

## SOME STRUCTURAL DILEMMAS OF WORLD ORGANIZATION\*

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We now have a quarter-century of experience with the general scheme of world organization embodied in the Charter of the United Nations. What light does that experience throw on the fundamental structural dilemmas which the Charter was an attempt to resolve? In posing this broad question I have no intention of attempting to assess the extent to which the United Nations has fulfilled or disappointed the expectations of its founders or has succeeded or failed in a balance sheet context. My concern is not with a political estimate of past, present, or future prospects but with the bearing of a quarter of a century of experience on some of the fundamental structural problems of world organization.

Three such problems were very much in the minds of most of us in San Francisco in 1945. They were not new problems; they had been familiar conundrums in League of Nations days. They were problems of checks and balances in the Montesquieu tradition which had so profound an influence on the basic concepts of American public law. Succinctly put they were the problems of the balance between the burden of responsibility implicit in power and the rights of all; the balance between the oneness of all international effort and the healthy vigor of its constituent elements; and the balance between the new measure of international authority essential to the establishment of an organized common peace and the continued freedom of action of the separate members of the world community. These cumulative and interlocking relationships among the weight of influence and responsibility and the

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weight of numbers, the coherence of the whole and the vitality of the parts, and interdependence and independence or, stating the issue more sharply, world order and national sovereignty, now confront us as dilemmas at every juncture in the further development of world organization.

All three dilemmas are adumbrated, though not fully discussed, in the *Report to the President on the Results of the San Francisco Conference by the Secretary of State*<sup>1</sup> in terms which reflect the thinking of the time. The *Report* stressed that the authors of the Charter intended to contrast the authority of the Security Council, based on the continued unity of the great powers, with the role of the General Assembly as "the town meeting of the world." The basic concept was much simpler than what proved necessary in actual practice. "In the framework of the United Nations", the *Report* reads, "the provisions for the General Assembly give recognition to the principle of the sovereign equality of all nations. The provisions for the Security Council recognize the special responsibilities of the great powers for maintaining the peace and the fact that the maintenance of their unity is the crucial political problem of our time."<sup>2</sup> None of this has ceased to be true, but it has proved to be much less than the whole truth. Yet the point of departure stated in the Secretary of State's letter to the President summarizing the *Report* has lost none of its cogency. "Men and women who have lived through war are not ashamed, as other generations sometimes are, to declare the depth and the idealism of their attachment to the cause of peace. But neither are they ashamed to recognize the realities of force and power which war has forced them to see and to endure."<sup>3</sup>

The *Report* stated with particular clarity the rationale of the decentralized structure of the economic and social functions of the United Nations system:

The battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of an enduring peace.

In the next twenty-five years the development of the economic and social foundations of peace will be of paramount importance. If the United Nations cooperate effectively toward an expanding world economy, better living conditions for all men and women, and closer under-

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<sup>1</sup>Dep't State Publication No. 2349, Conf. Ser. No. 71 (June 26, 1945).

<sup>2</sup>*Id.* at 67.

<sup>3</sup>*Id.* at 12.

standing among peoples, they will have gone far toward eliminating in advance the causes of another world war a generation hence. If they fail, there will be instead widespread depressions and economic warfare which would fatally undermine the world organization. No provisions that can be written into the Charter will enable the Security Council to make the world secure from war if men and women have no security in their homes and in their jobs.<sup>4</sup>

To foster cooperation in all these fields is a vast undertaking. . . .

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Arrangements for international cooperation in security matters are largely centered in the Security Council. By contrast, international economic and social issues cannot be dealt with by any one agency. Effective cooperation in fields so diverse and so fundamental to nations and individuals as the movement of trade, monetary stability, public health, freedom of the press, or aviation, requires the creation of specified agencies, some of which are already functioning while others are being planned.<sup>5</sup>

The *Report* further noted:

The Charter (Articles 57, 63) provides that these specialized organizations shall be brought into relationship with the United Nations through special agreements to be negotiated between them and the Economic and Social Council, subject to the approval of the General Assembly.

