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REVISION OF THE UNITED NATIONS CHARTER:  
A STUDY OF VARIOUS APPROACHES

*Richard F. Scott\**

I. *The Problem Defined*

ALTHOUGH the United Nations Charter has survived rigorous tests of practice and application, all will doubtless agree that it should now undergo careful review if not thorough revision. Review in moderate terms is a matter of continuous international process, the Charter's structures and rules being regularly applied to the situations of everyday international life. As the necessary precondition to revision, however, the Charter will be subjected to a more deliberate, systematic, and searching review before concrete proposals for revision reach a competent international authority. Thus review is at once exploratory and promising. But revision is much more.

Charter revision suggests a host of problems combining political and legal elements. Here the political aspects may not be entirely distilled from the legal for purposes of study in terms of political doctrine and technique. Nor do the legal aspects of revision problems separate themselves for lawyerlike analysis. Law interweaves with politics to confront lawyer and policymaker alike with mixed problems of technique in the sphere of international operations. Probably the larger problem is one of change and accommodation following from the expectation that the law should register more precisely the recognized changes in international life since the Charter's adoption. A widened sense of world community may permit or even demand a broader concept of regulation. Or divisive forces at work since the inception of the United Nations may seek reflection in a narrower, more contracted sphere for international control of politics through formal organization. In either case, proposals to modify the Charter center upon a notion of changing law, in this instance the basic law of the world community. Put thus in its proper context, Charter revision becomes more simply a problem of legal change. It would accordingly seem to presuppose a critical reexamination of alternative legal techniques made available by international law for the purpose of effecting changes in existing international legal relations.

Assuming prior political determination of the substantive matters to be modified, and given the existence of a range of available tech-

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niques, the ultimate choice of legal technique is conditioned by a number of political factors. In particular, any proposal emanating from the United States will be significantly affected by domestic politics and public opinion. International politics may likewise control the ultimate results of the revision process. The use of particular legal devices, independent of substantive proposals, may carry prohibitive, or at least conditioning, political implications. The Charter revisionist thus confronts a complicated problem. He must decide upon substantive changes, and choose devices which may effectuate the desired change. He must then find general domestic and international support for those changes, and select a legally permissible instrumentality with political implications consistent with over-all international goals.

If these are proper or practical limitations on the process of Charter revision, then the extreme approaches to revision may be excluded at the outset. One extreme position proposes that the United States minimize the sphere of international obligation and maximize the area of political free-play by renouncing the Charter entirely.<sup>1</sup> To this end, proponents of renunciation could rely upon the familiar doctrines of *rebus sic stantibus*,<sup>2</sup> prior breach,<sup>3</sup> and the alleged right

<sup>1</sup>At various times resolutions calling for withdrawal from the United Nations or rescission of the Charter are proposed to the Congress. Some are conditional upon the organization failing to follow a given policy. H.J. Res. 463, 82d Cong., 2d sess. (1952); S.J. Res. 14, 82d Cong., 1st sess. (1951); H.J. Res. 239, 82d Cong., 1st sess. (1951). Others are unconditional and absolute. H. Con. Res. 3, 83d Cong., 1st sess. (1953); H.R. 105, 83d Cong., 1st sess. (1953); H.R. 5080, H.R. 5081, 82d Cong., 1st sess. (1951); H. Con. Res. 166, 82d Cong., 1st sess. (1951).

<sup>2</sup>See THE FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX, P.C.I.J., Ser. A/B, No. 46, at 96, 158; 2 HUDSON, WORLD COURT REPORTS 448, 555 (1932); Opinion on the International Load Line Convention, 40 OP. ATTY. GEN. 119 (1941). International practice bearing on the doctrine *rebus sic stantibus* is collected in Harvard Draft Convention on the Law of Treaties, 29 AM. J. INT. L. SUPP. 655 at 1096 (1935); 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW §511, p. 349 (1943); 5 MOORE, DIGEST OF INTERNATIONAL LAW §772 (1908); Hill, "The Doctrine of Rebus Sic Stantibus in International Law," UNIV. OF MISSOURI STUDIES, IX, No. 3 (1934); McNAIR, THE LAW OF TREATIES 376 (1938); 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 2d ed., pp. 1523-1541 (1945). For a recent controversy see Briggs, "Rebus Sic Stantibus before the Security Council: the Anglo-Egyptian Question," 43 AM. J. INT. L. 762 (1949). Included in the Economic Aid Agreement with Spain is an express clause adopting *rebus sic stantibus* for that agreement. See Article X(2) of the Economic Aid Agreement, Agréements Concluded with Spain, 29 DEPT. OF STATE BUL. 435, 436, 439 (1953).

<sup>3</sup>See Harvard Draft Convention on Law of Treaties, 29 AM. J. INT. L. SUPP. 655 at 1077-1096 (1935), for a collection of the practice and authorities. Article 27(a) of the Draft, provides: "If a state fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting in a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such state." Soviet violations of the Charter are discussed in Acheson, "Progress Toward International Peace and Unity," 26 DEPT. OF STATE BUL. 647 (1952); Acheson, "The

of unilateral withdrawal from international organizations.<sup>4</sup> But even if the law of nations permits application of these principles against the Charter,<sup>5</sup> legal considerations in this area would doubtless yield to the overwhelming impact of political implications. Neither American<sup>6</sup> nor international opinion generally<sup>7</sup> presently supports renunciation of the Charter, and renunciation would lead only to a general

Peace the World Wants," 23 DEPT. OF STATE BUL. 523 (1950); Austin, "The Problem of Voting in the Security Council," 20 DEPT. OF STATE BUL. 512 (1949). The prolonged absence of the USSR from the United Nations organs during 1950 can be construed as a violation of art. 28(1). See Austin, "Review of Security Council Action in Defense of Korea," 23 DEPT. OF STATE BUL. 451 (1950). Other Soviet violations associated with the Korea action are discussed in SECURITY COUNCIL OFFICIAL RECORDS, 5th Year, No. 37 at 5 (1950). The effect of the violations for prior breach purposes, however, is vitiated by Charter remedies. See articles 5, 6, 10, 11, 12, 39; GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, 2d ed., 138, 140 (1949); KELSEN, THE LAW OF THE UNITED NATIONS 712, 714, 732 (1950).

<sup>4</sup>With respect to the right of withdrawal, Committee I/2 of the San Francisco Conference used the following language: "If . . . a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization." Report of Rapporteur of Committee I/2, as amended, 7 U.N. CONF. DOC. 324 at 328 (1945). This report was approved in plenary session of the Conference, 1 U.N. CONF. DOC. 620 (1945). For a view that this action of the Conference was of no legal significance see KELSEN, THE LAW OF THE UNITED NATIONS 127 (1950). But the American delegate in Committee I/2 maintained that "in an organization of sovereign states it was clear that all members would possess the faculty of withdrawal. . . ." 7 U.N. CONF. DOC. 262 at 265 (1945). U.N. Charter, art. 2(1), provides: "The Organization is based on the principle of the sovereign equality of all its Members." Cf. KELSEN, THE LAW OF THE UNITED NATIONS 125 (1950).

<sup>5</sup>But general international law conditions lawful withdrawal from treaties upon consent of all parties, a necessary implication of the rule *pacta sunt servanda*. See Harvard Draft Convention on the Law of Treaties, 29 AM. J. INT. L. SUPP. 655 at 661 and 977 (1935), art. 20 entitled "Pacta Sunt Servanda." As applied to such a basic question as renunciation or withdrawal, the contention that general international law is superior to the Charter has raised some controversy. While the concept "international law" is mentioned in articles 1 and 13, the Charter does not expressly accept its superiority or subordination to general international law. But the Charter is doubtless superior where its express language modifies previous rules of the law of nations. U.N. Charter, art. 103. See Verdross, "The Charter of the United Nations and General International Law," in LAW AND POLITICS IN THE WORLD COMMUNITY, Lipsky ed., 153 (1953); Wright, The Outlawry of War and the Law of War," 47 AM. J. INT. L. 365, 372 (1953); Taubenfeld, "International Actions and Neutrality," 47 AM. J. INT. L. 377, 384 et seq. (1953). But the Charter probably continues to rely on the general international law of treaties for support on technical matters, although even this need not be true if progressive development requires a different principle. Cf. Kunz, "General International Law and the Law of International Organizations," 47 AM. J. INT. L. 456 (1953).

<sup>6</sup>See generally, Hearings before the Senate Foreign Relations Subcommittee on Review of the United Nations Charter, 83d Cong., 2d sess. 10-11, 72, 104, 110, 149 (1954) [hereinafter cited Hearings (1954)]; Eisenhower, "Proclaiming Our Faith Anew," 28 DEPT. OF STATE BUL. 167 (1953); Truman, "U.S. Foreign Policy in Review," 28 DEPT. OF STATE BUL. 43 (1953); Revision of the United Nations Charter, S. Rep. No. 2501, 81st Cong., 2d sess. (1950).

<sup>7</sup>The United Nations Members' views on Charter revision generally are collected in GENERAL ASSEMBLY OFFICIAL RECORDS, 8th sess., Sixth Committee 55-105 (1953); "Documentation of All Charter Proceedings at San Francisco," 15 U.N. BUL. 446 (1953).

loss in the integrity of all international agreements. Under these circumstances, the renunciation technique fails to meet the minimum requirements of a workable alternative approach.

Similar problems would combine to frustrate proposals tending toward the other extreme of radical extension of United Nations competence. By forcing a "revolutionary displacement"<sup>8</sup> of the United Nations, it is conceivable that a Charter revision conference could turn itself into a constitutional convention and produce a draft world constitution or a Charter revised to exclude the Soviet Union. Given the backing of de facto power, such a revolution would probably be legal if effectively established,<sup>9</sup> but political objections to world government<sup>10</sup> or exclusion of the USSR<sup>11</sup> would be decisive. Thus the process of "revolutionary displacement" exists as a legal possibility,

<sup>8</sup> "Revolutionary displacement" takes place when one regime effectively replaces another by illegal methods. De facto power then combines with legal color of the new regime to overcome any inconsistency with the old. Should a member of the United Nations enter any agreement inconsistent with the Charter, article 103 provides that the Charter shall prevail. Since the schemes for world government or exclusion of the USSR would probably violate the Charter, they would constitute "revolutionary displacements" if effective.

