

# The Police in the Temple Order, Justice and the UN: A Dialectical View

Martti Koskenniemi \*

## I

Controversy reigns over the Security Council. Was the Council entitled to authorize a United States-led coalition to make war on its behalf to oust Iraq from Kuwait, or to re-establish the Aristide Government in Haiti?<sup>1</sup> Could it impose a peace arrangement, including a liability regime, on Iraq and to strengthen it by an economic blockade, originally set up for another purpose?<sup>2</sup> Was the Council acting within its competence as it prevented Bosnia-Herzegovina from exercising its 'inherent right of self-defence' by an arms embargo directed at the aggressor and the object of aggression alike, or when it short-circuited the International Court of Justice by demanding the extradition of two Libyan citizens over rights accorded to Libya by an international treaty?<sup>3</sup>

Such questions have aroused the anxiety of international lawyers. But there are other questions, too. Is the Council entitled to intervene in the government or misgovernment of States as soon as political agreement has been attained between its principal members that the matter raises a 'threat to international peace and security' under Article 39 of the Charter? This seems suggested by its enforcement action to counter Southern Rhodesia's illegal declaration of independence in 1965 and its reaction to South Africa's policy of *apartheid* since 1977.<sup>4</sup> Yet, white oppression of a black majority remained a special case – until the Council

\* University of Helsinki.

1 SC Res. 678 of 29 November 1990; SC Res. 940 of 31 July 1994.

2 SC Res. 687 of 3 April 1991.

3 For the arms embargo, cf. SC Res. 713 of 25 September 1991 and the analysis e.g. in Petrovic, Condorelli, 'L'ONU et la crise Yugoslave', XXXVIII *AFDI* (1992) 35-6 and on the Libyan situation cf. SC Res. 748 of 31 March 1992 and *Lockerbie (Libya v. USA)* case, ICJ Reports (1992) 114-127.

4 SC Res. 232 of 16 December 1966 (Southern Rhodesia); SC Res. 418 of 4 November 1977 (South Africa).

intervened in the civil wars devastating Liberia, Somalia, Angola and Rwanda<sup>5</sup> and to remove Haiti's military leadership.<sup>6</sup> Clearly, internal crises may create a danger of escalation and thereby implicate international security. But was the Council not stretching it a bit when it declared, at a euphoric moment, that problems of an ecological, social or economic kind may also concern the maintenance of international peace and security?<sup>7</sup> Was it in fact making a *carte blanche* declaration of the limitlessness of its powers?

That the Council frequently makes declarations about the lawfulness of State action may seem a relatively innocent incursion into a judicial function (in spite of the absence of a due process clause from the Council's [provisional] rules of procedure).<sup>8</sup> The setting up of two *ad hoc* war crimes tribunals to issue binding judgments seems already precariously close to international legislation.<sup>9</sup> Is the Council both a Court and a Parliament? What about its propensity to look away from flagrant breaches of the peace, or officially induced massacres, when its key members fail to agree on an appropriate reaction?<sup>10</sup> What is the Council's responsibility? Is it in the position of the Hobbesian sovereign, for whom 'there can happen no breach of Covenant' between himself and his subjects because there is no such Covenant at all. Is it true of the Security Council, that:

... because the End of this Institution is the Peace and Defence of ... all; and whosoever has the Right to the End, has the Right to the Means, it belongeth of Right [to him] to be Judge both of the meanes [sic] of Peace and Defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both before hand, for the preserving of Peace and Security, by prevention of Discord at home and Hostility from abroad ; and, when Peace and Security are lost, for the recovery of the same.<sup>11</sup>

- 5 E.g. SC Res. 788 of 19 November 1992 (Liberia); SC Res. 794 of 3 December 1992 (Somalia); SC Res. 864 of 15 September 1993 (Angola) and SC Res. 929 of 22 June 1994 (Rwanda).
- 6 Cf. SC Res. 841 of 16 June 1993, SC Res. 875 of 16 October 1993; SC Res. 940 of 31 July 1994, SC Res. 944 of 29 September 1994 and SC Res. 948 of 15 October 1994.
- 7 The full text of the relevant part of the statement issued from the Security Council 'Summit Meeting' reads: 'The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security'. UN Doc. S/23500 (31 January 1992).
- 8 Cf. generally Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *AJIL* (1970) 1-18. But see also the criticism by Graefrath of the Council's 'summary court procedure' in relation to the Libyan sanctions in 'Leave to the Court what Belongs to the Court', 4 *EJIL* (1993) 192 et seq. Also Higgins has later taken a more critical view, labelling the Council's decisions on the Iraqi liability regime as 'extremely unusual' and 'very, very different from anything we have expected of the Security Council before', in *Problems & Process. International Law and How We Use It* (1994) 183, 184. On this same point, cf. also Zedalis, 'Gulf War Compensation Standard: Concerns under the Charter', XXVI *RBDI* (1994) 333-350.
- 9 SC Res. 827 of 25 May 1993; SC Res. 955 of 8 November 1994.
- 10 For a discussion of the Iran-Iraq war (1980-1988) from this perspective, cf. O. Russbach, *ONU contre ONU. Le droit international confisqué* (1994) 141-166.
- 11 Thomas Hobbes, *Leviathan* (1651) Part II, Ch. 18.6 (Penguin 1982, ed. & Intr. by C.B. Macpherson) at 232-3.

The controversy relates to the Security Council's place in the UN and in the world. Given the Council's composition and working methods, its monopolization of UN resources and the public attention focused on the Council is problematic. The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly delimited competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs.

International lawyers have responded by seeking out normative limits to Council authority from an interpretation of Articles 1, 2, 24(1) and 39 of the Charter, laying down the purposes and principles of the Organization and the formal competence of the Council plus creating a link between them.<sup>12</sup> But the principles and purposes of the Charter are many, ambiguous and conflicting. The relationship between domestic jurisdiction in Article 2(7) and human rights under Articles 1(2), 1(3) and 55-56, for example, can only be determined by successive acts of application by UN political organs in accordance with the political logic of the moment.<sup>13</sup> The purposes and principles are no less indeterminate than the concept of a threat to peace. Textual constraint is practically non-existent. Inasmuch as each organ is the judge of its own competence, procedural constraint seems scarcely more significant.

For this reason, many have taken the 'realist' position that the relevant issue is conclusively settled through an analysis of the politically possible: if the Council – or the permanent five – can agree, then there is little more to say. The lawfulness of their agreement under some – always contested – standard is even at best of only academic interest. As such a standard cannot be successfully invoked against the Council, relying on it in practical politics (in contradistinction to learned articles) would encapsulate a discredited idealism. For better or for worse, what the Council says is the law.<sup>14</sup>

From the lawyer's perspective the realist response clearly misses the point. Authority is a normative and not a factual category. Power is distinct from authority: a gunman's orders do not turn into law merely because there happens to be no police around.<sup>15</sup> A nagging doubt remains, however. If the lawyers themselves are divided (and this 'internal' objection is intended to respond to their *Erkenntnisinteresse*) and the permanent members of the Council are always able to

12 Cf. Bedjaoui, diss. op., *Lockerbie case*, ICJ Reports (1992) 155-156 (paras. 25-26); Weeramantry, diss. op. *ibid.* at 170-175 and of the large commentary on the *Lockerbie case* e.g. Chappetz, 'Questions d'interprétation et d'application de la Convention de Montréal du 1971 résultant de l'incident aérien de Lockerbie', XXXVIII *AFDI* (1992) 477-479 and Graefrath, *supra* note 8, at 186-187. See also generally O. Schacter, *International Law in Theory and Practice* (1991) 399-400 plus the various essays in *Recueil des Cours*, Colloque: Le développement du rôle du Conseil de sécurité (1992).

13 M. Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989) 212-220. For a recent discussion, cf. Bailey, 'Intervention. Article 2.7 versus articles 55-56', XII *International Relations* (1994) 1-10.