In order to permit the Economic and Social Council and the specialized organizations a maximum of freedom in negotiating these agreements, the Charter has little to say about their nature and content. They may well differ from case to case. It will be the function of the Organization to coordinate rather than to control. . . . The design is clear: the specialized agencies are to be accorded the greatest measure of freedom and initiative compatible with purposeful and coordinated action on the part of the General Assembly, the Economic and Social Council and the agencies and organizations brought into relationship with them.<sup>6</sup>

There could be no more conclusive proof than these statements that the decentralized structure of the economic and social functions of the United Nations system was a conscious design based on overall policy. Thus, the result was not, as its critics have sometimes supposed, a series of historical accidents or the undisciplined pressures of special interests uncontrolled by an adequate concern for general policy.

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<sup>4</sup>*Id.* at 109.

<sup>5</sup>*Id.* at 111.

<sup>6</sup>*Id.* at 119-120.

The *Report* discussed the third dilemma, perhaps the most fundamental of the three, in a more tangential manner:

In the present state, at least, of world opinion, an international legislative body is out of the question, since the several nations are not willing to sacrifice their sovereignty to the extent of permitting an international legislature to enact laws binding upon them or on their peoples. At the same time, an assembly with the power to discuss but without the power to reach conclusions, is not an effective forum for the discussion of real issues or for the focusing of opinion.<sup>7</sup>

The General Assembly was, therefore, given functions which could be broadly described as being "*to deliberate, to administer, to elect, to approve budgets and to initiate amendments.*"<sup>8</sup> Of the budgeting powers the *Report* said:

The allocation to the General Assembly of the task of apportioning the expenses and approving the budgets of the Organization is an extension to the international field of the fundamental principle of democratic government that the purse strings should be held by the most widely representative organ.<sup>9</sup>

In this broad principle lay secreted one of the most sensitive of current problems.\* The broader question of where international action stops and national freedom of action begins, with its converse, was not, and at the time could not have been, brought into any clear focus.

The fundamental nature of these dilemmas has been abundantly confirmed by the experience of the intervening years; they remain the fundamental structural dilemmas of world organization.

The counterpoise of the Security Council and the General Assembly, the comparable logic of weighted voting in the International Monetary

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<sup>7</sup>*Id.* at 54.

<sup>8</sup>*Id.* at 55; See U.N. CHARTER art. 10-17.

<sup>9</sup>*Id.* at 57.

\*[Editor's Note] As an example of the sensitive nature of this topic, consider the fact that ten percent of the world's population and five percent of the contributors to the United Nations can now cast two-thirds of the votes in the General Assembly. This makes it possible for the large majority of small states to override the wishes of the largest contributors. However, it is significant to note, that on December 13, 1972, the General Assembly voted 81 to 27 with 22 abstentions to reduce the United States contribution to the United Nations regular budget from 31.5 percent to 25 percent. This in effect reduces the ceiling on an individual nation's contributions to 25 percent, on the principle that the United Nations should not be overly dependent on any one nation. This action was taken despite a strong opposition led by the Soviet Union. The General Assembly's approval of the reduction avoided a possible internal conflict within the United States since the Congress has expressed a strong sentiment in favor of reducing United States contributions. See N.Y. Times, Dec. 14, 1972, at 1, col. 1.

Fund and the World Bank and its affiliates, and the place of the States of Chief Industrial Importance in the Governing Body of the International Labor Office, have not provided an accepted solution for the problem of securing a reasonable balance between weight of influence and responsibility and weight of numbers. The problem has indeed become increasingly acute with the years, and greatly accentuated by the weight of an ever-increasing organization membership though this has not been the only important factor in the situation.

