agent was not “self-explanatory from a legal perspective, as the laconic formulation of paragraph 8 of the Judgment might suggest.”³²

In sum, the role of the Credentials Committee and the impact of its recommendations has grown substantially since U.N. member states first adopted the rules that govern its procedure. Far from its original ministerial function, which was built on the unsustainable distinction between accreditation and representation, the Credentials Committee has emerged as a key player in critical questions of global governance.

The Committee's current role amid a growing number of representation disputes before the General Assembly and other international institutions, including the ICJ, raises the question of how international law should resolve such disputes.

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¹ We are part of a Debevoise team that has provided legal advice to a member of the National Unity Government of Myanmar, and separately to Legal Action Worldwide in relation to a communication to the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute regarding the declaration by the National Unity Government of Myanmar accepting the Court's jurisdiction under Article 12(3).

² League of Nations, 17 OFF'L SPEC. SUPP. 155, p. 40 (1936); see Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the U.N. General Assembly*, 7 CAL. WESTERN INT'L L.J. 615, 621 (1977); Dan Ciobanu, *Credentials of Delegations and Representation of Member States at the United Nations*, 25 INT'L & COMP. L.Q. 351, 360–61 (1976).

³ League of Nations, 17 OFF'L SPEC. SUPP. 155, p. 41 (1936).

⁴ See *id.*

⁵ Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.19 (2021), Rule 28.

⁶ OLA, Letter to a Scholar, 1985 UN JURID. Y.B. 128 (Feb. 12, 1985), ¶ 1.

⁷ *Id.* Permanent Mission of Switzerland to the United Nations, THE GA HANDBOOK: A PRACTICAL GUIDE TO THE UNITED NATIONS GENERAL ASSEMBLY 19 (2017).

⁸ See, e.g., General Assembly, Report of the Credentials Committee, U.N. Doc. A/76/550 (Dec. 1, 2021).

⁹ See OLA, Letter to the Permanent Representative of a Member State to the United Nations, 1983 U.N. JURID. Y.B. 173 (Nov. 7, 1983); General Assembly, Second Report of the Credentials Committee, U.N. Doc. A/35/484/Add.2 (Mar. 2, 1981), ¶ 4.

¹⁰ OLA, Letter to the New York Liaison Office of the United Nations Educational, Scientific and Cultural Organization, 1973 U.N. JURID. Y.B. 139 (Nov. 23, 1973), ¶ 5.

¹¹ Rosalyn Higgins, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 151–52 (1963).

¹² OLA, Legal Aspects of Problems of Representation in the United Nations, U.N. Doc. S/1466 (Annex) (Mar. 9, 1950), p. 5.

¹³ *Id.*, p. 3.

¹⁴ *Id.*, p. 6 (emphasis added).

¹⁵ *Id.*

¹⁶ See General Assembly, Report of Sub-Committee 2 to the *Ad Hoc* Political Committee, U.N. Doc. A/AC.38/L.45 (Nov. 21, 1950), ¶ 9; General Assembly, Report of the *Ad Hoc* Political Committee, U.N. Doc. A/1578 (Dec. 1 1950), ¶ 19.

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- ¹⁷ General Assembly, Resolution 396(V), 5 GAOR, Supp. (No. 20) 24-25, U.N. Doc. A/1775 (Dec. 14, 1950), ¶ 1.
- ¹⁸ *Id.*, ¶ 3.
- ¹⁹ General Assembly, Verbatim Record of the 2281st Plenary Meeting, U.N. Doc. A/PV 2281 (1974), ¶ 159. The General Assembly upheld the President's ruling with 91 votes for, 22 votes against, and 19 abstentions. *Id.*, ¶ 185.
- ²⁰ See OLA, Credentials of Representatives to the 25th Session of the General Assembly, U.N. Doc. A/8160 (Nov. 11, 1970), ¶ 6; Jhabvala, *supra* note 2, pp. 615–17; Ciobanu, *supra* note 2, pp. 351–53.
- ²¹ See General Assembly, Report of the Credentials Committee, U.N. Doc. A/47/517 (Oct. 9, 1992).
- ²² See, e.g., General Assembly, First Report of the Credentials Committee, U.N. Doc. A/55/537 (Nov. 1, 2000), ¶¶ 8–9.
- ²³ See, e.g., *Quandary at UN: Who Speaks for Myanmar and Afghanistan?*, N.Y. TIMES (Sept. 11, 2021).
- ²⁴ General Assembly, Report of the Credentials Committee, U.N. Doc. A/76/550 (Dec. 1, 2021), ¶ 9.
- ²⁵ General Assembly, Resolution 396(V), 5 GAOR, Supp. (No. 20) 24-25, U.N. Doc. A/1775 (Dec. 14, 1950).
- ²⁶ See ICC, Office of the Prosecutor, Determination on the Communication Received in Relation to Egypt, ICC-OTP-20140508-PR1003 (May 8, 2014).
- ²⁷ See *ICSID Declines Disqualification Proposal Arising out of “Solomonic Solution” to the Problem of Venezuela’s Representation*, IA REPORTER (July 28, 2020).
- ²⁸ See *Myanmar Junta, Ousted Government Fight for Recognition at Top UN Court*, REUTERS (Feb. 18, 2022).
- ²⁹ See National Unity Government, Myanmar Withdraws All Preliminary Objections to the International Court of Justice Hearing on the Genocide Case, Announcement No. 2/2022 (Feb. 1, 2022).
- ³⁰ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim Record of Public Sitting (Feb. 21, 2022), p. 11.
- ³¹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment (Preliminary Objections) (July 22, 2022), ¶ 8.
- ³² *Id.*, Declaration of Judge ad hoc Kress, ¶ 4 (citing General Assembly, Resolution 75/287, UN Doc. A/RES/75/287 (June 18, 2021), Preamble & ¶ 2).