14 Pellet, 'Conclusions', in B. Stern (ed.), *Les aspects juridiques de la crise et de la guerre du Golfe* (1991) 490.

15 H.L.A. Hart, *The Concept of Law* (1962) 19-20, 54-60.

marshal prestigious names to buttress their reading of the relevant principles, how long is it useful – or possible – to resist?

The impasse of the 'realist' and the lawyer follows from their perspectives inevitably remaining within the controversy they seek to resolve. The competence of the UN relates to questions of order (power) and of justice (authority) but cannot be reduced to either one. The Organization is neither simply a policeman nor a Temple of Justice – though in its individual actions it tends to show itself as one or the other. In this paper I shall propose a 'dialectical' view on its competences that seeks to accommodate concerns of power and of authority and to provide a foothold for reformed institutional policy.

## II

The two great problems for international thought have related, in their most abstract formulation, to the conditions of order and the possibility of justice among States.<sup>16</sup> The *problem of order* is about how to establish and maintain effective authority among States that recognize no secular superior or common values – in conditions of 'anarchy' as political theorists like to put it.<sup>17</sup> This seems, at first glance, to be a purely causal-technical problem and has been so treated by much 'realist' political theory from Machiavelli and Hobbes onwards: power and its derivatives – fear and force – become the conditions *sine qua non* for its resolution.

The *problem of justice* has to do with the relationship of order with normative standards. Such standards are sometimes classified as political, sometimes legal, and people disagree about such (and other) classifications.<sup>18</sup> But the point is that they are external to the fact of power and claim to provide a measure for its acceptability and, at least implicitly, a programme for transformation. So described, justice is a purely normative phenomenon, by definition independent from the factual world for which it provides an evaluation.

The contrast (or indeed tension) between solutions to the two problems structures international thought and is present in the controversy about the Security Council. Hard approaches stressing the primacy of the order-problem (the Council's capacity to police its commands) conflict with soft approaches emphasizing the foundational character of justice (the need to assess the sanctity of its commands in the Temple of Justice). Though labels such as 'realism' and 'idealism' seem both tendentious and old-fashioned, the fact remains that as a matter of psychological

16 These are problems that take the existence of a states-society for granted and seek reform within it. For cosmopolitan movements that hope to replace States with other political subjects (such as 'mankind'), the problems look different.

17 Cf. e.g. S. Hoffmann, 'Is there an International Order?', in *Janus and Minerva. Essays in the Theory and Practice of International Politics* (1987) 85.

18 One classification is by T.M. Franck for whom justice, legitimacy and legality provide three related but separate standards from which to appreciate the functioning of international institutions. Cf. his *The Power of Legitimacy Among States* (1990).

orientation or literary genre, 'policing' approaches conflict with 'Temple' ones in any discussion of international issues – including the competence of UN bodies.

This persistence of the dichotomy may seem surprising inasmuch as it has long been clear that the two problems cannot be treated in abstraction from each other. Machiavelli conceded it to be an indispensable condition of an effective order that it enjoy what sociologists (shunning directly normative statements) nowadays call legitimacy. An illegitimate order is an unstable order. This argument is *internal*. It pays no regard to the pedigree of legitimacy: a 'feeling' of legitimacy induced by ignorance or manipulation is as good in supporting existing order as legitimacy based on critical reflection. In a corresponding manner, the complete absence of social institutions makes it impossible to realize standards of justice. Among people and States – unlike among angels – institutions are needed to undertake the distributive and retributive tasks that justice calls for. This argument, too, is internal: it looks at social institutions from the perspective of an anterior conception of justice.

Sophisticated contemporary legal and political theory concedes the interdependence of the problems of order and justice. The modern policy-maker or lawyer is neither a (pure) Hobbesian realist nor a (pure) Rousseauian utopian.<sup>19</sup> Today, everybody is a suave (Grotian) eclectic.<sup>20</sup> We readily recognize that a single-minded pursuit of order will create self-destructive politics. The Nazi order may have been optimally effective; but this could only be so at the cost of the tremendous injustice of its institutions which finally accounted for its breakdown. A single-minded pursuit of justice in secular conditions, failing to pay regard to the effectiveness of (existing or proposed) institutions degenerates into utopian politics that will sooner or later lead to anarchy or dictatorship.

However, such eclecticism works from within the dichotomy between 'police' and 'Temple'. The relationship between order and justice is conceptualized as *internal* to the chosen approach, or instrumental: justice as a means to uphold order, order as a means to realize justice. It fails to pay regard to the *external* relationship between the two, the extent to which both are constitutive of each other.

The very need for and definition of order are normative statements in their own right: conceptualizing 'order' in terms of stability, peace, or the 'securing of the elementary needs of the relevant group'<sup>21</sup> creates an axiological system with a normative premise. So does the definition of the basic units (States, say) or the basic concepts describing their relations (sovereignty, say). The causal-technical world of

19 As Martin Wight famously argued, the correct division is into three: those who stress the predominance of the facts of State power (realists), those who reject the state-centred model and emphasize the foundational character of a human community (revolutionaries) and the 'rationalists' or 'Grotians' trying to work out diplomatic and economic structures to bind States into a coordinative society. Cf. M. Wight, *International Theory: The Three Traditions* (1991). Cf. also Yost, 'Political Philosophy and the Theory of International Relations', 70 *International Affairs* (1994) 263-290.

20 Cf. also the discussion in Koskenniemi, *supra* note 13, at 2-8, 131-191.

21 H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977).

power emerges from a normative description.<sup>22</sup> But conversely, in the absence of natural justice (or at least of our capacity to know it), social norms emerge from the activity of social institutions. Customs, kings and parliaments make laws. Though these laws are sometimes unjust, and we recognize them as such, as Max Weber well knew, in a general sense our ideas about right and wrong emerge from the factual *a priori* that is constituted by our existing social (economic, cultural, religious, etc.) institutions.

The failure of modern internationalism to grasp the external dependence between order and justice means that its proposed reforms have normally been tilted in favour of solving one or the other problem<sup>23</sup> – while of course stressing the need to take account of its counterpart. Such thought, already initially out of balance, is constantly in danger of sliding into supporting what could be called cynic or utopian tyranny.

*Cynic tyranny* emerges when the system is tilted in favour of the problem of order and encapsulates justice only through an *internal*, instrumental relationship, i.e. by seeing justice as a (perhaps necessary) means towards order. It is a strategy of paying lip service to normative standards while constantly adjusting them in response to the daily requirements of the order's maximal effectiveness. Under such conditions, the distinction between normative beliefs created through manipulation and false consciousness on the one hand, and uncoerced consent on the other, disappears or cannot find institutional expression. Cynic tyranny emerges not only when no attention is paid to the acceptability of power but also (and more dangerously) when the Temple becomes a vehicle for buttressing the police.

The danger of *utopian tyranny* again, emerges when a society's institutions and its management problems are seen from the perspective of one normative belief. It is premised on the authentic character of an underlying normative world. Its political programme seeks to reformulate social institutions ('superstructure') – including the State and the states-system – to correspond to that foundation. In conditions of agnosticism (in today's diplomatic discourse) utopian tyranny realizes itself through a general degeneration of the Temple into preaching extremism, fundamentalism, nationalism, xenophobia, etc.<sup>24</sup>

In practice, it may be difficult to distinguish between cynic and utopian tyranny. We have seen sufficiently often that what starts out as a demand for authentic (utopian) justice may transform into cynic tyranny. And though perhaps empirically

22 On these arguments, cf. generally C. Brown, *International Relations Theory. New Normative Approaches* (1992) and for an incisive recent summary Frost, 'The Role of Normative Theory in International Relations', 23 *Millennium* (1994) 109-119. For a delightful general argument to this effect, cf. MacIntyre, 'The Indispensability of Political Theory', in D. Miller, L. Seidentorp (eds), *The Nature of Political Theory* (1983) 17-33.

23 But there is no equivalence: 'the quest for order in international affairs comes before that of justice', Hoffmann, *supra* note 17, at 118.