The balance was impaired almost from the outset by the failure to maintain the unity of the great powers and by the frequent use of vetoes to paralyze the Security Council. In the Uniting for Peace Resolution of 1950,<sup>10</sup> the General Assembly assumed the power to make recommendations whenever the Security Council fails to come to a decision. This decisive step was almost inevitable in a process of shifting the center of gravity of the United Nations from the Security Council to the General Assembly. As the scope of United Nations action expanded, the budgetary authority of the General Assembly became increasingly important. In the same manner in which the spending power has been a decisive increment to national authority in federal systems of government, so the power to finance new international activities has given the General Assembly a central role. The General Assembly which now exercises these powers is a very different body from the General Assembly of 1946. The membership of the United Nations has more than doubled and reflects a wholly changed political structure of the world. One state, one vote, was never more than a rough and ready alternative for the absence of any more satisfactory formula. It has become an increasingly unsatisfactory basis of representation as the degree of distortion of representative quality has grown. The composition of the General Assembly now reflects a political structure of the world shaped by historical and geographical accident, artificial by any rational criterion, and wholly anachronistic. Where men have established a common form of government on a continental or subcontinental scale they are underrepresented. Where men have broken apart into states so small that these cannot "stand by themselves under the strenuous conditions of the modern world" they are overrepresented. In both cases the representation of men has been lost in the representation of states; respect for the sovereignty of the state has excluded any consideration of the extent to which the General Assembly as a whole fairly represents mankind. It clearly does not. North America, north of the Rio Grande, with a

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<sup>10</sup>G.A. Res. 377, 5 U.N. GAOR Supp. 20, at 10, U.N. Doc. A/1775 (1950).

population of 227 million, is represented by two members with two votes; the English speaking Caribbean, with a population of 4.8 million, by four members with four votes; Latin America, with a population of 278 million, by twenty members with twenty votes. China, India and Japan, with a combined population of 1,432 million, or over 39 percent of the human race, have three votes; the rest of Asia and Oceania (excluding Australia and New Zealand), with a population of 554 million, is represented by eighteen members with eighteen votes. The Arab world, with a population of 125 million, is now represented by seventeen members with seventeen votes, and this number seems likely to be further increased; Israel has one. The rest of Africa, with a population of 258 million, is represented by thirty-four members with thirty-four votes. The members of the "Council of Europe" with a population of 312.6 million, are represented by fifteen members with fifteen votes; the USSR, with a population of 243 million, by three members with three votes, and the other communist states of Central and Eastern Europe, with a population of 127 million, by seven members with seven votes. While this disproportion may be to some extent offset by the power of large states to influence the votes of small states this makeup still disregards many forces. The result is a tendency to discredit still further the legislative quality of the General Assembly and other international bodies. Thus, compared with this pattern the unreformed House of Commons prior to the Great Reform Bill of 1832, or the composition of American legislatures prior to redistricting at the behest of the Supreme Court, were models of equitable representation.

The inequities of the one state, one vote system might be partially offset if it could be claimed that the system reflects political realities. This is true only in the sense that the system accords the claims of the smallest and weakest states a status of equality to that of the largest and most powerful. To the state vigorously asserting it, this claim is no doubt a political reality, but it has no relationship to the realities of power or responsibility measured by any other test. There is of course no agreed basis for calculating relative power and responsibility, but for the purpose of consideration of the United Nations we may take as a rough criterion the scale of contributions to the budget. The five largest contributors contribute 63 percent, the next ten largest a further 20.40 percent, and the remaining 111 the remaining 16.60 percent. The scale is by no means a faithful reflection in all cases of relative economic strength, but it gives vivid expression to the general order of the problem. In these circumstances it is not surprising that a majority in the General Assembly should seek to exercise there a power which they do not enjoy elsewhere. Nor is it surprising that the powerful should resist

the encroachment of the authority of the General Assembly upon the realities of power, and that the outcome should be a deadlock of mutual frustration in which neither the authority of the General Assembly in the United Nations system nor the realities of power in the world of states have an adequate impact on each other.

To state the problem is not to solve it or even to suggest that any satisfactory solution exists. It is even more difficult in international than in national policies to start afresh. The possibilities of the present are limited by the errors of the past. The "town meeting of the world" remains a central element in any conceivable scheme of world organization. Can we conceive of any change in its composition, its functions, its procedures or its relationship to other international bodies, existing or to be created, which would give us a more satisfactory overall pattern of world organization?

It is difficult to imagine any significant change in the basis of composition of the General Assembly while the world remains a world of states and the United Nations an organization of states. Most of the bolder schemes for world government involve a complete departure from the pattern. In such schemes suggested new types of World Assembly would embody in varied forms principles such as weighted voting, or the allocation of seats on the basis of a formula balancing population resources with other factors. In the boldest plans, there are provisions for the direct or indirect election of representatives to replace representatives designated by and responsible to governments. Such schemes envisage a wholly new political structure for the world, involving a world government of a federal type. Political probabilities apart, they present structural problems which we have only begun to define. The realistic course is to assume that for the immediate future the General Assembly will continue to be composed on the present basis and will consist of representatives of all member states of the United Nations with one vote for each state.