<sup>9</sup> While analytical theorists may dispute extensions of Professor Kelsen's doctrine of "effectiveness" as a necessary condition to the validity of a particular rule of law [KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 117 et seq. (1949); KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 214, 289, 412 (1952); Tucker, "The Principle of Effectiveness in International Law" in *LAW AND POLITICS IN THE WORLD COMMUNITY*, Lipsky ed., 31 (1953); Morgenthau, "Positivism, Functionalism, and International Law," 34 *AM. J. INT. L.* 260 (1940)], there seems to be general agreement that effective displacement of the basic structure of legal institutions results in a new and valid regime. See authorities, supra; Kunz, "Revolutionary Creation of Norms of International Law," 41 *AM. J. INT. L.* 119 (1947); Verdross, "The Charter of the United Nations and General International Law," in *LAW AND POLITICS IN THE WORLD COMMUNITY*, Lipsky ed., 154 (1953); White, "How to Amend the United Nations Charter," 37 *A.B.A.J.* 431 (1951).

<sup>10</sup> Support for world government proposals is presently insufficient to permit consideration as reasonable substantive possibilities. See Hearings (1954) at 79, 107, 114, 134 for specific statements relating to world government. In 1950 the Department of State took a position clearly contrary to world government proposals. See Hearings before the Senate Foreign Relations Subcommittee on Revision of the United Nations Charter, 81st Cong., 2d sess. 398, 408, 410, 427, 428, 438 (1950) [hereinafter cited Hearings (1950)]; Revision of the United Nations Charter, S. Rep. No. 2501, 81st Cong., 2d sess. 29, 30, 47 (1950). If the view of the executive branch is thus contrary, the legislative is one of patent hostility. Sec. 110 of the Department of State Appropriation Act, 1954, provides: "None of the funds appropriated in this title shall be used (1) to pay the United States contribution to any international organization which engages in the direct or indirect promotion of the principle or doctrine of one world government or one world citizenship; (2) for the promotion, direct or indirect, of the principle or doctrine of one world government or one world citizenship." 67 Stat. L. 367 at 372 (1953). Identical provision was made in the appropriation for 1953. 66 Stat. L. 549 at 556 (1952).

<sup>11</sup> Thus spokesmen for the Department of State have consistently supported the view that advantage lies with the policy keeping the Soviets within the organization. See Hearings (1950); Dulles, in Hearings (1954) at 10-11, 23, 25, and for general views, at 41-42, 68, 79, 80, 84, 88, 104, 105, 115.

but as a practical matter it seems to ignore the familiar dictum that "politics is the art of the possible."

Thus departing from both extremes of renunciation and revolutionary displacement, it remains to examine the less extensive but more workable devices which may be used to perfect changes within the existing United Nations framework. For this purpose, the formal amendment is important primarily for its popular currency, the techniques of "subordinate consistent agreement" and "interpretation and practice" for their feasibility. Because these three legal tools have individual constellations of implications, each will be considered separately with the substantive proposals dependent upon its function and application.

## II. *The Possibilities of Revision by Formal Amendment*

Current proposals to modify the United Nations Charter tend to center upon the formal amendment process. This procedure has always been permitted by general international law, ordinarily through the routine substitution of a new agreement for the old. To effect such a change, a corollary of *pacta sunt servanda* requires unanimous participation or consent.<sup>12</sup> That is to say, one treaty could not replace a prior inconsistent treaty without consent of all the parties. Any lesser doctrine would destroy the rule that treaty obligations must be carried out in good faith. However accepted the unanimous consent rule may be, nothing precludes signatories from waiving in advance their right to insist that a treaty otherwise valid and subsisting remain executory until each party consents to a change. This is the case with the United Nations Charter.

Chapter XVIII of the Charter spells out two distinct procedures for adoption of formal amendments. Like the Constitution of the United States, the Charter separates the procedures of proposal and ratification required to perfect an amendment. Article 108 provides for the proposal of amendments by the General Assembly. At this stage a mere two-thirds majority vote in the Assembly is required. Since the Security Council's participation is unnecessary, no veto power threatens this procedure. The second proposal procedure en-

<sup>12</sup> Harvard Draft Convention on the Law of Treaties, 29 AM. J. INT. L. SUPP. 655 at 661 and 977 (1935). Art. 20, entitled "Pacta Sunt Servanda," provides: "A state is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*)." If a subsequent agreement were permitted to modify the Charter without consent of all signatories, its binding effect would be lost. See U.N. Charter, art. 103. Application of general international law to the Charter is discussed in note 5 supra.

visages the use of a general conference independent of the United Nations. By a vote of two-thirds of the Assembly, any seven members of the Security Council concurring, a general conference for review of the Charter may be held at any time. Anticipating the possible disuse of the conference method, the framers of the Charter provided a special procedure to be followed by the Assembly at its tenth annual session. If, at the time the tenth General Assembly convenes, there has been no general conference for revision, the Charter requires that the agenda of that Assembly contain a proposal to call the conference. This does not, of course, require the calling of a conference; it merely ensures that the conference device will be seriously considered. Under this provision instead of a two-thirds vote of the Assembly, a mere majority—thirty-one votes—is required to call the conference. In either case the Security Council must concur by a vote of any seven of its members, but this is a matter *not* within the veto power of the permanent members. Once established by either procedure, the conference proposes amendments by a two-thirds majority, each member of the United Nations having one vote, none retaining the power to veto proposals of specific amendments. In short, the proposal process, whether utilized by the General Assembly or the conference, requires a mere two-thirds vote. No separate action is required by the Security Council; no veto power exists at this stage.

If the proposal procedure thus outlined offers promise of success, the ratification procedure offers promise of much less. Whether proposed by the Assembly or conference procedure, the ratification requirements are identical in each case. Chapter XVIII requires that amendments be ratified in accordance with their constitutional processes by two-thirds of the members of the United Nations, *including all the permanent members of the Security Council*. Hence proposed amendments may fail to come into force by dissent of either the United States, United Kingdom, France, China, or the Soviet Union. Even this assumes that two-thirds of the membership will ratify the proposed amendments. Such being the case, one may venture to suggest that the proposal of amendments by Assembly or conference looms large as a real possibility, but the sufficient number of ratifications in all likelihood failing, the actual coming into force of amendments is at best extremely unlikely. The political significance and attendant dangers of proposal without subsequent ratification is considered below in a different connection.

Current interest in Charter amendment revolves around the conference device. The tenth Assembly meets in the fall of 1955. By a majority of thirty-one votes that Assembly may, and best guesses predict it will, call a general conference to be held in 1956 or 1957. Preparatory work setting up the preliminary foundations for such a conference is already well under way in the United Nations<sup>13</sup> and the United States.<sup>14</sup> As early as November 1953 the great majority of United Nations members evidenced support for calling the general conference.<sup>15</sup>

Granting the probability that the conference will be convened, concrete proposals for revision assume considerable importance. Many such proposals have been suggested since the United Nations began to function. As the time for the conference approaches, however, at this very early stage, governments have taken generally a cautious attitude. Outspoken proposals by United Nations members are now conspicuous by their absence. In November 1953, when the Assembly's legal committee met to suggest certain preparatory activity, only a few governments used that opportunity to express support for concrete proposals. The representatives of Panama and Nicaragua declared their acceptance of a proposal to eliminate the veto in membership matters.<sup>16</sup> Nicaragua further suggested the need to remedy international problems arising out of atomic energy and self-determination of peoples developments.<sup>17</sup> Other governments were generally

<sup>13</sup> On November 28, 1953 the General Assembly passed by a vote of 54-5 a resolution initiating preparatory work. U.N. Doc. A/Resolution/133, Nov. 28, 1953. See GENERAL ASSEMBLY OFFICIAL RECORDS, 8th sess., Sixth Committee 55-105 (1953); Liang, "Preparatory Work for a Possible Revision of the United Nations Charter," 48 AM. J. INT. L. 83 (1954); Byrnes, "Preparatory Work to Begin on Review of U.N. Charter," 29 DEPT. OF STATE BUL. 908, 909 (1953); "Documentation of All Charter Proceedings at San Francisco," 15 U.N. BUL. 446 (1953). The Legal Committee of the Assembly decided not to solicit views on substantive proposals at this early date, but supported 48-5 the resolution as finally passed by the Assembly, *id.* at 495. The resolution requests the Secretary General to prepare and publish a systematic compilation of unpublished San Francisco documents, a complete index of the documents of that Conference, and a repertory of the practice of the United Nations organs appropriately indexed.

<sup>14</sup> During July 1953, the Senate authorized the creation of a Senate Foreign Relations Subcommittee to make a full study of proposals to amend or otherwise modify existing international peace and security organizations. S. Res. 126, 83d Cong., 1st sess. (1953), as amended by S. Res. 193, 83d Cong., 2d sess. (1954); "Review of U.N. Charter," 29 DEPT. OF STATE BUL. 310 (1953); "Revision of U.N. Charter," *id.* at 343; Hearings (1954).

<sup>15</sup> See authorities collected in note 13 *supra*.

<sup>16</sup> "Documentation of All Charter Proceedings at San Francisco," 15 U.N. BUL. 446, 449, 493 (1953).

