Michigan Journal of International Law

Volume 17 | Issue 2

1996

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Martti Koskenniemi
University of Helsinki

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It may seem anachronistic to suggest that law might have something to do with the high politics of international security. The period between the two world wars has, of course, been credited precisely by a mistaken reliance on such an idea. Confidence in the League of Nations' ability to deter aggression did not only, we are told by Realists of the post-war order, prove an academic error, it was positively harmful in directing attention away from the need to prepare for the inevitable aggression when it came.

This is the understanding that most of us, as diplomats, political theorists, or lawyers, have cultivated through most of the past five decades. We have labelled belief in the ability of rules and institutions to deter aggression "formalism," or even worse, "legalism," highlighting its abstract, utopian character, its distance from the flesh and blood of the application of power by states to fulfill their interests. Only ten years ago, Stanley Hoffmann commented on the state of world order studies:

> Nobody seems to believe anymore in the chances of collective security; because of its constraining character, it is too contrary to the freedom of judgement and action implied by sovereignty; and . . . it is in conflict with the imperatives of prudence in the nuclear

* Professor of International Law at the University of Helsinki, Finland. LL.D. (Turku, Finland). Served with the Finnish Ministry for Foreign Affairs from 1978 to 1995; Legal Advisor to Finland's Permanent Mission to the United Nations from 1989 to 1990.

This is a substantially revised version of a paper presented at the Conference "The United Nations: Between Sovereignty and Global Governance," held at the University of La Trobe, Melbourne, in July, 1995.

> age, in which the localization or insulation of conflicts appears far preferable to their generalization.[1]

In this article I want to examine the place of law in our thinking about and sometimes participation in decisionmaking regarding international security. After the end of the Cold War, and particularly since the United Nations' reaction to Iraq's occupation of Kuwait in 1990–91, an academic debate concerning the possibility of collective security has arisen anew.[2] My intention is not to take a definite view in that controversy. Instead, I shall suggest that this debate has been framed so as to obscure the role of normative considerations, including law, in the production or construction of collective security. A theoretical-instrumental bias produces competing descriptions of the conditions of international "security," but it fails to provide an understanding of the actual contexts of decisionmaking on "security." For an internal, or cultural examination of collective security, a distinctly legal approach seems not only useful, but unavoidable.

I. REBIRTH OF COLLECTIVE SECURITY?

The collective security system of the Charter is based on two elements. First, there is the prohibition against inter-state threat or use of force under Article 2(4). The second element is the Council's "primary responsibility for the maintenance of international peace and security, . . . [expressed in both the members' agreement] that in carrying out its duties under this responsibility the Security Council acts on their behalf"[3] and in those Charter provisions which establish a legal obligation on member states to carry out the Council's decisions.[4]

Collective security, often academically distinguished from balance of power politics, is seen as invoking an "automatic" reaction against any

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1. STANLEY HOFFMANN, *Is There an International Order?*, *in* JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 85, 117 (1987). The essay was originally published in French in 1985.

2. *See, e.g.*, Richard K. Betts, *Systems for Peace or Causes of War? Collective Security, Arms Control, and the New Europe*, INT'L SECURITY, Summer 1992, at 5; Helmut Freudenschuß, *Between Unilateralism and Collective Security: Authorizations to Use Force by the Security Council*, 5 EUR. J. INT'L L. 492 (1994); Andrew Hurrell, *Collective Security and International Order Revisited*, 11 INT'L REL. 37 (1992).

3. U.N. CHARTER art. 24, ¶ 1.

4. *Id.* arts. 25, 48. Also relevant in this context is Article 2(5), which requires member states to "give the United Nations every assistance in any action it takes in accordance with the present Charter," and requires that no assistance be given to any state against which preventive or enforcement action is being taken pursuant to the terms of the Charter. *Id.* art. 2, ¶ 5.

potential aggressor.[5] Collective security under the U.N. Charter system, however, involves little automation. Under the Charter, the decision of whether and how to react is vested with the Council, which itself has broad discretion. Whether this makes the Charter system something other than collective security under some definition is uninteresting. No system of rule-application is "automatic" as envisioned by the academic distinction between collective security and balance of power. The point is that under the Charter, member states have renounced some of their freedom of action by vesting the Council with competence to decide on collective action on their behalf and are (legally) bound by the decisions the Council has made. The United Nations system has a strong bias against unilateralism and broad directives to guide the Council as it exercises its competence.