The functions and procedures of a General Assembly so composed may be more open to review than its composition. The Charter states the functions of the General Assembly only in the most general terms and there have been and will continue to be changes in the balance of their relative importance. Much of the General Assembly's operation depends on the calendar and condition of international business at the time, the effectiveness of the Security Council and the Economic and Social Council at the time and the degree of reliance placed on special conferences, other methods of negotiation, and other international procedures. The arrangement whereby, in one way or another, almost anyone can place almost anything on the agenda of the General Assembly

may call for reconsideration. While the function of the General Assembly as the "town meeting of the world" neither can nor should be abridged, the relationship of this function to the governmental processes of international society taken as a whole may need thorough review.

The procedures of the General Assembly are its own creation and remain its creature. The Charter empowers the General Assembly to "adopt its own rules of procedure,"<sup>11</sup> and "establish such subsidiary organs as it deems necessary for the performance of its functions."<sup>12</sup> The only limitations on the General Assembly's procedural discretion embodied in the Charter are the requirement that "the General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require"<sup>13</sup> and the provisions governing voting.<sup>14</sup> Everything else is governed by rules and practice, which could be changed as part of a plan for a more effective United Nations. It may be that because of inertia, vested interests or weight of voting power no changes will take place except as the outcome of a crisis. But since the potential exists for a crisis which would jeopardize the entire future of the United Nations system, it is well to give some thought to the nature of changes in the procedure of the General Assembly which might help to avert or resolve such a crisis.

First, there should be some reconsideration of the system whereby the General Assembly operates through main committees composed of equal representation from each delegation. This system is a legacy from League of Nations days when, as the result of the unanimity principle, it operated quite differently in practice, ensuring that every voice which might veto a decision in the Assembly was heard in committee. Its present effect, however, is to build into every successive stage of the procedure the artificiality of the present distribution of voting power in the General Assembly itself. It is highly unusual for large deliberative bodies to do virtually all of their business in committees of the whole. No major legislative body works in this way. One can conceive of a compromise between the principle of one state, one vote and the various alternatives for it which have been suggested. This compromise would consist essentially of retaining the principle of one state, one vote at plenary meetings of the General Assembly as required by the Charter,

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<sup>11</sup>U.N. CHARTER art. 21.

<sup>12</sup>*Id.* art. 22.

<sup>13</sup>*Id.* art. 20.

<sup>14</sup>The effect of the voting provisions is spelled out in article 18. Paragraph 2 provides that "decisions . . . on important questions shall be made by a two-thirds majority of the members present and voting." On other questions, paragraph 3 provides that the decision be made "by a majority of the members present and voting." *Id.* art. 18.

but as is also permitted by the Charter, composing the committees which submit recommendations to the General Assembly so that they represent more equitably the contemporary balance of forces. In such a compromise it would be possible to vary the composition of committees with their mandate, agenda, and the circumstances generally. Such a system would involve a marked change in general direction, but there are perhaps anticipations of it in such developments as the composition of the Committee on the Peaceful Uses of Outer Space or the Eighteen Nation Disarmament Committee. Something of this nature may be necessary to preserve the reality of the United Nations system and in particular to avoid a major financial crisis or series of recurrent financial crises. It would, of course, be at best a pragmatic solution, preserving the forms of the equality of states at the stage of formal action by the General Assembly while respecting the realities of power and unequal national capacity to make a practical contribution to the work of the General Assembly. As such it might work. There is no logical escape from the dilemma, and the choice may be between this kind of empiricism and a United Nations system locked in a crisis of ever-increasing unreality.

No less necessary to our discussion is a hard look at the question of whether the United Nations relies too much on voting procedures to determine questions which it cannot hope to settle. Twenty years ago I wrote that:

[T]he voting procedures of the United Nations, which are based on the majority principle qualified by the requirement of special majorities for certain purposes and by the operation of a veto, have in present political circumstances produced a situation in which power is frequently divorced from responsibility, voting tends to become a substitute for negotiation rather than a measure of the amount of agreement reached or a final resort when negotiation fails, and the art of parliamentary manipulation is replacing that of diplomacy as a method of handling international problems for which diplomacy alone can produce an agreed solution.<sup>15</sup>

If this were already true in 1951, it is very much more so in 1971.