<sup>17</sup> *Id.* at 493.



noncommittal.<sup>18</sup> A generally favorable attitude was expressed by the United States representative, Mr. Byrnes, who emphasized the importance of ". . . utilizing the full opportunity this presents in its [the United Nations'] quest for a peaceful world order under law . . .".<sup>19</sup> Secretary Dulles had adverted to revision in similarly general language at the August 1953 American Bar Association meeting,<sup>20</sup> though several weeks earlier he thought it was timely to state that the "Department [of State] will favor the calling of the review conference when the question is put to the 1955 session of the United Nations General Assembly."<sup>21</sup> At that time Secretary Dulles continued to believe "that final United States policies on this question must await full public discussion of the issues as well as consultations with members of Congress,"<sup>22</sup> thus reaffirming earlier statements stressing the importance of wide participation in preparation.<sup>23</sup> Congressional interest is indicated by authorization of a Senate Foreign Relations Subcommittee to study proposals to amend, revise, or otherwise modify international peace and security organizations.<sup>24</sup> On January 18, 1954, Mr. Dulles appeared before this Subcommittee to state for the first time the State Department's views on specific areas for possible reform. These included removal of the veto from membership and pacific settlement matters, a new approach to disarmament problems, and a procedure for settling credentials disputes. He questioned, moreover, the adequacy of Charter provisions dealing with the General Assembly voting and the role of international law in United Nations affairs.<sup>25</sup> Nevertheless, the Department's attitude remains cautious and noncommittal, Mr. Dulles asking to be excused from categorical answers to detailed questions on possible changes.

<sup>18</sup> Other opinions were expressed in the General Assembly meeting in plenary session during September 1953. See excerpts reproduced in *REVIEW OF THE UNITED NATIONS CHARTER* (Documents), 83d Cong., 2d sess. No. 87 at 779-816 (1954). Suggestions tending to support revision of the veto power were made by Peru, id. at 782, Ecuador, id. at 787, Dominican Republic, id. at 795, Iceland, id. at 795, and Lebanon, id. at 804. Revision of the present formula for Security Council representation was suggested by Syria, id. at 797, revision of the non-self-governing territories provisions by France, id. at 798, and membership proposals were made by Costa Rica, id. at 801.

<sup>19</sup> "Documentation of All Charter Proceedings at San Francisco," 15 U.N. BUL. 446, 449 (1953).

<sup>20</sup> Dulles, "U.S. Constitution and U.N. Charter: an Appraisal," 29 DEPT. OF STATE BUL. 307 at 310, 343 (1953).

<sup>21</sup> Dulles, "Review of the U.N. Charter," 29 DEPT. OF STATE BUL. 310 at 311 (1953); *REVIEW OF THE U.N. CHARTER* (Documents), 83d Cong., 2d sess., No. 87 at 779 (1954).

<sup>22</sup> Dulles, "Review of the U.N. Charter," 29 DEPT. OF STATE BUL. 310 at 311 (1953).

<sup>23</sup> Dulles, "Revision of the U.N. Charter," 29 DEPT. OF STATE BUL. 343 (1953).

<sup>24</sup> *Supra* note 14.

<sup>25</sup> Hearings (1954) at 4-34.

Other views expressed in the United Nations favorable to the conference suggested the possibility of revision activity recreating an atmosphere which would lead to the discovery of new avenues of cooperation<sup>26</sup> or at least showing how the charter has been misinterpreted and abused in practice.<sup>27</sup> Members opposed to extensive and radical change were few in number. Only Afghanistan, Yugoslavia, Sweden, and Peru<sup>28</sup> expressed such views, which, if maintained, would not necessarily preclude changes of a minor character.

Most consistently opposed to steps even preliminary to a general conference were representatives of the Soviet bloc. They refused to admit the constitutionality of preliminary work and expressed the strongest opposition to suggested proposals of a substantive character. Indicating a threat of Soviet veto against proposals submitted to ratification, the Czech delegate adverted to the "inviolability of the Charter."<sup>29</sup> Similarly, reference was made to the conformity of the veto power with "international law," implying perhaps that Soviet spokesmen elevate to an "inalienable right" the voting procedure presently established in the Charter.<sup>30</sup> In any case these and other<sup>31</sup> statements referring to the revision concept as an aggressive device likely to do great damage to the organization offer ample evidence from which the only reasonable conclusion is that any amendments proposed by the general conference may expect failure of ratification by the USSR.<sup>32</sup> This being true, grave doubts exist regarding the utility of the amendment process.

What remains then as favorable in the formal amendment approach from the standpoint of the United Nations development and American foreign policy? Having shown that the conference will probably be held, and the conference may adopt resolutions without the veto problem, the key question goes to the utility of having such

<sup>26</sup> "Documentation of All Charter Proceedings at San Francisco," 15 U.N. Bul. 449 (1953).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at 448, 449.

<sup>29</sup> *Id.* at 448.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*; Mr. Vyshinsky's statement before the General Assembly, Sept. 21, 1953, REVIEW OF THE UNITED NATIONS CHARTER (Documents), 83d Cong., 2d sess., No. 87 at 780 (1954).

<sup>32</sup> In his testimony before the Senate Subcommittee, Ambassador Lodge made clear his belief that the Soviets would veto any amendments proposed by the West. Hearings (1954) at 42, 44. But Secretary Dulles was more optimistic when he said, "We can reasonably make our plans on the working hypothesis that no one nation will, in fact, be able arbitrarily either to impose changes or to veto changes," *id.* at 9, and ". . . I am not discouraged at all at the possibilities of having some changes here, if they seem reasonable and if they have a strong backing from world opinion." *Id.* at 23.

proposed amendments put to the membership knowing they will not come into force. Assuming that such amendments would not be forced into acceptance against the will of the USSR,<sup>33</sup> two possible rhetorical advantages suggest themselves for analysis.

The first rhetorical advantage of the amendment process would be an increase in activity and serious thought about United Nations affairs.<sup>34</sup> Preliminary work is already producing intense activity and a new literature on the United Nations will doubtless appear as the Charter revision conference approaches. Increased thought and activity emphasizing the idea and symbolism of the United Nations would tend to increase the broad basis of support for the United Nations and the principle of international cooperation. If public opinion works a decisive influence on the conduct of foreign relations, a broader base of thought sympathetic to the United Nations concept may facilitate more extensive reliance upon United Nations procedures by the member governments. This in turn, through a cyclical effect, conduces independently to further support for international cooperation and collective security. Law and community interacting in a primitive organizational context gradually lay the basis for a stable international society of nations amenable to a regime of law.<sup>35</sup> If it is possible to say that movements furthering these developments support the purposes of the United Nations, and these are "interests" of the United Nations, then it can be argued that rhetorical use of the amendment process conduces to the interests of world organization. If this were the only effect of rhetorical usage, where the amendments are expected to fail of ratification, the entire procedure would not be objectionable from the standpoint of the United Nations interests.

But these assumptions neglect the second and more questionable rhetorical use of the revision process. It was the Panamanian delegate to the General Assembly who adverted to the amendment procedure as a means of showing abuse of the Charter.<sup>36</sup> The danger

<sup>33</sup> See note 11 *supra*.

<sup>34</sup> Thus at the outset of the Senate Subcommittee's 1954 Hearings, Senator Wiley, after noting that there is a veto problem, further observed: "What we can do during this study is to understand more fully what is involved in our present participation in the United Nations and determine what changes, if any, we want to bring about and will work to bring about with respect to this organization." Hearings (1954) at 3; Dulles, *id.* at 24.

<sup>35</sup> Wright, "Law and Politics in the World Community," in *LAW AND POLITICS IN THE WORLD COMMUNITY*, Lipsky ed., 3 at 13 (1953).

<sup>36</sup> "Documentation of all Charter Proceedings at San Francisco," 15 U.N. *BUL.* 449 (1953).

lies in the great powers actually using it for that purpose.<sup>37</sup> To the end of furthering the world power position of the United States, it seems possible for the United States to push proposals through the conference by the necessary two-thirds vote, and then use the ratification campaign as a power and rhetorical device to further discredit and isolate the USSR. Dressed in appropriate ideological language, the ratification campaign could probably lower the prestige of the USSR by compelling it to "veto" amendments generally acceptable to the United Nations membership but untenable to the USSR. At best this would result in minimum advantage to the United States. At worst it may induce the Soviets to withdraw further from active participation in the organization's affairs. Surely the failure of ratification would result in the further frustration, not the realization, of United Nations interests. The decision to use or not to use the ratification campaign for power purposes thus turns on a necessary and careful balancing of interests. When the considerations going against the rhetorical use are supplemented by its tendency to discourage a sound basis of organizational development through interpretation and practice, the balance weighs heavily against use of the formal amendment procedure to effect change.

### III. *Effective Revision of the Charter by Subordinate Consistent Agreement*

A frequently used and readily available alternative technique of change is the permissible subordinate international agreement.<sup>38</sup> Treaties inconsistent with the Charter are clearly controlled by that document.<sup>39</sup> Yet a large area for extension of obligation is not foreclosed by the United Nations. Generally speaking, members<sup>40</sup> may further

<sup>37</sup> For a discussion of various uses of the conference method for Charter revision, see Gross, "Revising the Charter," 32 *FOREIGN AFFAIRS* 203 at 205 (Jan. 1954). Perhaps in anticipation of this difficulty, Secretary Dulles observed, ". . . while a charter review conference should be welcomed as a means of strengthening the United Nations, difference of opinion about how to do this should not then be pressed to a point such that the review conference would result in undermining the United Nations or disrupting it. The United Nations as it is, is better than no United Nations at all." Hearings (1954) at 9; also Lodge, *id.* at 37.

<sup>38</sup> See Dulles, Hearings (1954) at 11; How the United Nations Has Developed, Staff Study No. 2, Subcommittee on the United Nations Charter, 83d Cong., 2d sess. 12 (1954); Engel, "De Facto Revision of the Charter of the United Nations," 14 *J. OF POLITICAL SCIENCE* 132 at 139 (1952).

<sup>39</sup> Note 12 *supra*.