24 On this theme, cf. also my 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* (1994) 241-269 and 'The Wonderful Artificiality of States', *ASIL Proceedings 1994* (1995) 22-29.

more difficult to ascertain, the psychological process whereby a cynic tyrant at some point starts authentically to believe in his own manipulations is not impossible to envisage.

The point here is that if we conceive of the relation between social order and social justice only from the internal perspective, we fail to create (indeed, even to conceive) institutions that merit political support. Having the system tilt one way or the other may be even more unacceptable than merely staying within the (pre-modern) antagonism of hard and soft, realism and utopia. For unlike the tyrant *sans peur et sans reproche*, the cynic tyrant is able to buttress the edifice of his rule with a string of marvellous temples while the utopian tyrant has all the sophistication of the modern security police to carry out his work of ideological (and sometimes physical) purification – dangers catastrophically realized in the unholy alliance of modernity and the holocaust.<sup>25</sup>

### III

Let me sketch the strategy through which 20th century diplomacy within international institutions has sought to deal with the problems of order and justice.

The collapse of the 19th century world in the trenches of the Somme was a shock for the contemporaries and constituted in many fields – but particularly in politics and culture – the defining moment for modernity, and with it, the ideological environment for 20th century internationalism.<sup>26</sup> Despite its far greater quantitative significance, the Second World War and the establishment of the United Nations do not match up to the Great War and the experiment of the League of Nations in the shaping of our understanding of the problems of international policy.

The origins of the Great War – a great mystery to contemporaries – have been explained then and subsequently as stemming from various defects in the political system of the 19th century.<sup>27</sup> For many, the ‘system’ of Great Power predominance, occasional Congresses and the frantic search for intermittent alliances to deter one’s adversary was simply too technically ineffective, European-centred and random to accommodate ‘the displacement of an older structure of power by a new one between the leading States’.<sup>28</sup> From this perspective, the primary concern of the peace-makers in 1918-1919 had to be with strengthened, permanent institutions that

25 Cf. Z. Bauman, *Modernity and the Holocaust* (1991).

26 For an elaborate discussion of the significance of the First World War and the creation of the League of Nations for the ‘discipline of international institutions’ (through the themes of ‘break, movement and repetition’), cf. David Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* (1987) 841-988.

27 Cf. also Koskenniemi, *supra* note 13, at 131-3.

28 F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations Between States* (1963) 301, 302.

would include every State in a common bond against the potential aggressor (Germany).

Others interpreted the system's collapse by focusing on its unjust character: the Great Power primacy of the first half-century developed into a formal Imperialism in the second, manifested in the secrecy and limited character of Great Power consultations and the opening up of large parts of the globe for an official territorial scramble. It could not accommodate claims for national self-determination nor for the pursuit of internal democracy – indeed, some of it seemed to be actively directed at keeping nationalism, liberalism and socialism under control.

These contrasting interpretations of the failure of the premodern diplomatic structures are famously illustrated by the Versailles peace conference, torn between its desire for effective provisions to curtail German influence and for a just system of political boundaries in Europe. The approach behind the Treaty's exorbitant reparation and other war guilt provisions, imposed on Germany without her presence in the negotiations, collided head-on with Wilsonian ideas about the realization of the self-determination of the peoples formerly under Ottoman and Habsburg rule and about the institution of liberal democracy in as many European countries as possible.<sup>29</sup> At a very general level, this conflict reveals an ambiguity about the League's character: was it a collective military arrangement or a peace organization, committed to renouncing force? It tried to be both – with the result of never being fully convincing as either.

The Covenant encapsulated this tension in various ways. For example, the guarantee for Europe's post-war boundaries in Article 10 was intended to form the basis of Europe's new territorial order.<sup>30</sup> If these were violated, all members would take concerted action. But the guarantee was only reluctantly agreed upon by the States with the principal responsibility to enforce it – and not least because of a doubt about the justness of the agreed boundaries.<sup>31</sup> The much-belaboured principle of 'peaceful change' in Article 19 sought to temper the injustice of the reparations

29 The tension between these two aims of the Versailles settlement has been much commented upon. One of the most readable comments being Harold Nicolson's autobiographical account of the loss of high idealism of a young British diplomat: 'We arrived determined that a peace of justice and wisdom should be negotiated: we left it, conscious that the Treaties imposed upon our enemies were neither just nor wise', *Peace-making 1919* (1936) 187. But for the contrary view that 'there has surely never existed a peace of so idealistic a character', cf. G.M. Gathorne-Hardy, *A Short History of International Affairs 1920-1939* (4th ed., 1960) 18.

30 Text of Article 10: 'The Members of the League undertake to respect and preserve, as against external aggression, the territorial integrity and existing political independence of all Members of the League...'

31 On the British attitude, cf. Sir A. Zimmern, *The League of Nations and the Rule of Law* (1945) 199-200, 218-221, 243-247; F.S. Northedge, *The League of Nations: Its Life and Times* (1986) 30-31, 91-95. On the (divided) American view, cf. the account by Wilson's Secretary of State, R. Lansing, *The Peace Negotiations. A Personal Narrative* (1921) 34-35, 53-54, 106-108 and 121-125. The guarantee was the crucial difference between him and Wilson (leading to Lansing's resignation) and one reason for the Senate's non-ratification of the Covenant.



and territorial provisions agreed at Versailles.<sup>32</sup> But the apparent balance between Articles 10 and 19 was too unstable: the former was the League's hard core, the latter merely a disposable ingredient in fact never resorted to after 1929.

That the Covenant became a part of a controversial peace treaty may have been necessary for there to be a Covenant at all. Wilson's idealism may never have squared with Clemenceau's concern with French security. In this sense, the contradictory character of the settlement was decidedly not a result of the confused ideas of the peace-makers, or their ill will ('it just happened' writes Nicolson),<sup>33</sup> but followed logically from the contradicting understandings of the Congress system's failure and thus opposite theories about what was needed to avoid its recurrence. That the diplomats may not have treated the problem in an optimal fashion is less interesting.

The League system incorporated a number of technically sophisticated solutions to problems of European order and justice. Many of these relied on legal regimes (provision for peaceful settlement, sanctions against non-complying States, internationalized zones, system of plebiscites, etc.).<sup>34</sup> Among the consequences of their collapse later on was the birth of an international 'realism' that concluded that legal regimes are by their very nature useless or perhaps even counterproductive in the search for international order: *de maximis non curat praetor*. They rely for their operation on the existence of the kind of community that they seek to bring about.<sup>35</sup> Though 'realism' may now be on the way out, this is the argument and the experience that today's lawyer needs to confront when arguing for a determined limit on the authority of the Security Council.

But the problems of the League were not exhaustively related to tensions inside the Covenant. At critical moments, Great Powers were not (or no longer) members. But even members showed lack of faith in the collective response system by looking elsewhere during the Vilnius and Memel crises in 1920 and 1923 and the Manchurian occupation in 1931.<sup>36</sup> Though sanctions were adopted against Italy in October 1935, the collective system never recovered from the League's inaction during the German occupation of the Rhineland the following March – with the

32 Text of Article 19: 'The Assembly may from time to time advise the reconsideration by Members of the League of Treaties which have become inapplicable, and the consideration of internal conditions whose continuance might endanger the peace of the world'.

33 Nicolson, *supra* note 29, at 188.

34 For a theorization of these legal techniques as part of an international law 'modernism', cf. Berman, "'But the Alternative is Despair": Nationalism and the Modernist Revival of International Law', 106 *Harvard Law Review* (1993) 1806, 1859-1903.

35 Cf. E.H. Carr, *The Twenty-Years Crisis 1919-1939* (1981).

36 These doubts could hardly have been illustrated in a more striking manner than by the conclusion of the Locarno agreements in 1925 which (re-)guaranteed Germany's western frontier – with the direct implication of putting into question the eastern frontier – an arrangement which was 'totally at variance with the League system and went far to destroy it', Northedge, *supra* note 31, at 96-7.