That the Cold War made it impossible to apply the security system embedded in Chapter VII of the Charter is, of course, well-known.[6] The procedure for collective reaction in Articles 39 through 42 was set aside in favor of the balance of power strategies employed by the great powers outside the United Nations. The little enforcement activity that remained with the Security Council was limited to decolonization issues that did not bear upon great power relations. Appeals by the General Assembly to activate collective security under the Charter system came to nought.[7]

Judged against the Council's historical record, its reaction to Iraq's invasion of Kuwait from August 1990 onwards was clearly something new, even though paradoxically described as a "return" to the original concept of Chapter VII of the Charter. In his 1992 *Agenda for Peace*, the Secretary-General made several references to "collective security." He explained:

> an opportunity has been regained to achieve the great objectives of the Charter — a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, "social progress and better standards of life in larger freedom." This opportunity must not be

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5. *See, e.g.*, Betts, *supra* note 2, at 16; John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994/95, at 5, 29–32.

6. For analyses, see, e.g., N.D. WHITE, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY (1990).

7. *See* G.A. Res. 159, U.N. GAOR, 40th Sess., 117th plen. mtg., Agenda Item 73, U.N. Doc. A/RES/40/159 (1986); G.A. Res. 119, U.N. GAOR, 37th Sess., 108th plen. mtg., Agenda Item 137, U.N. Doc. A/RES/37/119 (1983).

> squandered. The Organization must never again be crippled as it was in the era that has now passed.[8]

During the first forty years of the United Nations (1946–86), the Council made only two determinations of "breach of the peace" under Article 39.[9] In that same time span, only two states (Israel and South Africa) had their acts labelled "aggression" while the Council recognized the existence of a "threat to international peace and security" seven times.[10] During the first forty-five years of the United Nations' history, the Council had resorted to military force three times,[11] and to binding non-military sanctions twice.[12] In light of the perhaps seventy-three inter-state wars that broke out during this same period,[13] the data clearly shows the dramatic extent of the Council's paralysis.

Since 1990, the situation looks altogether different. Collective measures have been taken in eight situations — Iraq, Liberia, former Yugoslavia, Somalia, Libya, Angola, Haiti, and Rwanda. The Council has authorized the use of military force five times through a total of nineteen resolutions.[14] In each of the eight situations, the Council had recourse to binding, non-military sanctions. For comparison, consider the following statistics: in 1988, there were five peacekeeping operations, by 1994, the number was seventeen; in 1988, the Council adopted fifteen

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8. Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 3, U.N. Doc. A/47/277 (1992).

9. S.C. Res. 502, U.N. SCOR, 37th Sess., 2350th mtg., U.N. Doc. S/RES/502 (1982) (Falklands); S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., U.N. Doc. S/1501 (1950) (Korea).

10. S.C. Res. 573, U.N. SCOR, 40th Sess., 2615th mtg., U.N. Doc. S/RES/573 (1985) (Israel's attack on PLO headquarters in Tunis); S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg., U.N. Doc. S/RES/418 (1977) (South Africa); S.C. Res. 353, U.N. SCOR, 29th Sess., 1781st mtg., U.N. Doc. S/RES/353 (1974) (Cyprus); S.C. Res. 307, U.N. SCOR, 26th Sess., 1621st mtg., U.N. Doc. S/RES/307 (1971) (Pakistan); S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg., U.N. Doc. S/RES/232 (1966) (South Rhodesia); S.C. Res. 161, U.N. SCOR, 16th Sess., 942d mtg., U.N. Doc. S/4741 (1961) (Congo); S.C. Res. 54, U.N. SCOR, 3d Sess., 338th mtg., U.N. Doc. S/902 (1948) (Palestine).

11. Korea, The Congo, South Rhodesia. The last was an authorization for Britain to patrol Beira harbour in Mozambique to prevent oil from reaching Rhodesia. S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg., U.N. Doc. S/RES/221 (1966).

12. The economic blockade of Southern Rhodesia (1966–79) and the arms embargo of South Africa (1977–94).

13. WHITE, *supra* note 6, at 47.

14. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994) (Haiti); S.C. Res. 929, U.N. SCOR, 49th Sess., 3392d mtg., U.N. Doc. S/RES/929 (1994) (Rwanda); S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993) (former Yugoslavia); S.C. Res. 814, U.N. SCOR, 47th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993) (Somalia); S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (Iraq). For a full analysis of the resolutions, see Freudenschuß, *supra* note 2, at 493–522.

resolutions, in 1994, the Council adopted seventy-eight. From 1988 to 1994, the number of annual informal consultations among Council members rose from forty to 240.[15]

A qualitative development has likewise taken place in the Council's understanding of its task of "maintaining international peace and security." Traditionally, collective security — and with it, the Council's competence — was seen as a military matter, concerned with the prevention of inter-state violence and, in particular, the transboundary use of force. However, most modern large-scale violence does not involve formal armies marching across boundaries. As *Agenda for Peace* never tires to remind us, and countless reviews of post-Cold War peacekeeping keep repeating, the greatest proportion of large-scale violence that presents a threat to international peace and security is home-brewn violence — civil war. Whatever conceptual difficulties tackling with non-international conflicts might pose for traditional applications of collective security,[16] the limitation of violence within one state has not prevented the Security Council from using its mandate to intervene during recent years.