<sup>40</sup> Non-members as well are limited by the Charter in respect to security matters, U.N. Charter, art. 2(6), and treaties with members which conflict with the Charter. Art. 103. Otherwise non-members enjoy an equal right to participate in arrangements con-

obligate themselves to pursue a course of action even in areas of international relations on which the Charter speaks. Thus it is assumed that the Charter does not preempt the fields of activity it regulates. Since the Charter lays down a minimum body of rules, members may re-enter the fields covered by the Charter and use the treaty device to secure further restrictions on political discretion. Or express rights held under the Charter may be waived by the members, so long as this procedure does not constitute a threat to the peace.<sup>41</sup> Both techniques are supported by a long line of accepted practice of United Nations organs and individual members.<sup>42</sup>

At least within the purview of article 51, subordinate collective security agreements are doubtless permissible and consistent with the Charter. Regional arrangements predicated on subordinate agreements occupy the attention of Chapter VIII of the Charter. In pursuance to these provisions the western powers have entered such important agreements as the Rio Pact,<sup>43</sup> the Bogota Charter,<sup>44</sup> the North Atlantic Pact,<sup>45</sup> and the Pacific Security Agreements.<sup>46</sup> Some such subordinate agreements expressly recognize the legal superiority of the Charter.<sup>47</sup> In at least one instance, the Bogota Charter, a security agreement clearly extends its sphere of obligation beyond the area of *express* Charter authorization,<sup>48</sup> thus suggesting a broader concept of compatibility. Military and economic undertakings as recent as the

sistent with the Charter. Thus Italy and Portugal became signatories to the North Atlantic Pact. See Hearings before Committee on Foreign Relations on the North Atlantic Treaty, 81st Cong., 2d sess., Pt. 1 at 93 (1949).

<sup>41</sup> At some point, of course, waiver of rights affects the whole community adversely. Basic rights affecting peace ought not to be within the waiver power, since the waiver may effect a modification of the Charter violating art. 103. If, for example, two or more states waive their right to freedom from the use or threat of force found in art. 2(4), then the community as a whole suffers if violence follows. This is merely to show that limits to a waiver power clearly exist, however illusive the controlling principle may be.

<sup>42</sup> See p. 55 *infra*.

<sup>43</sup> "Inter-American Treaty of Reciprocal Assistance," T.I.A.S. 1838; 17 DEPT. OF STATE BUL. 565 (1947).

<sup>44</sup> "Charter of the Organization of American States," T.I.A.S. 2361; 46 AM. J. INT. L. SUPP. 43 (1952).

<sup>45</sup> 34 U.N.T.S. 243; T.I.A.S. 1964, 63 Stat. L. 2241 (1949).

<sup>46</sup> Pacific Security Agreement, T.I.A.S. 2493; Security Treaty with Japan, T.I.A.S. 2491 (1952); 25 DEPT. OF STATE BUL. 148 (1951).

<sup>47</sup> See art. 10 of the Rio Pact, *supra* note 43; art. 102 of the Bogota Charter, *supra* note 44; art. 7 of the North Atlantic Pact, *supra* note 45. Cf. Treaty Constituting the European Defense Community, arts. 121, 122, Senate Executive Q and R, 82d Cong., 2d sess. 167, 203 (1952); Draft Treaty Embodying the Statute of the European Community, art. 72 (1953).

<sup>48</sup> Note 44 *supra*, art. 25.

Spanish-American agreements of 1953<sup>49</sup> offer continued support to the view that members may enlarge upon their Charter obligations. Possible use of this technique to expand the obligations of members in their direct participation in the United Nations is shown by the proposals contained in the famous Thomas-Douglas Resolution of 1950.<sup>50</sup> While this resolution was not successful in the Senate, the reasons for its failure were other than legal.<sup>51</sup> Without formal amendment of the Charter, the Thomas-Douglas Resolution proposed voting changes and implementation in the security structure of the United Nations by a "supplementary agreement under article 51 open to all members of the United Nations." The supplementary agreement would bind its signatories to come to the aid of the victim of attack if requested to do so by a two-thirds vote of the General Assembly, including three permanent members of the Security Council. Armed forces for implementing the duty to aid the victim of attack would be available in the spirit of article 43 of the Charter. The resolution accordingly proposed a treaty eliminating the veto and earmarking in advance specific military forces to be available to the Security Council or General Assembly. To this extent the Thomas-Douglas Resolution went beyond the Vandenburg Resolution which called for supplementary agreements to remove the veto from pacific settlement matters.<sup>52</sup>

The sound legal basis for the procedure adopted in the Thomas-Douglas Resolution was forcefully put before the Senate Foreign Relations Subcommittee by Professor Quincy Wright. He argued that the Resolution conformed with the principles, purposes, and other express provisions of the Charter, practice under the Charter, practice under the League Covenant, and legal doctrine properly laid down by the World Court.<sup>53</sup> Consequently, it may be agreed that use of subordinate consistent agreements is firmly established as a permissible legal technique for effecting change of existing structures like the United Nations.<sup>54</sup>

<sup>49</sup> See Text of Defense Agreement in Agreements Concluded With Spain, 29 U.S. DEPT. OF STATE BUL. 436 (1953); Text of Economic Aid Agreement, *ibid.*; Text of Mutual Defense Assistance Agreement, *id.* at 440.

<sup>50</sup> S. Con. Res. 52, 81st Cong., 1st sess. (1949); Hearings (1950) at 2 et seq.; Revision of United Nations Charter, S. Rep. No. 2501, 81st Cong., 2d sess. 25 (1950).

<sup>51</sup> Revision of United Nations Charter, S. Rep. No. 2501, 81st Cong., 2d sess. 27, 47, 53 (1950).

<sup>52</sup> S. Res. 239, 80th Cong., 2d sess. (1948).

<sup>53</sup> Testimony of Professor Wright, Hearings (1950) at 27 et seq.

<sup>54</sup> Cf. Revision of the United Nations Charter, S. Rep. No. 2501, 81st Cong., 2d sess. 27 (1950).

Its legal basis once established, the subordinate consistent agreement device opens an avenue of considerable possibility. Changes as extensive as the Atlantic Union rely upon this concept.<sup>55</sup> Separate agreements may be used to effect change in the structure and function of the United Nations in less ambitious ways already mentioned. In fact most, if not all, proponents of formal amendment might first rely upon the agreement process as a preliminary testing ground and laboratory for experimentation before proceeding to formal amendment of the Charter. Thus conditioned by observation of a change on a basis less than universal, intransigent dissenting states might eventually be persuaded to participate or at least acquiesce. Untrammelled by the veto problem, this procedure provides a means for the proponents of change to have their revision while the divisive effects of renunciation, revolutionary displacement, and the vetoed formal amendment are in the main successfully avoided. In more precise terms, use of the subordinate consistent agreement procedure may provide the West with desired changes without forever foreclosing closer cooperation with the USSR. Any legal device which so nicely balances the conflicting demands of progress and stability deserves the utmost in attentive exploration.

#### IV. *Effective Change through Interpretation and Practice*

The fifth and final technique of change admissible to the United Nations context lacks important incidents of the others already discussed. Growth and development of an existing structure through interpretation and practice, the ancient, conservative, and often difficult technique lacks the force and drama inherent in renunciation, revolutionary displacement, subordinate agreement, and formal amendment. But what the process of interpretation and practice lacks in force and drama it gains in reliability and effectiveness.

Proponents of interpretation and practice as the preferable means of change properly assume that the Charter cannot be modified by formal amendment. This being the case, it is an easy next step to show that the written Charter as presently constituted is the best common denominator, the most acceptable statement of interests and aspirations of the world community and its member states. Even to the probably limited extent to which the USSR can now allow itself to participate in the functions of the organization, that minimum participation may be preferable to none at all. Some changes being

<sup>55</sup> See testimony of Justice Roberts, Hearings (1950) at 232, 237, 238.

desirable notwithstanding minority objection, the gradual method of interpretation further assumes that its pragmatic, piecemeal, and sometimes awkward results are more acceptable than no change at all. Any progressive change through this technique depends, moreover, on a conception that the unamended Charter of 1945 can carry considerably more legal traffic,<sup>56</sup> that the Charter, in other words, is sufficiently flexible to permit extensive internal change without losing its character as a regulator of international politics.

Two theories of interpretation compete to control the last assumption. Like the historical controversy central to interpretation of the American Constitution, a concept of liberal versus restrictive interpretation raises controversy relative to the Charter in the international sphere. Both have articulate advocates well armed with legal weapons to support each view. Reduced to its simplest terms, the restrictive view would argue that the United Nations has only that authority and competence expressly delegated by the members in the San Francisco Charter.<sup>57</sup> Growth in competence beyond the express grants would be possible only through a formal amendment process, not through interpretation and practice. On the other hand, the liberal view emphasizes the constitutional character of the Charter with the organization deriving its powers from express functions and purposes

<sup>56</sup> Thus Secretary Dulles has observed, "The defects in the charter can to a considerable extent be corrected by practices which are permissible under the charter." Hearings (1950) at 8. In 1950, Dean Rusk said, ". . . there is no question but that the Charter can carry much more traffic if its members desire to have it do so." Hearings (1950) at 385. The ability of the Charter to grow without formal change depends in part on the ambiguity of its constitutive instrument. The controlling work showing this ambiguity is KELSEN, *THE LAW OF THE UNITED NATIONS* (1950). See also, *How the United Nations Charter Has Developed*, Staff Study No. 2, Senate Subcommittee on the United Nations Charter, 83d Cong., 2d sess. (1954); ENGEL, "De Facto Revision of the Charter of the United Nations," 14 *J. OF POLITICS* 132 at 133 (1952).