Covenant finally abandoned in the summer of 1936 as the sanctions against Italy were lifted.<sup>37</sup>

That the League collapsed because member States did not believe in it is merely a tautology: as an order system it seemed far too compromised by the wish to treat all members on an equal footing and to rely on their good faith in fulfilling their obligations.<sup>38</sup> As a justice system it was too formal and inflexible to provide effective relief to the various grievances concerning the *status quo* of 1919. Neither French obstinacy (indeed obsession) nor German indignation could find an outlet within it. And nothing in the Covenant took account of tyrants, acting *mala fide*, and using the weaknesses of the order system to play the divergent interests of League members against each other (e.g. Japan's policy *vis-à-vis* the western allies during the Manchukuo crisis 1931-32) and the weaknesses of the justice system to buttress their domestic position (e.g. Italy's colonial grievances). That the tyrants now appear utopian and cynic simultaneously – like Marinetti's futurism or Le Corbusier's architecture – is a striking reminder of the limits of politics in modern conditions and a nice counterbalance to the discrediting of law by post-war 'realism'.

#### IV

The origins of the Second World War have been far less the object of historians' controversy than those of its predecessor – though differences in philosophical or political outlook have led them to stress sometimes structural causes, sometimes personal responsibilities. That Hitler (or Germany, or Versailles) is to 'blame' but that the confused Western policy bears its share of responsibility, too, there is no doubt, at least not since Professor Taylor's defence of the latter thesis.<sup>39</sup> But to understand the peace of 1945 we need less to grasp the 'real' origins of the war than the lessons that contemporaries drew from the twenty-years' crisis as they tried to construct a new peace. Among the most striking of those lessons was the assumption that the League *could* have managed international affairs if only the Covenant had been more adequately drafted. No politician was prepared to argue – as some political scientists did – that peace could *a priori* not be attained through institutions. The continuity between official inter-war and post-war diplomacy was based on the assumption that what was needed was not something new but more of

37 A good review of the League's action against Italy is e.g. C.L. Brown-John, *Multilateral Sanctions in International Law. A Comparative Perspective* (1975) 59-159.

38 As illustrated by the unanimity rule which 'stultified all action by the League by ensuring that always, on every issue, there were some members who could block action against their interests', Hinsley, *supra* note 28, at 310, 314-315.

39 A.J.P. Taylor, *The Origins of the Second World War* (1961).

the same: a more effective League with 'clear-cut obligations', 'teeth' and better 'procedures'.<sup>40</sup>

On the other hand, it is striking to what extent our present image of the United Nations differs from the image it had to its midwives. The Charter took shape during three moments: the initial conception had been discussed between London and Washington since 1940; a Great Power conception culminated in the Dumbarton Oaks proposals of 1944, and the final product was refined by the lesser powers' landmark in San Francisco the following year. The discussions took place as the war was still raging and that environmental fact could not but have an impact. Hinsley summarizes:

The Charter was less interested in legal and just settlement; the great danger was war and any settlement was better than war.<sup>41</sup>

Reading the political documents of the first two moments – the 1941 Atlantic Charter, the 1942 Declaration of the United Nations, the 1943 Moscow Declaration<sup>42</sup> – one finds nothing of the substance of the organization as we have come to know it. There is no mention of the social, economic and humanitarian tasks that have been such a visible part of the UN from the early 1960s onwards. The institutions of the new organization were simply taken over from the model provided by the League. This is not because Great Powers would have ignored these tasks. Apart from the Soviet Union, they accepted that the League's activities in the economic and social fields had been beneficial and should be expanded.<sup>43</sup> They even thought that a proposal to give the UN competence to promote 'the observance of basic human rights' was significant enough to disagree on it.<sup>44</sup> Yet, practically all preparatory discussion focused on the role that the Great Powers would have in policing the coming peace, a question culminating in the form of decision-making in the Security Council.

For the Great Powers, the United Nations was a structure devoted to maintaining order. International justice was simply not dealt with – possibly as the overwhelming problem in this field was still to attain victory from 'Hitlerism',<sup>45</sup> in comparison to which every other grievance must have seemed secondary.<sup>46</sup> Perhaps surprisingly, the San Francisco Conference accepted the main principles of the

40 E. Luard, *A History of the United Nations. Volume 1: The Years of Western Domination, 1945-1955* (1982) 4-10.

41 Hinsley, *supra* note 28, at 338.

42 Conveniently reproduced e.g. in L.M. Goodrich, E. Hambro, *Charter of the United Nations. Commentary and Documents* (1946) 305-308.

43 Cf. e.g. Luard, *supra* note 40, at 12, 26.

44 This proposal, originally made by the United States and opposed by the United Kingdom and the Soviet Union, was the source of present Article 1(3).

45 Declaration by United Nations, 1 January 1942.

46 The Western allies – at least Churchill – must also have felt it difficult to agree on entering in a discussion about international justice with Stalin.

proposed order system practically without dissent.<sup>47</sup> Small powers expended their energy to buttress the Assembly's position in the security field. But despite some amendments, the principle that the Assembly could not challenge the Council's absolute primacy, was maintained. The Conference also focused on the Assembly's functions in the economic and social fields and succeeded in upgrading the ECOSOC to a 'principal organ'. As the ECOSOC was to coordinate the activities of specialized agencies, but was also positioned as a subsidiary organ of the General Assembly, the Conference in effect achieved an all-encompassing dichotomy between the organization's 'political' activities and its activities in the economic, social and humanitarian fields, each being headed by a principal organ: the Council and the Assembly.

This dichotomy between *hard UN* (political activities for which the Security Council is mainly responsible) and *soft UN* (activities for which the General Assembly – through the ECOSOC – is mainly responsible) is functionally and ideologically the most significant structuring feature of the organization. It governs everything from the career options of UN staff members and the specialization of diplomats at permanent missions, via the structure of the organization's budget and the permanent tension between Geneva ('soft') and New York ('hard'), to the organization's image in the selective eyes of the mass media. It has been both a source of constant tension in the orientation of the UN's activities as well as an invaluable asset in overcoming difficult periods – most conspicuously by allowing soft activities to compensate for the problems which the Cold War occasioned for carrying out hard ones.<sup>48</sup>

Unlike the Covenant, the Charter does not appear to take on the dual task of maintaining order as well as guaranteeing justice. The contrast between Articles 10 and 19 (territorial guarantee and peaceful change) seems non-existent in the Charter; there is no mention of either concept anywhere. Still, the effect of the principle of non-use of force (Article 2(4)), together with Articles 24 and 25 and Chapter VII is to constitute a guarantee of the *status quo* which is, at least on the surface, procedurally much stronger than the Covenant. And though 'peaceful change' had acquired a bad name under the League, the reasons for providing some way to cope with an unjust *status quo* were no less urgent in 1945 than they had been in 1919. It would be wrong to think that the rather haphazard mention of the organization's 'purpose' to 'achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms' in Article 1(3) was meant to attain that purpose. It was probably put in simply to cover the general

47 The two issues in the Dumbarton Oaks proposals that raised most controversy among the smaller powers were the application of the right of veto by a Great Power in a dispute concerning itself, and regional arrangements. Cf. Luard, *supra* note 40, at 45-49, 51-54.

48 For one early periodization of the relative shifts between Assembly and Council, cf. Goodrich, 'The Security Council', in J. Barros (ed.), *The United Nations. Past, Present and Future* (1972) 29-30.

functionalist belief that cooperation in these fields was useful for attaining peace and to provide a justification for the UN's economic and social activities under Chapter IX. Nevertheless, over the decades it has been precisely these activities that have sought to alleviate the patterns of internal and transnational injustice buttressed by the states-system.