> Of the five peace-keeping operations that existed in early 1988, four related to inter-state wars and only one (20 per cent of the total) to an intra-state conflict. Of the 21 operations established since then, only 8 have related to inter-state wars, whereas 13 (62 per cent) have related to intra-state conflicts .... Of the 11 operations established since January 1992 all but 2 (82 per cent) relate to intra-state conflicts.[17]

Moreover, it has long been argued that war can effectively be prevented only by tackling its root causes, that war is merely the external manifestation of the violence of the social institutions, that peace follows only from domestic enlightenment and justice.[18] Modern liberals have continued to make the same case. Peace starts at home with the eradication of poverty, social injustice, and the violation of human rights.[19] Today, "non-military threats to security" and the "comprehensive concept of

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15. *See Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 49th Sess., at 5, U.N. Doc. A/49/1 (1994); *Supplement to An Agenda for Peace: Position-Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR, 50th Sess., ¶ 11, U.N. Doc. A/50/60 (1995).

16. *Cf.* Hurrell, *supra* note 2, at 38–39.

17. *Supplement to An Agenda for Peace: Position-Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 15, ¶ 11.

18. *See* IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch*, *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Ted Humphrey trans., Hackett Publishing Co. 1983) (1795), especially the "First Definitive Article of Perpetual Peace: The Civil Constitution of Every Nation Should Be Republican[,]" *id.* at 112–15.

19. For a programmatic discussion, see Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

security" are rooted in the vocabulary of diplomats and politicians throughout the political spectrum. At one euphoric moment in 1992, the Security Council, in its first meeting at the level of Heads of State and Government, stressed that "[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[20] It is not yet clear whether this much-quoted sentence should be taken at face value; that is, as an indication of the Council's readiness to use its collective security powers under Chapter VII of the Charter to deal with economic, social, humanitarian, or ecological developments which, in its opinion, are sufficiently grave to warrant such treatment. But the statement invokes the language of Article 39 of the Charter that triggers the Council's reactive competence and does suggest an image of the Council as a post-Cold War Leviathan; not only as police but as judge,[21] or perhaps as priest,[22] of a new world order.

II. Collective Action or Power Policy?

However, there is controversy about the correct understanding of these developments. While many agree with the Secretary-General that the Council's newly found activism should be seen as a "return" to the "original" Charter conception, others have been more doubtful. Several factors complicate a reading of the Council's recent activity as an application of collective security.

The first problem relates to the Council's notorious selectiveness.[23] Why Libya, but not Israel? Why the Council's passivity during most of the eight-year Iran-Iraq war? Why has the Council's reaction in Africa been markedly less vigorous and effective than in the Gulf? Why the discrepancy between the Council's forceful attack on Iraq (an Islamic country) and its timidity to defend the Muslims of Bosnia-Herzegovina? The choice of targets, as well as the manner of reacting, has certainly not been automatic. The argument is made that the Council has not reflected the collective interests of United Nations members as a whole, but only

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20. *Note by the President of the Security Council*, U.N. SCOR, 47th Sess., 3046th mtg. at 3, U.N. Doc. S/23500 (1992).

21. *See* Jean-Marc Sorel, *Rapport général L'élargissement de la notion de menace contre la paix*, *in* Société Française pour le Droit International, Colloque de Rennes, Le Chapitre VII de la Charte des Nations Unies 3, 52 (1995); Keith Harper, Note, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U. J. Int'l L. & Pol'y 103 (1994).

22. *Cf.* Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 Eur. J. Int'l L. 325 (1995).

23. *See* Olivier Russbach, ONU contre ONU: Le droit international confisqué (1994).

the special interests and factual predominance of the United States and its Western allies within the Council.