<sup>57</sup> The Charter seems to add some support to the restrictive view. Art. 2(1), acknowledging that the "Organization is based on the principle of the sovereign equality of all its Members," combines with the domestic jurisdiction reservation of art. 2(7) to narrow the scope of United Nations authority. Thus grounded by these two provisions on "sovereign equality," it can be argued that the members intended to part with only that authority expressly granted the United Nations in the Charter. All else is reserved to the sovereign members; grants of power in derogation of sovereignty are not to be presumed. Some authority for this view is found in International Court of Justice decisions. See dissenting opinion of Judge Hackworth, *Reparations for Injuries Suffered in the Service of the United Nations*, I.C.J. Rep. 174 at 198 (1949): "There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desire to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot be freely implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of the powers expressly granted." See also, *Competence of the General Assembly for Admission of a State to the United Nations*, I.C.J. Rep. 4 at 8 (1950). Cf. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 26 *BRR. Y.B. INT. L.* 48 (1949).



as well as specific grants in its constitutive document. The proponents of liberal construction, accordingly, produce a rule allowing the organization such competence necessary to enable it to act in any way consistent with its functions and purposes except where the Charter expressly prohibits action.<sup>58</sup> Considered as technical legal choices between competing concepts of treaty interpretation, neither restrictive nor liberal concepts find universal acceptance in doctrine and practice. Yet in a context limited to organic treaties such as the United Nations Charter, the preponderant authority of international law, including the opinion of the World Court<sup>59</sup> and international practice,<sup>60</sup> precludes the restrictive and emphatically supports the liberal view as the law of the Charter.

Taken within the range of its fullest possible impact, the liberal view opens the door to far-reaching changes. Developed to their fullest potentials, the purposes of maintaining peace and security, developing friendly relations among nations, achieving cooperation in economic, social, cultural or humanitarian spheres,<sup>61</sup> and establishing conditions under which justice and respect for the obligations of international law can be maintained,<sup>62</sup> it is not altogether impossible that the United

<sup>58</sup>This approach is variously characterized as "liberal," "effective," "functional," "rational," "purposive," interpretation and sometimes "progressive development." These terms are used interchangeably in this discussion.

<sup>59</sup>The controlling and now classic case is *Reparations for Injury Suffered in Service of the United Nations*, I.C.J. Rep. 174 (1949); 43 AM. J. INT. L. 589 (1949). Speaking of the United Nations, the Court said, "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged." I.C.J. Rep. 179 (1949); 43 AM. J. INT. L. 589 at 592 (1949). To the same point the Court added, "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." I.C.J. Rep. 182 (1949); 43 AM. J. INT. L. 595. This definitely marks an acceptance of the liberal view. See on this decision, Wright, "The Jural Personality of the United Nations," 43 AM. J. INT. L. 509 (1949); comment, 48 MICH. L. REV. 496 (1950); Hambro, "A Case of Development of International Law Through the International Court of Justice in LAW AND POLITICS IN THE WORLD COMMUNITY, Lipsky ed., 243 (1953). Other cases supporting the liberal view include: *Corfu Channel Case*, I.C.J. Rep. 1 at 24 (1949); *Competence of the International Labour Organization in the Matter of the Regulation of Conditions of Work of Persons Employed in Agriculture*, P.C.I.J., Ser. B, No. 2 at 9, 1 HUDSON, WORLD COURT REPORTS 124 (1922); *Interpretation of the Treaty of Lausanne*, P.C.I.J., Ser. B, No. 12 at 6, 1 HUDSON, WORLD COURT REPORTS 722 (1925); dissenting opinions of Judges Azevedo and Alvarez in *Competence of the General Assembly for Admission of a State to the United Nations*, I.C.J. Rep. 4 at 12, 22 (1950). Cf. U.N. Charter, art. 13(1)(a).

<sup>60</sup>See authorities collected in Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 26 BRIT. Y.B. INT. L. 48 (1949); Wright, "National Courts and Human Rights—The Fugii Case," 45 AM. J. INT. L. 62 (1951).

<sup>61</sup>U.N. Charter, art. 1 (1, 2, 3).

<sup>62</sup>U.N. Charter Preamble; for "principles" implementing the Preamble and the Purposes of art. 1, see art. 2.

Nations as presently constituted could progress to encompass elements of government far more extensive than those found in its present operating structure. Through a development program one may characterize as "creeping world government," even extreme proposals for a legislative power in the General Assembly, powers to tax, to establish a United Nations police guard, to eliminate the veto, to achieve universality of membership and compulsory judicial jurisdiction, may find effective implementation when the community is prepared to submit to a regime of United Nations law.<sup>63</sup> Without the difficulties inherent in the formal amendment process, even such radical modifications of the operating structure of the United Nations exist as possible developments through interpretation and practice.

If radical change is thus made legally possible, certainly the modest proposals for formal amendment need not perish upon the obstacles to that procedure. The doctrine of functional interpretation provides a more workable and efficacious technique for modest, pragmatic adaptation of the Charter to changed circumstances and aspirations of the world community. In even the few years of its existence, the Charter has shown considerable flexibility and capacity to adjust to necessary or convenient changes. Of the many available examples showing such development,<sup>64</sup> two are chosen for closer examination. Two significant impediments to effective application of the United Nations have been reduced through interpretation and practice. When the United Nations had legal competence to act, the great power veto posed an insurmountable hurdle to effective action. The limitation excluding matters "essentially within the domestic jurisdiction" of the states concerned posed a second limitation even in the absence of frustration by veto. Yet several years practice drastically narrowed the effective range of the veto power and all but destroyed the domestic jurisdiction limitation.

The veto power is simply a requirement that the permanent members lodge a concurring vote on all matters of substance in the Security

<sup>63</sup> Taken in its widest application, the concepts of liberal interpretation and "progressive development," U.N. Charter, art. 13(1)(a), could legally admit of these extreme advances in the organization's competence. But only when the political base supporting such radical change exists would they become more than mere legal possibilities. Obviously the required political climate does not presently exist.

<sup>64</sup> For other examples of development by interpretation and practice, see generally GOODRICH AND HAMBRO, *CHARTER OF THE UNITED NATIONS* (1949); KELSEN, *THE LAW OF THE UNITED NATIONS* (1950); Engel, "De Facto Revision of the Charter of the United Nations," 14 *J. OF POLITICS* 132 (1952); *How the United Nations Charter Has Developed*, Staff Study No. 2, Senate Subcommittee on the United Nations Charter, 83d Cong., 2d sess. (1954).

Council.<sup>65</sup> No action may be taken without the concurring votes of the United Kingdom, France, China, the United States, and the Soviet Union. In short the "veto problem," from the standpoint of the United States stems from the politics of the USSR combined with the Soviet power to veto measures running against its interests or favoring the interests of the western powers. Wide use of the Soviet veto in such situations created the "veto problem" and the more serious danger that the United Nations would consequently fail in its efforts to preserve the peace through a universal concept of organization.<sup>66</sup>

The year 1950 brought several changes highlighting interpretation and practice as workable tools against the veto power. Only the fortuitous circumstance of the Soviet representative's absence in the Security Council during June and July made the Korea Resolutions of those months possible.<sup>67</sup> The Council's action determining North Korea the aggressor,<sup>68</sup> recommending enforcement measures,<sup>69</sup> and creating the Unified Command<sup>70</sup> unquestionably required the concurring votes of all permanent members, including the USSR. But the Soviet representative being absent, the resolutions lacked the *con-*

<sup>65</sup> The relevant provisions of art. 27 provide as follows: "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members." Art. 27(2). "Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." Art. 27(3). The literature on the veto is collected in SOHN, *CASES ON WORLD LAW* 669 (1950). See JIMINEZ DE ARECHAGA, *VOTING AND THE HANDLING OF DISPUTES IN THE SECURITY COUNCIL* (1950); Gross, "The Double Veto and the Four-Power Statement on Voting in the Security Council," 67 *HARV. L. REV.* 251 (1953); The Problem of the Veto in the United Nations Security Council, Senate Foreign Relations Subcommittee on the United Nations Charter, Staff Study No. 1, 83d Cong., 2d sess. (1954).

<sup>66</sup> The ultimate source of the "veto problem" is clearly found in the political relations of the U.S. and the USSR. The veto problem is only a legal reflection of the cold war. Probably its greatest effect upon the legal structure is found in the development of regional and self-defense structures with power to act without threat of the Soviet veto. See van Kleffens, "Regionalism and Political Pacts," 43 *AM. J. INT. L.* 666 (1949); Heindel, Kalijarvi, and Wilcox, "The North Atlantic Treaty in the United States Senate," 43 *AM. J. INT. L.* 633 (1949). Similar reactions of the Soviets gave impetus to security organizations in Eastern Europe separate from the United Nations. See Kulski, "The Soviet System of Collective Security Compared With the Western System," 44 *AM. J. INT. L.* 453 (1950). In both cases the probable frustration of future action by the United Nations led to reliance upon an essentially regional rather than a universal concept of security organization.

<sup>67</sup> In protest against the continued presence of the Chinese Nationalist representative, the Soviet delegation boycotted the United Nations deliberations from January 13, 1950 to August 1, 1950. See "Enforcing Peace," 9 *U.N. BUR.* 143, 148, 149 (1950).

<sup>68</sup> Resolution of June 25, 1950, U.N. Doc. S/1501.

<sup>69</sup> Resolution of June 27, 1950, U.N. Doc. S/1511.

<sup>70</sup> Resolution of July 7, 1950, U.N. Doc. S/1588.