Nor were the Charter provisions on trusteeship and non-self-governing territories designed to attain the massive redistribution of sovereignty that decolonization meant in practice. That the relevant provisions were flexible enough (despite colonial powers' constant legal objections to the interpretation of Chapter XI of the Charter so as to internationalize what was supposed to be a national trusteeship) to provide a basis for a programme of pushing into independence a much larger number of territories than were originally listed within the trusteeship system (11 territories) reformed these parts of the Charter into a veritable *de facto* peaceful change mechanism.<sup>49</sup>

The Charter combines in a much more subtle way than the League did, the maintenance of international order with the purpose of providing for (minimal) conditions of international justice. True, its text is tilted in favour of political activities. Therefore it may have been fortunate that the Cold War set in before the Great Powers were able to stabilize their control on the world. This occasioned an immediate transformation of the Organization's core activity from the Council to the General Assembly. Though this *de facto* shift was originally manoeuvred for political purposes, it provided the basis for tackling problems of international injustice, particularly colonialism and underdevelopment – the kinds of injustice that the Assembly's majority felt most acutely. The Charter's *textual* imbalance was compensated by the *practice* that raised social, economic and humanitarian activities to the core. The 'tyranny' of the Great Powers was overruled by the 'tyranny' of the majority.

## V

'The Charter was meant to be based on a separation of functions. Therefore, usually, the Council and the Assembly operate independently of one another'.<sup>50</sup> The Charter deals with the relationship between order and justice through a procedural mechanism that uses the two main organs so as to allow the treatment of both types of problem simultaneously and to ensure that neither is fully overtaken by or collapsed into the other. The competence, composition and procedures of each organ is justifiable only as a separation of powers arrangement which seeks to provide optimal efficiency in policing the world as well as a forum for seeking

49 For the original (though contested) understanding of the distinction between trust territories and non-self-governing territories, cf. e.g. Hall, 'The Trusteeship System', XXIV *BYIL* (1947) 70-71.

50 Vallat, 'The General Assembly and the Security Council of the United Nations', XXIX *BYIL* (1952) 78.

agreement on various economic, social and humanitarian policies, while trying to keep both in check so as to avoid the dangers inherent in establishing a full precedence of one over the other.

As regards *competence*, the Security Council has 'primary responsibility for the maintenance of international peace and security' (Article 24 (1)). This is the Charter resolution to the problem of order; in exercising this competence, the Council should not be seriously obstructed by the other organs, particularly the General Assembly.<sup>51</sup> On the other hand, under Articles 10 and 14, the Assembly may deal with every conceivable international problem and 'recommend measures for the peaceful settlement of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'.<sup>52</sup> The problem of justice is dealt with by establishing a general competence for the Assembly to make it come true.

The *composition and procedures* of the Council are determined by the single-minded purpose to establish a causally effective centre of international power. That the five Great Powers have permanent membership and the right of veto in the Council and that the Council has the authority to *bind* members would be indefensible under any conception of institutional justice worthy of that name. But it is clearly defensible in view of what were held to be the main reasons for the League's ineffectiveness. The UN's collective security-system (unlike the League's) is based on the co-option of overwhelming power. It follows tautologically that if such power is overwhelming it allows co-option only on its own terms.

The Assembly's composition and procedures reflect an equally single-minded purpose to create a global scope for the organization's activities – another conclusion drawn from the League's failure. To co-opt all States, however, requires that all States have a say in the directing of the organization's economic, social and humanitarian activities. As any observer of the annual Assembly sessions may testify, its activity is not geared towards maximal effectiveness; quite the contrary.<sup>53</sup> Its composition and working methods would be nonsensical were it for the Assembly to create or maintain the international order – as illustrated by the controversy in the early sixties about the financing of peace-keeping operations 'demonstrating the limitations of what could be done through the General Assembly majority voting'.<sup>54</sup> But what other way can justice be defensibly discussed or set up than by a voting procedure? That the Assembly may not pass binding resolutions may be ineffective – in a secular world where values differ, however, it is the only

51 Article 12(1) of the Charter.

52 Article 14. Cf. also Articles 2(2) and (3).

53 H.G. Nicholas describes the Assembly as a 'talking shop with all the potentialities and disabilities that that implies' – summarizing these implications in a wonderful chain of attributes, namely 'irresponsible, vain, chaotic, extreme', its debates sometimes 'reaching a higher level of hypocrisy, unctuousness, and flatulence than is healthy for any organization', *The United Nations as a Political Institution* (4th ed., 1971) 100, 98, 113.

54 Goodrich, in Barros, *supra* note 48, at 44.

acceptable solution; justice – unlike order – cannot be created out of the barrel of a gun.

A policeman and a Temple of Justice: neither has been a tremendous success. For decades, the Council was no guarantee of anyone's security: inasmuch as there was security, it depended on external facts, particularly a State's position with respect to the balance of terror. The Organization's soft activities continue to pay the price of the fact that its members are States whose representativeness cannot be taken for granted and whose ulterior motives often make the argument about the Assembly's democratic character seem a tenuous hypocrisy.

The principle of the division of competences, however, remains sound. The Security Council should establish/maintain order: for this purpose, its composition and procedures are justifiable. The Assembly should deal with the acceptability of that order: its composition and powers are understandable from this perspective. Both bodies provide a check on each other. The Council's functional effectiveness is a guarantee against the Assembly's inability to agree creating chaos; the Assembly's competence to discuss the benefits of any policy – including the policy of the Council – provides, in principle, a public check on the Great Powers' capacity to turn the organization into an instrument of imperialism.

## VI

Yet, this nice balance has not ensured absence of conflict. The Charter extends the Assembly's power of discussion to matters of international peace and security.<sup>55</sup> The limits to the Assembly's power come from a duty to refer matters to the Council when 'action is necessary'<sup>56</sup> and from the prohibition to make recommendations in situations or disputes pending before the Council, unless the Council so requests.<sup>57</sup> In practice, however, the Assembly has passed resolutions in all conceivable situations, whether they were on the Council's agenda or not.<sup>58</sup> These resolutions have sometimes complemented simultaneous Council action, sometimes contradicted it, the only limit having been set by its inability to pass mandatory decisions or to take formal 'enforcement action'.<sup>59</sup> It has established

55 Articles 10, 11(2) and 14 of the Charter.

56 Article 11(2) *in fine*.

57 Article 12(1).

58 A policy defensible by the Council's curious practice never to move an item from its list after it has been received there – with the result that the list now covers nearly all conceivable international (regional) conflicts with some seriousness.

59 This was, of course, the bottom-line rule regarding the delimitation of the competences of the two organs outlined by the ICJ in the *Expenses* case, Reports (1962) 164-166. For a useful overview of cases where Assembly action has sometimes complemented, sometimes pre-empted Council action cf. N.D. White, *Keeping the Peace. United Nations and the Maintenance of International Peace and Security* (1993) 140-157, 161-177.

peace-keeping forces,<sup>60</sup> made appeals to States for the establishment of voluntary embargoes<sup>61</sup> – and sometimes bluntly accepted by an overwhelming majority resolutions earlier vetoed in the Council by a Great Power.<sup>62</sup>

The first serious constitutional controversy within the organization concerning the powers of its two main bodies related, of course, to the passing of the Uniting for Peace Resolution in connection with the Council having been blocked by the Soviet veto in the Korean crisis in 1950. A Western manoeuvre resulted in a palace revolution whereby the Assembly took it upon itself to:

consider the matter immediately with a view to making the appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>63</sup>

The controversy over the lawfulness of the Uniting for Peace resolution has long been over. It did not occasion a revolutionary transformation of the organization's activities. The nine Special Emergency Sessions held under the new procedure have scarcely differed from the Assembly's other special sessions. Apart from the setting-up of UNEF I in 1956, they did not initiate operational action. They resulted in condemnatory resolutions whose effect on the political world has been no different from that of its normal resolutions. Even peace-keeping operations have been, since the 1960s, firmly in the Security Council's hands. Nor have the Assembly's efforts to reform the Charter's order-system been impressive. The Assembly's Special Committee on the Review of the Charter ('Charter Committee') has routinely discussed Chapter VII matters at its annual sessions but has so far failed to achieve concrete results. In the 1980s and 1990s the Assembly did pass a number of declarations, drafted by the Charter Committee, on matters relative to international security – but always with the proviso that they would not imply

60 Most famously, UNGA Res. 1000 (ES-I) 5 November 1956.

61 For the Assembly's early recommendation on arms embargoes on Portugal and Congo, cf. UNGA Res. 1807 (XVII) 14 December 1962 and Res. 1474 (ES-4) 20 September 1960, 1600 (XV) 15 April 1961. On South Africa, the Assembly still recommended an embargo in 1990, 45/176 B and F (19 December 1990).