What kind of alternative can we envisage? I can see only one: a greater reliance on negotiation rather than voting to resolve matters which are in controversy. Unanimity as the general basis of international organization is a thing of the past, and rightly so, for it spells paralysis. Weighted voting, majorities including specified votes, and

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<sup>15</sup>C. W. JENKS, *THE COMMON LAW OF MANKIND* 174 (1958). This presents a reproduction of an address which the author delivered to the Grotius Society on October 26, 1951.

special majorities may provide elements of a solution in specific contexts but are not solutions of general application.

At the time of the crisis in the General Assembly concerning the applicability of Article 19 of the Charter to states in arrears in the payment of their assessments for the financing of peace-keeping operations, I ventured to make the following suggestion:

A wider acceptance of the principle of consensus represents the only realistic approach to many of our difficulties. The only valid test of the value of international organization is the effectiveness of the results secured. With an increasing recognition of the importance of consensus as an element in effectiveness there may be a growing disposition to prefer the negotiated agreement to the unilateral *pronunciamento*. In world organizations, as in human affairs generally, one may reasonably hope that a growing maturity will be reflected in mellower reasonableness. Whatever can be done to institutionalise the provision of opportunities for expanding the scope for reasonableness may represent the most important contribution that can be made in the immediate future to resolving the problem of how international decisions should be taken.<sup>16</sup>

This still, in my judgment, represents the only realistic approach.

The essence of this approach consists of trying to live with the structural dilemma of balancing the burden of responsibility implicit in power and the rights of all. The balance should be achieved by the practice of wisdom and restraint rather than trying to resolve it by some fundamental structural change for which no widely acceptable formula appears to be available. Such an equilibrium between the weight of power and the weight of numbers presupposes a minimum of understanding between centers of power. This fundamental concept is indeed explicit in the Charter itself. If we reject the concept that the powerful have responsibilities which they must share, we are left with no foundation for a responsible and realistic United Nations system.

To the British constitutional lawyer none of this involves a surrender to pure politics. We are upon the familiar ground of the conventions of the constitution without which the law of the constitution is unworkable. May not the United Nations now need a Dicey<sup>17</sup> to give intellectual consistency and cogency to the conventions of the Charter, the only law

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<sup>16</sup>Jenks, *Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisation*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW* 48, 63 (1965).

<sup>17</sup>See A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1959).

of the constitution which we have or are likely to have in our time? Without such an expression the Charter will become increasingly unreal. Is not the only solution for otherwise insoluble problems a firm respect for certain accepted conventions of responsibility?

Our second dilemma is to maintain a reasonable balance between the oneness of all international effort and the healthy vigor of its constituent elements. The dilemma was a difficult one even at the outset; it has become substantially more difficult during the years which have elapsed since San Francisco.

The decentralized structure of world organization has become far more complex than could then have been envisaged. Successive phases in the development of the United Nations system have added new elements to the system. New problems, new approaches to old problems, and new balances of power in the evaluation of problems have been given institutional expression. Whereas at the early meetings of the Administrative Committee on Co-ordination of the United Nations and the Specialized Agencies there were eight participating organizations, there are now twenty-three, with further additions probable. Regional organizations have become more important than was foreseen. The United Nations system now has cooperative relationships with nine major regional systems and many other regional organizations.

For an increasing number of states admission to the United Nations as participants in so complex an international system represents a burden exceeding both the present capacity of their national administrative structures and in some cases their financial resources. There has been growing criticism of the complexity of the system. There is also a tendency to reject the conscious design on which the system was based, partly because that design reflects a complexity in the structure of government foreign to the new states which centralize authority in the Chief of State and his immediate advisers. In these states the interlocking of international and national action which the decentralized system was designed to promote loses much of its reality. While these developments have been occurring, various aspects of public policy have interacted more closely as the result of broader and more integrated economic and social policies and the growing importance of comprehensive development planning in many countries. The increasing proportion of international action which is operational in character and closely related to development plans has given added importance to this factor.