*cursing* vote of a *permanent* member. Nevertheless the resolutions were carried and never successfully impeached. On their face, the resolutions appear illegal.<sup>71</sup> But their legality may nevertheless be demonstrated through an analysis of practice and interpretation. First, the inquiry must establish whether the voting formula actually requires a "concurring vote" to avoid the veto. Is any failure to lodge a concurring vote a veto? A clear and consistent practice of the Council provides a negative response to this question. Prior to the Korea Resolutions, at least forty instances of abstention from voting are recorded.<sup>72</sup> Abstention was never treated as a vote against a Council measure; in no instance did the abstention of a great power effect a veto. Even as early as August 1947, the then President of the Security Council, Mr. F. El-Khouri of Syria, was able to say, "I think it is now jurisprudence in the Security Council—and the interpretation accepted for a long time—that an abstention is not considered a veto, and the concurrent votes of the permanent members mean the votes of the permanent members who participate in the voting. Those who abstain intentionally are not considered to have cast a veto. That is quite clear."<sup>73</sup> No objections to the President's formulation of the rule were recorded in the official records of the Council. This inroad on the veto power, in effect interpreting "concurring vote" to mean "absence of an express negative vote," was adequately confirmed by practice and acquiescence. The opening petard once established, it was much easier to deal with the effect of a permanent member's absence. The "concurring vote" requirement reduced to the "no express negative rule," the absolute character of the veto was lost. The "abstention" concept provided the category in which the "absence problem" was laid to rest. But no clear practice solved this problem. An absence had not yet been considered an "abstention" for veto purposes. Consequently, to treat this question of first instance, the better approach dwelled heavily upon the rule of functional or rational interpretation and progressive develop-

<sup>71</sup> The Soviet argument against the legality of the Korea Resolutions is summarized in "Enforcing Peace," 9 U.N. BUL. 143 (1950). Should the illegality of the Korea Resolutions be established, then participation in the action by the Unified Command forces could violate United Nations Charter, art. 2(4) which obligates members to refrain from the use or threat of force in their international relations. See also, Kunz, "Legality of the Security Council Resolutions of June 25 and 27, 1950," 45 AM. J. INT. L. 137 (1951); KELSEN, *THE LAW OF THE UNITED NATIONS* (Supplement 1951).

<sup>72</sup> The practice of abstention in the Security Council is discussed in Liang, "Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council," 44 AM. J. INT. L. 694 at 696 (1950).

<sup>73</sup> SECURITY COUNCIL OFFICIAL RECORDS, 2d Year, No. 68 at 1711 (1947).

ment. Thus McDougal and Gardner, discussing this concept and its application to the veto problem; argued: "When the march of events inevitably lays bare ambiguities and alternatives of interpretation . . . , even the most modest deference to rationality must require that interpretation . . . which best promotes the major purposes . . ." of the institutions under consideration.<sup>74</sup> Applying the major purposes of the Charter to this aspect of the veto problem, the authors forcefully conclude that absence of a permanent member cannot frustrate the work of the Security Council.<sup>75</sup> To allow one member to absent itself and disable the organization is to invite anarchy, not fulfillment of the United Nations purpose to maintain and enforce peace. From the immediate consequences of the Korean episode, then, two limitations upon the veto were sharpened and developed. The abstention rule was further established and broadened to include the voluntary absence of a permanent member.

A third and perhaps more drastic limitation upon the veto in practice had its origin in thoughts prior to, as well as contemporary with, the Korean action. Sometime before the Korean problem arose, the threat of a Soviet veto to measures directed against possible Soviet aggression, created substantial doubt that the United Nations would be able to act against such aggression. Suggestions then appeared directing attention to the General Assembly and its possible role as an agency of collective security in the event Council action were frustrated by the veto.<sup>76</sup> These ideas were sharpened by the Korean episode and the fortuitous circumstances permitting action without the veto in that case. On the correct assumption that the Soviets would return to the Security Council to prevent by veto such United Nations action in the future, increased attention to the possibilities in the General Assembly led to the "Acheson Plan"<sup>77</sup> which culminated in the General Assembly resolution "Uniting For Peace" of November 3, 1950.<sup>78</sup>

The Uniting for Peace Resolution provides, *inter alia*, "that if the Security Council, because of lack of unanimity of the permanent mem-

<sup>74</sup> McDougal and Gardner, "The Veto and the Charter: an Interpretation for Survival," 60 *YALE L.J.* 258 at 266 (1951).

<sup>75</sup> *Id.* at 266, 272.

<sup>76</sup> Hearings (1950) at 415; Bancroft, "Strengthening The United Nations," *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 149 at 152 (1950); Goodrich, "Strengthening the United Nations: Maintenance of International Peace and Security," *id.* at 143, 147; Wright, *id.* at 166.

<sup>77</sup> Acheson, "The Peace the World Wants," 23 *DEPT. OF STATE BUL.* 523 at 525 (1950).

<sup>78</sup> *GENERAL ASSEMBLY OFFICIAL RECORDS*, 5th sess., Supp. No. 20, p. 10 (1950).

bers, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to the Members for collective measures, including in the case of a threat to the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security." Analytical arguments going to the validity of "Uniting for Peace" seem generally to favor the conclusion that it does not conform to the letter of the 1945 Charter.<sup>79</sup> This is supported by the framer's rather clear assumption that in fact only the Security Council would take action involving armed force, the Assembly to have authority to operate in the field of peace and security but not to the point of recommending to the members that they use armed force against an aggressor determined as such by the Assembly. While this is not the place to deal with the details of analytical argument in this respect,<sup>80</sup> it would seem that the best justification for the resolution's legality lies in the progressive development concept. Certainly one can argue that the better test of legality is furtherance of the purposes and functions of the United Nations. If the resolution "Uniting for Peace," by removing the veto from situations affecting the peace, does in fact tend to advance the organization's effective competence to maintain international peace and security, then no analytical complaint can invalidate the resolution.<sup>81</sup> Thus the principle of functional interpretation has been used

<sup>79</sup> Exclusive authority to determine and deal with threats to the peace was vested in the Security Council. See Report of the Senate Committee on Foreign Relations on the United Nations Charter, 79th Cong., 1st sess., S. Ex. Rep. No. 8 (1945). See also the arguments of Mr. Vyshinsky in the United Nations, GENERAL ASSEMBLY OFFICIAL RECORDS, 5th Year, First Committee, 80, 118, 132 (1950); GENERAL ASSEMBLY OFFICIAL RECORDS, 5th Year, Plenary Meetings, 324-334 (1950); KELSEN, THE LAW OF THE UNITED NATIONS 953 (Supplement 1951).

<sup>80</sup> Bancroft, "The United Nations as a Collective Security Organization," PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 159 (1951); Wright, "Collective Security in the Light of the Korean Experience," *id.* at 165; Cohen, "Principles Governing the Imposition of Sanctions under the United Nations Charter," *id.* at 153; Woolsey, "The Uniting for Peace Resolution of the United Nations," 45 AM. J. INT. L. 129 (1951).

<sup>81</sup> See remarks of Mr. Gutierrez of Cuba, GENERAL ASSEMBLY OFFICIAL RECORDS, 5th Year, Plenary Meetings, at 321, 323 (1950). Mr. Romulo of the Philippines declared, "This authority springs from broad powers of the General Assembly under the Charter, from the United Nations inherent right of survival and from its supreme responsibility to all the world's peoples to preserve peace. No legal technicality, however brilliantly advanced, can prevail against the overriding force of this threefold principle," *id.* at 295. See extended argument of Mr. Costa Du Rels of Bolivia and authorities cited, *id.* at 313 et seq.

to expand the competence of the veto-less Assembly, showing the Charter's clear capacity for growth in an area charged with severe political consequences and difficulties.

The second impediment to United Nations action altered materially through interpretation and practice is the equally familiar "doctrine of domestic jurisdiction." A favorite of theorists for its theoretical assumptions and difficulties, the doctrine of domestic jurisdiction has raised similarly difficult problems in application. Article 2(7)<sup>82</sup> of the Charter contains the most recent of many familiar formulas designed to limit the effective sphere of state obligations and the competence of international organizations.<sup>83</sup> Its primary function is to parry the possible thrust of the operating provisions of treaties and agreements. This was the purpose of article 2(7) of the Charter.<sup>84</sup> It purported to remove from the United Nations the competence to intervene in social, economic, civil liberty, immigration, tariff, form of government, and similar areas of state concern not ordinarily subject to international controls. While other provisions of the Charter give the organization some authority to deal with those matters, the reservation of domestic matters in turn revested exclusive authority to deal with these questions in the members. Thus limiting the legal competence of the United Nations at the outset, the domestic jurisdiction clause alarmed commentators to describe the organization as materially disabled by express provisions in its Charter.<sup>85</sup>

Experience in practice during the first few years of its existence, however, emphatically denies this role for article 2(7). Its intent and language to the contrary, the domestic jurisdiction clause is presently narrowed to preclude little if any action the organization would otherwise undertake.<sup>86</sup> Over the objections of the Netherlands and the

<sup>82</sup> U.N. Charter, art. 2(7) provides as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

<sup>83</sup> See Preuss, "Art. 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," 74 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL* 553 (1949).

<sup>84</sup> Gross, "The Charter of the United Nations and the Lodge Reservations," 41 *AM. J. INT. L.* 528, 550 (1947).

<sup>85</sup> *Ibid.* See Kelsen, "Limitations on the Functions of the United Nations," 55 *YALE L.J.* 997 (1946); Eagleton, "United Nations Aims and Structures," *id.* at 974, 979; Goodrich, "The Amount of World Organization Necessary and Possible," *id.* at 950, 964.

<sup>86</sup> Goodrich, "United Nations and Domestic Jurisdiction," 3 *INT. ORG.* 14, 28 (1949).

United Kingdom, the reservation failed to prevent the United Nations from expressing itself on the character of the Franco government in Spain.<sup>87</sup> Nor did it foreclose the vigorously protested action against South Africa in relation to its discriminatory treatment of Indian minorities.<sup>88</sup> Arguments against the competence of the United Nations to deal with the "civil wars" in Indonesia<sup>89</sup> and Korea,<sup>90</sup> with human rights in Africa,<sup>91</sup> Rumania, Bulgaria, Hungary,<sup>92</sup> Tunis and Morocco<sup>93</sup> have equally failed to prevent United Nations intervention. All of these disputes involved matters probably falling within the domestic jurisdiction concept of 1945 broadly construed.<sup>94</sup> Competence of the United Nations was in each case vigorously challenged. But the challenges were adequately met with argument and principle in each instance. Not once did the challenge prevail.