62 One recent example having been the United States intervention in Panama in December 1989. A non-aligned draft resolution in the Council (S/21048) would have deplored the intervention but was vetoed on 23 December by the US, France and United Kingdom (the vote having been 10-4-1). A resolution closely following the text of the earlier non-aligned draft was passed by the General Assembly on 29 December, UNGA Res. 44/240 (75-20-40). A comparable method was used by the Assembly in 1980 to condemn the Soviet invasion in Afghanistan – where a resolution essentially similar to that passed in the Assembly had been subject of the Soviet veto; and the US invasion of Grenada – where the Assembly passed a resolution essentially similar to an earlier draft vetoed in the Council by the US. For the former, cf. S/13729 and UNGA Res. ES-6/2 (14 January 1980) and the latter cf. UNGA Res. 38/7 (2 November 1983). Today, the Assembly disagrees with the Council in respect of the maintenance of the Bosnian arms embargo, cf. UNGA Res. 48/88 (20 December 1993), paras. 17-18 and with the United States in respect of the continued Cuban embargo, cf. Res. 48/18 (15 November 1993).

63 UNGA Res. 377 A (V) 3 November 1950 para. A (1).



changes in the Charter itself.<sup>64</sup> The significance of these declarations has remained small. An *ad hoc* Committee was set up in 1993 to examine the composition of the Security Council.<sup>65</sup> It has, however, so far failed to reach agreement on any proposals.

The new activities of the Security Council have occasioned the first major constitutional crisis in the United Nations since the passing of the Uniting for Peace Resolution.<sup>66</sup> This time, the crisis is in the opposite direction. It is not the Assembly that is trying to deal with the problem of order; the Security Council is attempting to deal with the problem of international justice.

The depth of the crisis is not so much related to the Council's enlarged jurisdiction *ratione materiae*: had it merely started to deal with a larger number of situations, including the internal conflicts and problems of social, economic, or humanitarian character to which it referred in its summit declaration of January 1992, few would have been concerned. The affair's seriousness is occasioned by the Council's willingness to use its exceptionally 'hard' powers of enforcement, binding resolutions, economic sanctions and military force for 'soft' purposes of international justice. This is what is new and problematic. 'It was to keep the peace, not to change the world order, that the Security Council was set up'.<sup>67</sup>

As is well-known, the Council's formal competence to take enforcement action is based on the criteria in Article 39: the presence of an act of aggression, breach of the peace, or a threat to the peace. The enlargement of the Council's powers has been undertaken through a new interpretation of what counts as a 'threat to the peace'. The sense of 'peace' has been widened from the (hard) absence of the use of armed force by a State to change the territorial *status quo* to the (soft) conditions within which – it is assumed – peace in its 'hard' sense depends,<sup>68</sup> a change from a formal to a substantive meaning.<sup>69</sup>

It is generally accepted that UN organs have the authority to determine, at least *prima facie*, the limits of their own jurisdiction.<sup>70</sup> The ICJ, for instance, enjoys no

64 Cf. Manila Declaration on the Peaceful Settlement of Disputes, UNGA Res. 37/10 (15 November 1982); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 42/22 (18 November 1987); Declaration on the Prevention and Removal of and Disputes and Situations which May Threaten International Peace and Security and on the Role of the United Nations in this Field, 43/51 (5 December 1988); Declaration on Fact-Finding by the United Nations in the Field of Maintenance of International Peace and Security, 46/59 (9 December 1991); and Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements and Agencies in the Maintenance of International Peace and Security, 49/57 (14 December 1994).

65 UNGA Res. 48/26 (3 December 1993).

66 For the volume of the increase in the Council's activity between 1988-1994, cf. the Reports by the Secretary-General, A/49/1 (2 September 1994) 4-6 (paras. 29-33).

67 Sir Gerald Fitzmaurice, diss. op., *Namibia* case, ICJ Reports (1971) 294 (para. 115).

68 Cf. also P.-M. Dupuy, 'Sécurité collective et organisation de la paix', 97 *RGDIP* (1993) 624.

69 This is one of the key themes in the Secretary-General's *Agenda for Peace*; to extend the organization's coercive powers from reactive (peace-keeping, peace-making) to preventive action (peace-building), S/2411, A/47/277 (17 June 1992) e.g. para. 21.

70 *Expenses* Case, ICJ Reports (1962) 168.

general authority of constitutional review – however much its advisory or contentious procedure may be used to decide incidental jurisdictional issues.<sup>71</sup> The right ‘of last resort’ of member States to decide, for themselves, on whether an act has been *ultra vires* is difficult to reject<sup>72</sup> – despite the evident problems it causes to the credibility of the collective system.

Now the chase for a Somali clan leader, the Libyan sanctions or the Iraqi liability regime, among a host of other controversial Chapter VII decisions, are difficult to justify under a coherent theory of ‘threat to peace’. Some lawyers have suggested remedying the situation by a revision of the Council’s composition.<sup>73</sup> I would suggest that the Council simply has no business venturing into such theory-building, or that even if it does so, there is no compelling argument as to why the General Assembly could not simply overrule the Council. The kinds of considerations that make for a wide, substantive definition of peace are of no concern for the police but must be decided in the Temple.

Before invoking the objections to the wide reading of ‘threat to international peace and security’ by the Council, it is first necessary to see that the appeal of such a reading follows from a real difficulty to separate form from substance, or order from justice. Indeed, it may appear that such a separation cannot be undertaken, that social order is always dependent on its perceived ‘legitimacy’. Studies of international security (order) have focused on a wide or a ‘comprehensive’, integrated notion of security, pointing out that even if the subjects of security are ‘States’ (a by no means self-evident moral choice), there are many ways in which State security may be threatened. A ‘State’ is not only a territorial unit but also a set of institutions (e.g. form of government, a secular/religious base) and ideas (e.g. national, historical or ideological justification).<sup>74</sup> These institutions or ideas may be subject to a wide variety of partly internal, partly external, political, ideological or economic threats that are no less dangerous to the State’s identity or viability than clear-cut military threats against its territory. Mass exodus, for example, into a State may effectively change its linguistic, religious or ethnic base – and thereby also its identity.

These arguments – originally voiced within peace studies – convince many politicians who have started to speak about a ‘comprehensive’ security policy that

- 71 *Namibia Case*, ICJ Reports (1971) 45 (para. 89). But see also *ibid.*, at 53 (para. 115) and e.g. Graefrath, *supra* note 8, at 200-205; Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’, 5 *EJIL* (1994) 93-99; Gaja, ‘Reflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial’, 97 *RGDIP* (1993) 315-317 and Franck, ‘The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?’, 86 *AJIL* (1992) 519-522.
- 72 Cf. D. Ciobanu, *Preliminary Objections. Related to the Jurisdiction of the United Nations Political Organs* (1975) 173-179; Sur, ‘Sécurité collective et rétablissement de la paix: la résolution 687 (3 avril 1991) dans l’affaire du Golfe’, *RdC*, Colloque 1992, at 19-20.
- 73 Caron, ‘The Legitimacy of the Collective Authority of the Security Council’, 87 *AJIL* (1993) 552-588; Franck, ‘Fairness in the International Legal and Institutional System. General Course on Public International Law’, 240 *RdC* (1993-III) 196-218.
- 74 Cf. B. Buzan, *People, States & Fear* (2nd ed., 1991) 57-107.

would take account of various kinds of non-military threats to their countries.<sup>75</sup> Likewise, statements by the Security Council, the Secretary-General and influential scholars have used the vocabulary of security to justify the need for a more effective international governance through the Security Council.<sup>76</sup> In accordance with the arguments made above in section II, however, there are serious theoretical, systemic and practical objections to these proposals.