Given this background, the continuing increase in international budgets combined with the continuing inadequacy of the resources available to meet well-established needs has caused a recurrent questioning of the rationale of the whole system.

This recurrent questioning, in my view, underestimates the legal and practical difficulties of fundamentally recasting the present system. It overlooks the capacity for growth, adaptation, constantly improving coordination, and increasingly purposeful common action which has been demonstrated and disregards the extent to which this cooperation operates as a counterpoise to the structural weaknesses of the United Nations itself. Finally, it fails to provide any convincing alternative for the system's original rationale which remains valid.

The decentralized system, because it is the outcome of deliberate decisions of policy at the highest level and elaborate negotiations among governments, is embodied in a complex of treaty engagements. These treaties have received world-wide ratification because of their special safeguards and procedures. They cannot be modified by resolution of the General Assembly or any other simplified or expeditious procedure. To renegotiate them would be a Herculean task—dangerous at this time because of the retrogression in willingness to accept international engagements—and disproportionate at any time in the foreseeable future to any result likely to be attained thereby.

The existing framework of the decentralized system has permitted a process of continuous development which has changed profoundly its practical operation. It has given us the elements of a much more closely knit world system, and can achieve much more with imaginative and determined leadership. To demonstrate this with chapter and verse would require a volume but the evidence is comprehensive and convincing. It may be said, however, that the decentralized system ensures a diffusion, and in some cases a weighting, of authority which to some extent offsets the structural weaknesses of the United Nations itself.

The original rationale of the decentralized system remains unanswered and unanswerable. What is that rationale? "The whole scheme rests upon the underlying assumption that there cannot be, in the modern world, any single focus of authority where decisions on matters of international concern can be centralized."<sup>18</sup> That assumption remains true. May I elaborate the point in language which I have used before:

As the modern State has become the welfare State, government has ceased to be the prerogative of a small number of central departments of State, notably treasuries and foreign offices. It has become a complex of public services embracing every aspect of the life of the community. Within this complex there are recognised arrangements for

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<sup>18</sup>Jenks, *Co-ordination in International Organization: An Introductory Survey*, 28 BRIT. Y.B. INT'L L. 29, 88 (1951).

evolving general policy, but as the life of the community becomes more complex, and the machinery and procedures of government are increasingly adapted to its changing needs, these arrangements seek essentially a coordinated diffusion of responsibility. World organisation is evolving in the same direction and manner. Twentieth-century world affairs cannot be conducted by foreign offices and treasuries; they embrace too broad a spectrum of human affairs and interests. To be practically effective contemporary world organisation must interlock at innumerable different points with national arrangements with a continuing responsibility for policy and action; it must actively involve in continuous international cooperation all the major departments of government with substantive responsibility for the increasing range of questions with important international aspects and leave them the freedom of action necessary to enable them to conduct their collective business successfully and implement their decisions by action within the scope of their recognised departmental responsibilities.

These are fundamentals of policy and political structure which outweigh the admitted inconveniences of the decentralised system.<sup>19</sup>

The upshot is that we must continue to live with the second as with the first of our three dilemmas and recognize that the only solution for otherwise insoluble problems lies once more in a firm respect for certain accepted conventions of responsibility.

The third dilemma is the institutional equivalent of the classical problem of the relationship of international and municipal law. Much of the discussion of it revolves around the purport, scope, and effect of the principle set forth in the Charter that the United Nations shall not "intervene in matters which are essentially within the domestic jurisdiction of any state."<sup>20</sup> While controversy concerning this principle continues to weigh upon political psychology, the real issues lie elsewhere. The Permanent Court of International Justice declared as long ago as 1923 that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question" and "depends upon the development of international relations."<sup>21</sup> In the United Nations period the development of international relations has brought virtually everything within the scope of international discussion and there is now little inhibition on the discussion of anything in the United Nations. As irritating, unfair, irresponsible, and far from impartial as discussion may sometimes be, there is a balance of advantage in the full

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<sup>19</sup>C. W. JENKS, *A NEW WORLD OF LAW?* 235 (1969).

<sup>20</sup>U. N. CHARTER art. 2, para. 7.