The key to understanding these disputes and the reconciliation of intervention with the broad language of article 2(7) is provided by interpretation and practice. The clause itself contains several terms flexible enough to admit of narrow construction. If "intervention," "essentially," or "domestic jurisdiction" were limited by construction, then the effect of the whole article would be contracted. To the extent the article is contracted, the competence of the United Nations is extended. The concepts selected for this treatment were "essen-

<sup>87</sup> JOURNAL OF THE SECURITY COUNCIL, No. 28 at 549 (April 17, 1946); U.N. GENERAL ASSEMBLY OFFICIAL RECORDS, 1st sess., pt. 2 (Resolutions) 63 (1946).

<sup>88</sup> See comment, "The 'Domestic Jurisdiction' Limitation in the United Nations Charter," 47 COL. L. REV. 268 (1947); Preuss, *supra* note 83, at 636 et seq.

<sup>89</sup> SECURITY COUNCIL OFFICIAL RECORDS, 2d Year, No. 68 at 1659, 1703 (1947).

<sup>90</sup> Korea Resolutions, *supra* notes 68-70. With regard to the domestic jurisdiction issue see the argument of Mr. Jebb, SECURITY COUNCIL OFFICIAL RECORDS, 5th Year, No. 28 at 4, 6 (1950).

<sup>91</sup> See Annual Report of the Secretary-General on the Work of the Organization, 1952-1953, GENERAL ASSEMBLY OFFICIAL RECORDS, 8th sess., Supp. No. 1 at 31 (1953); "Racial Situation in South Africa Reported on by Commission," 15 U.N. BUL. 486 (1953).

<sup>92</sup> Interpretation of Peace Treaties with Bulgaria, Hungary, and Rumania, I.C.J. Rep. 65, 70 (1950). For a summary of United Nations action with respect to the problem of human rights in Bulgaria, Hungary, and Rumania, see Annual Report of the Secretary-General on the Work of the Organization, 1950-1951, GENERAL ASSEMBLY OFFICIAL RECORDS, 6th sess., Supp. No. 1 at 22 (1951).

<sup>93</sup> Annual Report of the Secretary-General on the Work of the Organization 1952-1953, GENERAL ASSEMBLY OFFICIAL RECORDS, 8th sess., Supp. No. 1 at 35 (1953); Annual Report of the Secretary General on the Work of the Organization 1951-1952, GENERAL ASSEMBLY OFFICIAL RECORDS, 7th sess., Supp. No. 1 at 44 (1952); Howard, "The Problems of Tunisia and Morocco in the Seventh Session of the General Assembly," 28 DEPT. OF STATE BUL. 359 (1953); Dejanya, "Competence of the General Assembly in the Tunisian-Moroccan Questions," PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 53 (1953).

<sup>94</sup> For legal arguments supporting a broad construction of the domestic jurisdiction reservation, see KELSEN, THE LAW OF THE UNITED NATIONS 769 (1950).



tially" and "domestic jurisdiction."<sup>95</sup> In most cases, the issue was: What attributes force a matter into the concept "essentially within the domestic jurisdiction" of a state? The results of discussion and decision suggest that only those matters not of "international concern," and otherwise domestic, fall within the article. This formulation has been expressed in the United Nations debates,<sup>96</sup> and provides the best rule for reconciling the cases.<sup>97</sup> If all matters of "international concern" are international and not domestic in character, then article 2(7) no longer poses an obstacle to an extended United Nations competence. This being true, interpretation and practice have achieved a two-fold result. The substance of domestic jurisdiction is rendered ineffective against the United Nations action formerly falling within

<sup>95</sup> Although discussion at various times urged a narrow construction of "intervention" as well. Preuss, note 83 *supra*, at 605 et seq. To the framers, "intervention" seemed to mean any action by the organization, probably including mere discussion. Report of Subcommittee B to Committee II/2, 9 U.N. Conf. Doc. 407 (1945). But "intervention" in international law means the threat or use of force, at least something like "dictatorial interference." 2 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW, 7th ed., 150 (1952). If this narrow construction were accepted, then all of the resolutions of the General Assembly challenged on the basis of domestic jurisdiction would be outside of the reservation and hence permissible under the Charter. For none involved the use of force. It is suggested, however, that the other concepts be broadened for this purpose. A civil war, for example, is a domestic matter. It is out of the United Nations jurisdiction unless it falls within chapter VII. If it does fall within chapter VII, as a threat to the peace, then the Security Council may deal with it in pursuance to its powers under chapter VII. This is an express exception to the reservation found in U.N. Charter, art. 2(7). Should the action by the Security Council be frustrated by the veto, however, the Assembly may wish to act in pursuance to the Resolution "Uniting for Peace," GENERAL ASSEMBLY OFFICIAL RECORDS, 5th sess., Supp. No. 20, p. 10 (1950). Since the express exception of art. 2(7) applies only to the Security Council, difficulties confront the Assembly in the domestic civil war situation. If all the advances against domestic jurisdiction are written off as a limitation of "intervention," the Assembly is still incompetent to deal forcibly under "Uniting for Peace" against a civil war. The Assembly's action would then flatly contradict the reservation of domestic matters. Hence the problem is best solved by a construction of "essentially domestic," and a workable solution would exempt all matters of "international concern" from the limitation. This concept would permit the Assembly to act under the "Uniting for Peace Resolution" where an otherwise domestic civil war poses a threat to the peace.

<sup>96</sup> Preuss, note 83 *supra*, at 627 et seq. Speaking of the character of the Spanish Government, the Report of the Security Council Subcommittee on the Spanish Question said: "There can be no question that the situation in Spain is of international concern." Report of the Subcommittee on the Spanish Question, SECURITY COUNCIL OFFICIAL RECORDS, 1st Year, 2d Ser. Spec. Supp. at 1 (1946). Mr. Vyshinsky: "These [domestic matters] are not matters which have an international character; these are not matters which concern international relations." GENERAL ASSEMBLY OFFICIAL RECORDS (Plenary Meetings) Pt. 2, 1041, 1043 (1946). Cf. statement of Mr. Lodge to the General Committee of the Eighth General Assembly: "The United States has observed with increasing concern the tendency of the General Assembly to place on its agenda subjects the international character of which is doubtful. . . . The United States holds that this problem deserves most careful consideration by all member governments in preparing for the Charter Review Conference." REVIEW OF THE UNITED NATIONS CHARTER (Documents) 83d Cong., 2d sess., Doc. No. 87 at 283 (1954). But see Hearings (1954) at 56.

<sup>97</sup> Discussion note 95 *supra*.

article 2(7). One impediment to the use of progressive development techniques is removed. The fully sovereign character of the member states thus substantially reduced, even less support remains for a "sovereignty" based conception supporting a restrictive view of Charter interpretation generally.<sup>98</sup> Hence it may be concluded that interpretation and practice is an effective method for creating change in a legal structure such as the Charter. Already the veto and domestic jurisdiction limitations are substantially reduced. These developments made possible in security and other areas of intense political interest, then surely the remaining impediments to forceful action in the United Nations may be removed by the same method.

Difficulties nevertheless remain. The concept of development by interpretation and practice may raise questions associated with the customary law of nations. As customary international law suffers from an inability to effect rapid change in the context of a clear tradition of customary law and the inability to erect new organizational forms, so these objections may be raised against development of the United Nations through practice. For example, the International Court of Justice has upheld the veto power on applications for membership.<sup>99</sup> The Court has missed an opportunity to extend its compulsory jurisdiction by dicta suggesting the Court would refuse to take jurisdiction when the only evidence of consent consists of a Security Council resolution recommending that the parties submit their dispute to the Court.<sup>100</sup> These rules being supported more or less by practice and judicial decision, it may be doubted that they can be overcome through interpretation and practice. The second objection goes to the possibility of erecting a new structure by interpretation. How, for example, can

<sup>98</sup> Notes 57, 59 *supra*.

<sup>99</sup> Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Rep. 4 (1950).

<sup>100</sup> Corfu Channel Case (Preliminary Objection), I.C.J. Rep. 15 at 26 (1947-1948). The Court's jurisdiction rests upon consent of litigants. Statute of the International Court of Justice, art. 36. It may be expressed, however, in various ways. For a collection of materials bearing on the consent requirement to the World Court's jurisdiction in contentious cases see HAMBRO, *THE CASE LAW OF THE INTERNATIONAL COURT* 321 et seq. (1952); HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 405-482 (1942); LISSITZYN, *THE INTERNATIONAL COURT OF JUSTICE* 61-71 (1951). In the Corfu Channel Case, *supra*, the Court took jurisdiction on other evidence of consent but did not consider the Security Council Resolution recommending to the Albanian government and the United Kingdom that they refer the case to the Court. Despite the provision of art. 36(1) that "the jurisdiction of the Court comprises . . . all matters specially provided for in the Charter of the United Nations," a concurring minority held that acceptance of the Charter by the members did not express their consent for the Council to make a binding recommendation vesting jurisdiction in the Court. Cf. U.N. Charter, art. 36(1, 3); Corfu Channel Case (Preliminary Objection), at 31; Hudson, "The Twenty-Sixth Year of the World Court," 42 *AM. J. INT. L.* 1 (1948).

practice and custom create an International Criminal Court? Institutions like courts do not ordinarily appear without an organic instrument. How then could the gradual method of interpretation meet the need for the creation of new institutions *ab initio*? How can effective restraints and safeguards be placed against the institutions like the proposed International Criminal Court?