The *theoretical objections* to the comprehensive concept of security relate to the extent that it seems to assume both that we know (or can reliably ascertain) those social conditions in which security flourishes and that everybody would, of necessity, have good reason to agree on their enforcement through the Security Council. Now it may be true that democratic societies are not in the habit of going to war against each other. And it may also be true that the substance of international law is moving against totalitarianism.<sup>77</sup> It does not, however, follow that the Council should be empowered to make every State a democratic one. It is not only, as J.S. Mill famously argued, that democracy and liberalism cannot be created by force (though that seems plausible enough) but that we simply do not know what 'democracy' would mean for a Russian, Somali, Chinese, Algerian or other non-Western, non-liberal society. But we do have the experience that attempts to insert the political system of European States into Africa by the first generation of non-colonial leaders, trained in Paris or London in the 1960s, failed to create a viable African political life.<sup>78</sup> Our Kantian ethics invites us to assume that everyone wishes to be treated like we would like. This is rubbish; to think in terms of moral universals creates demands on ourselves (and the UN) that we (or the UN) have absolutely no means to fulfil. Our inevitable guilt will need only a small push to turn into cynicism and brutalization (a push daily attempted by journalistic accounts of UN 'failures') – 'Morality is the last refuge of Eurocentrism'.<sup>79</sup>

But even if the Security Council were, miraculously, in possession of a causally credible recipe for global security, it is still not true that it should enforce it. In the first place, the extent to which a given policy or situation, national or international, might contribute to 'security' is merely one, and not self-evidently the most important, criterion whereby it may be evaluated. Nothing in political history has undermined the fact that social transformation for the better might sometimes

75 For example, the special summit of the European Council held in Brussels on 29 October 1993 defined the general objectives of European security by reference to its territorial integrity and political independence of the European Union but also in terms of its democratic character, its economic stability and the stability of neighbouring regions. Cf. Fink-Hooijer, 'The Common Foreign and Security Policy of the European Union', 5 *EJIL* (1994) 195.

76 Cf. *Agenda for Peace*, *supra* note 69, paras. 12-16 and e.g. Urquhart, 'International Security after the Cold War', in A. Robert, B. Kingsbury, *United Nations, Divided World. The UN's Roles in International Relations* (2nd ed., 1993) 94-103.

77 Or, as some say, in 'pro-democratic' directions, cf. Crawford, 'Democracy and International Law', *LXIX BYIL* (1993) 123-133.

78 Cf. B. Davidson, *The Black Man's Burden. Africa and the Curse of the Nation-State* (1992).

79 H.-M. Enzensberger, *Civil War* (1994) 59, 56-71.

necessitate revolution.<sup>80</sup> In the second place, peoples' views about the peaceful conditions of societies are not technical but political: they do not speak about causality (or not of causality only) but about norms, values and preferred ways of life. There is no necessary harmony between them; they are situational and conflicting. To believe otherwise is to make the classical Utopian mistake – a mistake which translates itself into a politics of tyranny.<sup>81</sup>

These objections do not mean that Article 2(7) of the Charter should be resuscitated. They do not mean that international action should not be taken to relieve absolute suffering and misery merely because national bureaucrats fail to provide UN personnel with a *laissez-passer*. But they do mean that action should be measured in accordance with what is possible; that 'enforcement action' should not be enforced on the people it intends to save; and that the rule must remain the accommodation of local values. Above all, they mean that such action should be exceptional and open to review and revision by a representative body tasked to deal with normative controversy, that is, *faute de mieux*, the General Assembly.

The view that 'security' is comprehensive and depends also on the presence of acceptable conditions of social life is certainly not manifestly implausible. But there is a long way from the truth of that statement to the falsity of the view which says that it is the Security Council's task to bring about those conditions. Dictators always saw everywhere a threat to the *Ordnung*; and no conflict was too small for the intervention of the security force. Theirs, too, was a comprehensive notion.

The *systemic objection* follows from the theoretical one. There is a crucial difference between policies intended to safeguard 'security' and policies intended to bring about the good life – a difference encapsulated in the distinction between the police and the Temple. The former relies on causal-technical assumptions about what type of action most efficiently safeguards communal peace. In a (Hobbesian) world where causal-technical assumptions are opposed to normative ones, and preferred as they are understood to be verifiable in contrast to the latter being of merely 'subjective preference', public policies are always on the move towards setting up a *Leviathan*. This effect is not created simply by liberal agnosticism about norms but through the association of agnosticism with a belief in an overriding, and non-normative, value of 'security'.

Now the position of the Security Council under the UN Charter is, as we have seen, that of the technician of peace, the police. Its composition, procedures and practices are completely indefensible if we assume that its tasks extend to assessing and enforcing the conditions of the good life – including rules of international law – among and within States. These are normative tasks that can be acceptably tackled only through a decision-process that is subject to public criticism and in which every concerned entity can participate. As each organ determines for itself the limits

80 As (controversially) declared by the UN General Assembly in respect of decolonial struggle in Res. 2625 (1970). Cf. generally H. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

81 On this theme generally, cf. I. Berlin, *The Crooked Timber of Humanity* (1990) especially at 1-48.

of its own competence, the Assembly can simply assume this role. There is no need for a Council determination to that effect as there is no *general* primacy of Council over the Assembly, the police over the Temple.

The Council's recent activity has brought to light its *practical inappropriateness* as a forum to justice. There is no 'due process' clause in the Council's (provisional) Rules of Procedure. The treatment – or non-treatment – of the Libyan views in connection with the passing of Resolution 731 in January 1992 that effectively determined Libya's guilt in sponsoring terrorism was below all standards of procedural fairness.<sup>82</sup> The moderate proposals by Professor Bowett to reform the Council's procedures would be as necessary as they are unlikely to take place.<sup>83</sup> The Council's internal discussions over the past few years have not brought the prospects of a meaningful reform any closer.

Let me offer just two examples of the Council's lack of concern for procedural 'detail'. First, the Council's economic sanctions are managed by five separate sanctions committees (on Iraq, Yugoslavia, Libya, Somalia and Angola) with completely inadequate secretarial help, each having been established in connection with a particular sanctions resolution and conducting its work in secret and in isolation from the other committees.<sup>84</sup> As a result, the committees routinely make diverging interpretative decisions with significant economic effects not only on the target States but, for instance, on States, organizations and private companies seeking authorizations to make deliveries under the 'humanitarian exceptions' clauses in the relevant resolutions.<sup>85</sup> The committees consist of diplomats of the permanent missions of Council member States who have no access to the economic, humanitarian and other data that would be needed for rational decision on delivery authorizations, and little time or interest to examine the tens of thousands of annual requests and other communications properly.<sup>86</sup> The committees neither publish their decisions nor follow-up on their effects. Reports on the national implementation of sanctions are neither analysed nor commented upon. Unlike the Committee

82 Cf. Graefrath, *supra* note 8, at 187-191, 196, 204.

83 Bowett, *supra* note 70, at 100.

84 The principle of secrecy was set up by the Iraqi sanctions Committee in August 1990, more by default than conscious planning. This has then been followed by the other committees. As a result, public analysis and commentary of sanctions management by the Council has remained almost non-existent – the exception being commentary on the work of the Iraqi sanctions committee, its initial protocols having leaked out and been published separately in D. L. Bethlehem (ed.), *The Kuwait Crisis: Sanctions and their Economic Consequences*, Part II, Vol. 2 (1991) 773-985. For comments, cf. Koskeniemi, 'Le comité des sanctions (créé par la résolution 661 (1990) du Conseil de sécurité)', XXXVII *AFDI* (1991) 119-137 and Scharf, Dorosin, 'Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee', XIX *Brooklyn Journal of Int'l Law* (1993) 771-827.

85 For Iraq, cf. SC Res. 687 of 3 April 1991 para. 20; For Yugoslavia cf. SC Res. 760 of 18 June 1992; for Libya cf. SC Res. 748 of 30 March 1992 paras. 4(a) and 9. For the provision in respect of Haiti (no longer in force) cf. SC Res. 841 of 16 June 1993, para. 7.