<sup>21</sup>Advisory Opinion on Nationality Decrees in Tunis and Morocco, [1923] P. C. I. J., ser. B, No. 4 at 24.

freedom of speech provided by the "town meeting of the world." Between discussion and intervention there remains a wide margin, with an increasing tendency not to construe as intervention any form of international action which falls short of coercion by armed force. The real problems center on the balance of international obligation and national discretion in respect of the vital functions of any system of government, international no less than national: law enforcement by the prevention and suppression of breaches of the peace; the settlement of differences and disagreements by adjudication or other effective procedures of peaceful settlement; the constant reattuning of law to life by legislation; and finance, the sinews of peace no less than of war. In all these matters there remains a hiatus between the requirements of world order and political attitudes based on established constitutional practice and traditions.

When I was first writing on international law, forty years ago, we gave a good deal of thought to what we then called the constitutional substructure of the collective system and were much concerned with the modifications of constitutional law and practice which would be necessary to make an effective international system workable.<sup>22</sup> The topic became an unrealistic one, particularly in the terms in which we then conceived it, before the Second World War occurred. I know of no thorough reexamination of it since that time. Important everywhere, it is especially important in relation to constitutional systems which, like that of the United States, are based upon the separation of powers. In more recent years this fundamental problem appears to have attracted much less attention from a scholarship overburdened with other preoccupations.

The potentially gravest issues are those relating to law enforcement by the prevention and suppression of breaches of the peace. The fulfillment of the obligations of the Charter, and in particular the obligation to carry out the decisions of the Security Council, may involve major political and military decisions and the exercise of far-reaching legal powers. In countries like the United States, enabling legislation, such as the United Nations Participation Act,<sup>23</sup> has given recognition to the exercise of such powers not involving the employment of armed forces. There is now some practical experience of recourse to such powers. The provision of the Charter for the negotiation of special agreements with the Security Council having remained ineffective, however, there is no

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<sup>22</sup>See, e.g., Zimmern, *et al.*, *The International Aspect of the Indian Constitution*, in *INDIA ANALYZED* 125-184 (1933).

<sup>23</sup>United Nations Participation Act of 1945, 22 U.S.C. § 287 (1964).

comparable authority for the employment of armed forces to give effect to a decision of the Security Council. There is, therefore, a continuing gap between international obligation and constitutional authority in respect of the most vital of the functions of the United Nations and the most politically sensitive and potentially serious of all areas of international obligation. Where the balance of authority between the representatives of the people and the executive in respect of matters of foreign policy and military action has become acutely controversial, the probability of deadlock has become almost a certainty. While particularly acute, and liable to be particularly intractable, under systems of government based on the separation of powers, the problem is by no means limited to them. It may find expression in parliamentary upheaval no less than in congressional deadlock.

The question of constitutional authority to submit to international adjudication and give effect to the decision or award impinges less immediately on imminent threats to the peace but raises another aspect of the same fundamental issue. The question takes different forms in different countries. In the United Kingdom, for instance, it appears to be well established that the Crown can submit anything to international adjudication in the exercise of the prerogative in advance of or at the time of the specific question's arising. Any decision, however, cannot be given effect if it requires changing the law, paying money, or, by constitutional convention, ceding British territory without legislative sanctions. In the United States the matter has a long history, including the rejection by the Senate of the Olney-Pauncefote Treaty<sup>24</sup> in 1897, the Roosevelt Arbitration Treaties<sup>25</sup> in 1905, and the Taft-Knox Arbitration Treaties<sup>26</sup> in 1911, on the ground that the obligation to arbitrate without reference to the Senate in each case was an encroachment on its prerogatives. That this is not wholly ancient history is demonstrated by the persistence of the Connally Amendment to legislation providing for the acceptance by the United States of the compulsory jurisdiction of the International Court of Justice, excluding from such acceptance matters essentially within the domestic jurisdiction of the United States as determined by the United States.<sup>27</sup> The progress of compulsory jurisdiction, and of international adjudication, insofar as its progress depends on a

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<sup>24</sup>For text of treaty see 5 A.J.I.L. 88 (Supp. 1911); [1896] FOREIGN REL. U.S. 238 (1897). See generally 7 MOORE, INT'L L. DIGEST 74-78 (1906).