Both central objections to the process of development by interpretation and practice ignore the character of basic institutions already established under the Charter. The World Court, Security Council, and General Assembly are already working institutions. Through development and application, these established institutions, particularly the General Assembly, could provide adequate solutions to the problems of overcoming existing practice and erecting new institutions. Accordingly, the Assembly could revise the jurisdiction requirements of the World Court<sup>101</sup> and undertake to admit new members to the organization without a favorable recommendation of the Security Council.<sup>102</sup> Similarly, the proposed criminal court could be established by resolution of the Assembly without unanimous consent of the members.<sup>103</sup> Indeed the views of the American member of the Special Committee charged with drafting a statute for such a court suggested General Assembly action as part of a plan for implementing the proposed statute.<sup>104</sup> Should the Assembly adopt this procedure for creating new institutions, adequate safeguards and limitations may be worked into the proposal and implementing resolutions.<sup>105</sup> Hence an increased emphasis upon the powers of the Assembly suggests the general direction for development making possible the changes necessary to success-

<sup>101</sup> U.N. Charter, arts. 10, 13. Cf. generally Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," 25 BRIT. Y.B. INT. L. 1 (1948).

<sup>102</sup> See dissenting opinions of Judges Alvarez and Azevedo, Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Rep. 12, 22 (1950); statement of Mr. Vieyra, Argentine representative, in the Ad Hoc Political Committee on the Admission of New Members (mimeograph, 1953).

<sup>103</sup> Legal arguments going to the Assembly's competence to establish an independent judicial body are discussed in "International Criminal Jurisdiction," 15 U.N. BUL. 193 (1953); Liang, "The Establishment of an International Criminal Jurisdiction: The Second Phase," 47 AM. J. INT. L. 638 (1953); Wright, "Proposal for an International Criminal Court," 46 AM. J. INT. L. 60 (1952); Liang, "Establishment of an International Criminal Jurisdiction: First Phase," *id.* at 73.

<sup>104</sup> "International Criminal Jurisdiction," 15 U.N. BUL. 193 (1953).

<sup>105</sup> Safeguards are of course provided in the Revised Draft Statute for an International Criminal Court, adopted by the 1953 Special Committee on International Criminal Jurisdiction, *id.* at 196. Cf. Finch, "Draft Statute for an International Criminal Court," 46 AM. J. INT. L. 89 (1952).

ful realization of the purposes of the United Nations.<sup>106</sup> In the event the General Assembly's functions thus find emphasis and application, difficulties associated with customary international law raise no wholesale inhibitions to further growth through interpretation and practice.

It is not therefore unreasonable to posit the gradual technique of interpretation and practice as the preferable legal basis for effective change. That method is shown to be more than a mere concept; it is a working tool of international life. It has reformulated and limited drastically the practical effect of the veto; it has confined if not destroyed the jurisdictional limits of domestic matters. Its use within the context of existing institutions of the United Nations evidences a utility beyond that associated with customary growth in the law of nations generally. Legal difficulties accordingly fail to emerge as effective inhibitions to the process of progressive development by interpretation and practice.

While progressive development has limitations, these are political rather than legal in character. Assuming that the legal difficulties discussed above may be readily overcome, the remaining obstacle to efficient change is essentially a political matter. Asking what the community desires in terms of change and growth, the political limitations are altogether proper. They would and should limit change by any other device as well as progressive development. The problem thus reduced to politics, the burden of change shifts to the political community. If the community's desires and needs cannot be effected within the formal structure of the existing organization, then development of the sense of community, not formal amendment of the Charter is

<sup>106</sup> This may require less emphasis upon recourse to the World Court for advisory opinions on matters of competence. Since the legal question of competence is so thoroughly political in inception and consequence, the process of decision by the political organ immediately concerned may be preferable. Thus Mr. Vyshinsky, speaking to the domestic jurisdiction issue in the African Human Rights dispute before the General Assembly said: "The Soviet delegation considers that justice must indeed be secured and it should be secured by an international court; but this international court is here, it is yourselves, it is all of us, it is our Organization which should deliver its verdict. This is what we want, this is what we demand." *GENERAL ASSEMBLY OFFICIAL RECORDS (Plenary Meetings) Pt. 2, 1041, 1045 (1946)*. This was apparently the view of the framers. "In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers." *Report of Committee IV/2, 13 U.N. Conf. Doc. 703 at 709 (1945)*. See panel discussion, "Strengthening the United Nations," *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 141, 164 (1950). Cf. *id.* at 158-159. For a different side of this problem see Gross, "States as Organs of International Law and the Problem of Autointerpretation" in *LAW AND POLITICS IN THE WORLD COMMUNITY*, Lipsky ed., 59 (1953). Compare Kunz, "The United Nations and the Rule of Law," 46 *AM. J. INT. L.* 504 (1952); Eagleton, "The United Nations: A Legal Order?" in *LAW AND POLITICS IN THE WORLD COMMUNITY*, Lipsky ed., 129 (1953); Cowles, "Revision of the United Nations Charter and the Development of Law," 33 *NEB. L. REV.* 35 (1953).

required. To argue formal amendment in this context is to assume a revolutionary change in the attitudinal and political structure of the world community, an assumption at best utopian, at worst divisive and destructive. If the community is prepared to revise the basic organization for control of international life, this need not be attempted through formal amendment of the Charter; it can be properly and promptly effected through progressive development of the existing structure.

#### V. *Legal Techniques and Policy Goals as Interrelated Problems in Charter Revision*

These concluding observations assume that change is both necessary and resolutely desired by a preponderant majority of United Nations members. The substance of specific change is ordinarily left to determination through the international political process. Legal method has as its task the delimitation of techniques available for implementing specific proposals for change. Yet policy and method combine to present a galaxy of mixed problems of interaction between law and politics. Each has its unavoidable and material effect upon the other. Therefore, it may be assumed that, change being desired, the ultimate choice of technique involves a balancing of specific means, a weighing of advantages against disadvantages to the whole scheme of possible developments under consideration. Thus any treatment of goals without reference to legal means leaves one material part of the problem of change unsolved.

Revolutionary techniques survive analysis as legally possible but politically improbable methods. *Rebus sic stantibus* and the doctrine of prior breach seem to argue too much. Like the notion of withdrawal from the United Nations, these drastic devices require destruction of the whole concept of world organization in order to achieve even limited and modest change. As unrealistic possibilities, they may be accordingly excluded from further consideration.

If the extremes of renunciation are to be avoided, so must the competing extreme method of revolutionary displacement. While this device remains equally available as a legal possibility, there is little evidence that favorable opinion sufficient to warrant a drastic increase in the function of world organization exists. To emphasize the need for such revolutionary extensions of organizational structures implicit in Atlantic Union or World Federation serves only to divert attention from the less dramatic but more meaningful possibilities for modest change within the existing United Nations framework.

If organizational change is to be effected through the international political process, moreover, it may be urged that revision by the technique of formal amendment be approached cautiously if not entirely avoided.<sup>107</sup> While it may be contended that change by subordinate agreement remains a possibility worthy of considerable exploration, proposals for formal amendment tend to inhibit the process of change by interpretation and political accommodation.<sup>108</sup> Since the formal amendment process seems doomed to frustration at the outset, it remains to examine the interrelations of amendment and practice.

One of the principal difficulties inherent in the amendment process centers upon the admissions it may imply. To propose a drastic amendment is to admit that its substance is presently unlawful under the Charter or general international law. Otherwise, it could be argued, the amendment would not be necessary or desirable. To propose, for example, that the veto be removed from pacific settlement or membership matters is to admit that the veto power presently applies to those matters. Such admissions, it is submitted, serve only to increase the impediments to progressive development. If such far-reaching amendments fail of ratification, a clear certainty at this juncture, then the net result of pressing for amendment is negative from the standpoint of development along the lines proposed in the amendments.

If the amendment process is thus self-defeating from the legal progressive development standpoint, it tends also to inhibit the process of gradual political adjustment. For the West to urge its proposals upon the organization will require the USSR to select one of several alternative policies. Since the Soviet intransigence with respect to amendment matters is a known factor, it may be assumed that the USSR will not acquiesce in far-reaching proposals offered by the West. If the USSR is embarrassed and isolated by amendment proposals, it might in turn offer amendments to embarrass the West. Choosing to avoid these possibilities, Soviet policy could totally ignore the amendment activity or initiate a further withdrawal from international cooperation. In any case the likelihood of intensified political disunity is clear. Failing of ultimate ratification, the amendments would doubtless serve

<sup>107</sup> See Gross, "Revising the Charter," 32 *FOREIGN AFFAIRS* 203 (Jan. 1954). The possibility that Charter review and amendment would endanger the organization's structure as it presently exists was recognized by Secretary Dulles, Hearings (1954) at 6, 9, and Ambassador Lodge, *id.* at 37.

<sup>108</sup> But Secretary Dulles thought, ". . . it may be found practical to solidify practices which involve effective working of the charter which will overcome many of the defects which are now found in it, from an operating standpoint." Hearings (1954) at 10. The contrary view is discussed in Morgenthau, "The New United Nations and the Revision of the Charter," 16 *REVIEW OF POLITICS* 3 at 16 (1954).

merely to increase international tensions and decrease the areas of effective international communication. To the extent these results impair gradual adjustments in the east-west conflict, the amendment process would again appear self-defeating.

Serious thought about developing the United Nations ought thus to consider the problem as one much broader than mere formal amendment. Caution may be necessary where the veto is expected. In other areas, where prior agreement with the Soviet Union may be reached, caution based on these assumptions may be unnecessary. Yet the veto danger areas seem to call for a reticent approach to revision by amendment. If reticence enlarges the future possibility of progressive development and political adjustment, protection of those interests should outweigh the dramatic advantages of the amendment process. From the standpoint of United Nations interests, enthusiasm resulting from an amendment campaign may not favorably balance the divisive results in the sphere of gradual political adjustment and organizational growth. Since the gradual approach rests upon the extensive and unexhausted capacity of the organization to adjust itself to gradual changes in the community, it should not be hastily threatened by the pursuit of impossible but attractive formal amendments. As the world community gradually seeks a system of order by extending its organizational structure through practice, drastic methods might be avoided if the United Nations is to absorb the community's growth and function as an acceptable regulator of international politics.