86 The Yugoslavian sanctions committee alone received more than 34,000 communications in 1993 and during the first eight months of 1994 had received already more than 45,000. Cf. Report of the Secretary-General on the Work of the Organization, A/49/1 (2 September 1994) 5 (para. 32).

established in 1968 to survey the implementation of the embargo against Southern Rhodesia,<sup>87</sup> they do not even file reports on their activities to the Council itself<sup>88</sup> – a situation casting serious doubt on the meaningfulness of the Council's sanctions policy.

Second, having set up two war crimes tribunals the Council has so far failed to demonstrate its willingness to take these bodies seriously by providing the necessary conditions for their adequate functioning. There has been much publicity on the difficulties of the Yugoslavian war crimes tribunal, and the potential conflict between the 'peace process' and the 'crimes process'. The investigation of the Rwandan war crimes was allocated to a Commission of Experts without adequate funds and technical personnel and unable to conduct the kinds of large-scale investigations outside Kigali that would have been necessary for the setting up of a credible war crimes process.<sup>89</sup> The Chairman of the Expert Committee appealed on 23 August to member States for assistance to provide at least one hundred investigators, 20 doctors and 60 assistants. By the end of November 1994, however, only a handful of investigators had visited the country and the final 36-page report of the Commission falls short of providing an adequate basis for indictments in the Tribunal, established in November.<sup>90</sup>

These are only some examples of the Council's *nonchalance* in regard to the practical implementation of its decisions, made possible by its absence of accountability within the UN system. How else can it be explained that the Council has never required States that have been authorized to 'take necessary measures' under Chapter VII (in respect of Iraq, Haiti, Somalia, Rwanda, or the protection of Bosnia's 'safety zones') to report on those measures to the Council or to members at large – in complete disregard of the implications of the delegation of powers by members to the Council under Article 24(1) of the Charter?

The Council's failure to ensure the implementation of an increasing number of its resolutions in former Yugoslavia, Somalia and Angola may now have demoralized the Council's atmosphere to the extent that serious reform towards some legal culture within it has become impossible. One wishes the situation were otherwise. One thing is certain, however: with the exception of Haiti, all the crises begun after the end of the Cold War are still continuing. The Council will have to face up to the consequences of its inability to make reality of its inflated promises. A test case will be the form through which it will guarantee the partition of Bosnia-Herzegovina having a number of times required respect for its 'territorial integrity' and rejected the aggressor's right to enjoy the fruits of his aggression<sup>91</sup> – indeed

87 SC Res. 253 (1968) 29 May 1968.

88 With the insignificant exception of the Iraqi committee's formal reports on the permanent arms embargo on Iraq, set up in SC Res. 687 (1991).

89 For the setting up of the Commission of Experts, cf. SC Res. 935 of 1 July 1994.

90 SC Res. 955 of 8 November 1994. For the Commission's final report, cf. UN Doc. S/1994/1405 (9 December 1994), especially paras. 22-26.

91 E.g. in SC Res. 757 of 30 May 1992, 3rd preambular paragraph.

having once put all its eggs in the basket of an International Peace Conference whose Chairmen rejected an earlier partition plan on the grounds that ‘... such a plan could achieve homogeneity and coherent boundaries only by an enforced population transfer’.<sup>92</sup>

So the question is whether the Assembly might still be able to recover its role as the normative Temple of the Organization, independent of the Great Powers and capable of challenging them. The prospect may appear daunting: the Assembly is clearly a part of Philip Allott’s inter-statal ‘unsociety’ – a fact which alone may seem enough to prevent it from assuming a meaningful normative role.<sup>93</sup> Tragic Utopianism shakes hands with the realist for whom ‘international government is, in effect, government by that state which supplies the power necessary for the purpose of government’.<sup>94</sup> For both, the condition of present institutions prevents significant normative transformation.

Despite the paraphernalia, the ineffectiveness, the ulterior motives, the ignorance, the in-fights, it still remains the Assembly that can provide the counterweight to the Council, provided it is determinate enough. Article 14 of the Charter may be only a ‘modest approach to the problem of “peaceful change”’,<sup>95</sup> but it does provide the Assembly with the formal basis to study and recommend peaceful adjustments of any situation – including unjust *status quo* – and to challenge the Council’s authority when that might seem appropriate. The argument that the Assembly is ‘less realistic’<sup>96</sup> than the Council and therefore should not be taken too seriously has no effect here (unlike in issues of military security).

Still, the problem is less with formal competence than with *de facto* will and capacity. Recent attempts to reform the Assembly so as to concentrate its work better and to reinforce the coordinating role of the ECOSOC go in the right direction.<sup>97</sup> But they have brought in little by way of strengthening the Assembly in its Charter-based role as a *forum* to decide, by majority votes if necessary, on the economic, social and humanitarian policies that could transform the living conditions of national societies. The *Agenda for Development*, brought in as a timid counterpart to the Secretary-General’s *Agenda for Peace*, may have used up its momentum without succeeding in making proposals on the reform of worldwide economic and social decision-patterns. That exercise, as well as, surprisingly, the initial years of the Commission for Sustainable Development, were transformed into

92 Report of the Secretary-General on the International Conference on the former Yugoslavia, S/24795 (11 November 1992) 13 (para. 36).

93 P. Allott, *Eunomia. New Order for a New World* (1990) 239-259.

94 Carr, *supra* note 35, at 107.

95 Goodrich, Hambro, *supra* note 42, at 104.

96 Pellet, ‘Le Tribunal criminel international pour l’ex-Yugoslavie. Poudre aux yeux au avancée décisive’, 98 *RGDIP* (1994) 30.

97 For the recent decision to restructure and revitalize the Assembly’s economic, social and related activities, cf. UNGA Res. 48/162 (20 December 1993). For an overview and a moderate analysis of the prospects of serious reform (noting that the taboo against changing the Charter is lifting) cf. Bertrand, ‘The Historical Development of Efforts to Reform the UN’, in Roberts, Kingsbury, *supra* note 76, especially at 428-436.

new forums for North-South controversy. On the other hand, there are some signs of the Assembly seeking seriously to examine the Council's activities. It has, for instance, used its budgetary powers to set limits on Council activity – one (controversial) example having been in connection with the financing of the Yugoslavian war crimes tribunal. It has also called for more transparency in the Council's working methods. In 1994, it requested the Council not only to review its working methods but also to 'provide, in a timely manner clear and informative account of its work, including Security Council resolutions and other decisions, inclusive of measures taken under Chapter VII' and declared its readiness to initiate 'in-depth discussion' of the matters contained therein.<sup>98</sup>

There is, undoubtedly, a new anger feeding the work of the General Assembly and some of its subsidiary bodies. After years of fruitless academic pondering, the Assembly decided in 1994 to request the International Court of Justice for an advisory opinion on the lawfulness of nuclear weapons. There may not be much political wisdom in such a request. But the feeling that lies behind it – that it is perverse to believe that being a Great Power endows one with the right to make a lawful threat of mass destruction – cannot be overlooked. It is a justified feeling of anger, perhaps of frustration. It has three directions in which to grow. It may seek to turn the Assembly into a Temple of Justice; it may conclude that the Assembly can never become such a Temple, and fall back into frustration; or it may be co-opted by the Great Powers handing out again plastic pearls and trinkets for sovereign rights.

## VII

The police are ransacking the temple, searching for criminals and those it calls terrorists. The mind of the police – the security police in this case – is a machine, programmed to believe that history ended and we won it; that what remains is a clash of civilizations and we intend to come up first. As it proceeds – helmets, boots, blackjacks and all – towards the altar, the people draw silently away into the small chapels, surrounding the *navis*, each to attend communion before a different god. After the police have gone, the altar hall is empty but for the few that were left to guard it, and their admirers. The frescoes, the bronze statuettes, the stained glass, the marble speak from different ages, through different symbols, and towards a now empty centre. *Quod non fecerunt barbari, fecerunt Barberini*. The peace of the police is not the calm of the temple but the silence of the tomb.

98 UNGA Res. 48/264 (29 July 1994).