<sup>25</sup>Reprinted in II MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, 1149 (F. Israel ed. 1967).

<sup>26</sup>See generally C. G. FENWICK, INTERNATIONAL LAW 618 (4th ed. 1965); 2 L. OPPENHEIM, INTERNATIONAL LAW § 17 at 31) (7th ed. 1952).

<sup>27</sup>See generally W. BISHOP, INTERNATIONAL LAW 70-71 n. 148 (3d ed. 1971).

wider measure of compulsory jurisdiction, presupposes some solution of this element in the dilemma of the gap between international obligation and constitutional authority.

Another context in which the same fundamental issue arises is that of the creation of new law by treaty. Internationally, as in the national community, the law cannot keep pace with life without a vigorous legislative process. We now have the elements of a vigorous international legislative process. In far too many cases international legislative effort is ineffective because the outcome, perhaps the only possible outcome, of international negotiation is treated as subject to amendment by legislative process in the same manner as legislative proposals wholly within the authority and responsibility of the national legislature. The extent of the problem cannot be measured by the number of cases in which an "amendment" to a treaty has prevented ratification or limited its value and practical effectiveness. It is virtually impossible to estimate in how many cases no action was taken, or action was too long deferred, primarily because of the potential embarrassment of legislative "amendment" of the treaty as negotiated. In this context no international obligation has yet arisen, but the gap between international negotiation and constitutional authority becomes a serious bar to the development of more effective international legislative procedures which the needs of the world community, and the interests of all its members, so urgently require.

The gap between international obligation and constitutional authority is still more striking in relation to the financing of international organizations. The Charter of the United Nations provides clearly that "the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly,"<sup>28</sup> and the constitutions of other international organizations contain equivalent provisions. These provisions create unequivocal obligations, and if they did not the whole structure of international organization would inevitably collapse. This is an unpalatable position to legislative bodies which find uncongenial the distinction between their final authority to appropriate and tax for national purposes, and the function of voting appropriations to meet legally binding international assessments. Yet these assessments must be binding if we are to have any international system at all. The distinction is not always, and perhaps only rarely, understood, and when understood it tends to be resented, not unnaturally, as nothing is less palatable to power than to be confronted with the limits of its power. The crux

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<sup>28</sup>U.N. CHARTER art. 17, para. 2.

of the matter is that only the executive can act for the state internationally and participate in international decisions assessing contributions on member states. Thus, the international representative body that assesses contributions upon member states is, in the eyes of national representative bodies, composed of appointees from a governmental branch that possesses no taxing power. The answer in law is, of course, simple and conclusive. The Charter of the United Nations and constitutions of the other international organizations have been fully accepted by, and thereby become legal obligations of member states, each acting by its appropriate constitutional procedure. These obligations bind the state and all its organs, including the legislature in its capacity as the appropriating authority. In law there is nothing more to be said. There remains the political problem.

There is no neat solution for this complex of problems. They involve a major structural dilemma: that of the difficulty of reconciling the effectiveness of the world system with the continued freedom of the participating nations. In respect of this, as of our first and second dilemmas, the only solution in sight for otherwise insoluble problems lies in a firm respect for certain accepted conventions of responsibility.

This may well appear a disappointing conclusion to an apparently promising line of inquiry. The fundamental structural dilemmas which the Charter was an attempt to resolve remain fundamental dilemmas still far from resolution. Is this a conclusion to be dismissed as disappointing or does it suggest that the Charter was well conceived and gives us as good an instrument as we can hope to have to shape future policy wisely? Does not the answer to most of our problems lie in a much higher sense of responsibility in international and national bodies alike? There is neither justification nor cure for irresponsibility in international or national bodies. The escalation of irresponsibility is one of the gravest dangers in the contemporary outlook for world organization. Irresponsibility at either the national or the international level tends to prompt and aggravate further irresponsibility at the other. There is no solution for any of our structural dilemmas except in a broader sanity, a calmer deliberateness, a more consistent loyalty to principle, a cooler courage. Let that be the tone and temper of our common resolve to grapple firmly with our otherwise insoluble problems. We live in a world with a new scale of things, a new system of things, and a new complexity of things; we must match these with a new and much higher standard of responsibility.