This point seems particularly potent in relation to the form of the Council's recourse to military force. The Kuwait crisis presented a unique opportunity to activate the integrity of the Charter's collective reaction machinery. This would have included not only a decision on military action against Iraq, but also the conclusion of "special agreements" under Article 43 between the Council and member states for the submission of national military contingents to the Council as well as the activation of the military staff committee as envisioned in Article 47. However, none of this was done. The Council merely gave its "authorization" for a coalition led by the United States to attack Iraq while absolving itself from the operational command and control of the coalition action.[24]

Lawyers have been at pains to find a plausible legal basis for this novel formulation: collective security or unilateral action in (collective) self-defence — or *excès de pouvoir*?[25] The debate has been largely inconsequential. Since Operation Desert Storm, the same formulation has been used in each of the four other situations (Somalia, former Yugoslavia, Rwanda, and Haiti) in which the Council has decided to use military force. In each, the acting party has been a powerful member or a coalition led by a powerful member (usually the United States, except for "Operation Turquoise" in Rwanda, which was carried out by France).[26]

It is equally difficult to interpret the "new generation peacekeeping" as a collective security device. True, the appearance of blue helmets with increasing frequency in the context of actual fighting, and sometimes with a mandate to use limited force, has seemed a step toward collective enforcement of pre-established standards of behavior. However, a closer study of the relevant cases (particularly those of UNPROFOR in Krajina and Bosnia and UNOSOM II in Somalia) shows that the use of force is

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24. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990).

25. There is a great deal of literature on the subject. *See, e.g.*, Robert Lavalle, *The Law of the United Nations and the Use of Force, Under the Security Council Resolutions of 1990 and 1991, to Resolve the Persian Gulf Crisis*, 23 NETH. Y.B. INT'L L. 3, 33–46 (1992); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991); Colin Warbrick, *The Invasion of Kuwait by Iraq*, 40 INT'L & COMP. L.Q. 482, 486–87 (1991); Michel-Cyr Djiena Wembou, *Réflexions sur la validité et la portée de la résolution 678 du Conseil de Sécurité*, 5 AFR. J. INT'L & COMP. L. 34, 44–49 (1993); Ralph Zacklin, *Les nations unies et la crise du Golfe, in* LES ASPECTS JURIDIQUES DE LA CRISE ET DE LA GUERRE DU GOLFE 57, 69 (Brigitte Stern ed., 1991).

26. S.C. Res. 940, *supra* note 14 (U.S.-led military intervention in Haiti "to facilitate the departure from Haiti of the military leadership"); S.C. Res. 929, *supra* note 14 (French action to "achieve . . . humanitarian objectives" in Rwanda); S.C. Res. 836, *supra* note 14 (NATO air strikes to support peacekeepers); S.C. Res. 794, *supra* note 14 (Operation "Restore Hope" in Somalia).

not directed at keeping aggression at bay, but at carrying out humanitarian assignments during armed conflict for puposes similar to those of the Red Cross.[27] A careful examination of the nineteen resolutions in which the Council has either authorized member states to take military action or otherwise expanded the mandate of peacekeeping forces has prompted one observer to conclude that "a new instrument has been created out of the need to fill the gap between the invocation of an inapplicable or inopportune right to collective self-defence and the unwanted application of the system of collective security."[28]

In addition, the application of economic sanctions by the Council in the eight Chapter VII situations has not been automatic in a way that would have clearly distinguished it from an interest-governed exercise of economic power. True, most states implemented the Iraqi sanctions diligently, transforming the Council's decisions into acts of national law.[29] Yet the Council's failure to manage its economic statecraft in a rational way has made it doubtful whether member states should continue to take its use of sanctions seriously. There has been no antecedent planning of the measures nor an evaluation of their effects on the target states' economy or political decisionmaking. The objectives of sanctions have sometimes been very unclear. The sanctions have been managed by five separate committees consisting of diplomats of the member states of the Council who have neither the interest, time, or resources to do the job properly. These five committees work in secret, not even reporting to the Council. They follow partly differing procedures resulting in differing interpretative decisions on, for example, the application of the humanitarian exemptions.[30] The Council has failed to react to widely publicized violations of sanctions by individual states, for example, the Islamic states' non-application of the Libyan boycott in force since 1992. The Council has also failed to take action to alleviate the problems of vulnerable third states.[31]

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27. *Cf.* S.C. Res. 836, *supra* note 14 (limited use of force to protect the "safe areas"); S.C. Res. 814, *supra* note 14 (limited use of force mandate for UNOSOM II).

28. Freudenschuß, *supra* note 2, at 522.

29. *Cf.* THE KUWAIT CRISIS: SANCTIONS AND THEIR ECONOMIC CONSEQUENCES (D.L. Bethlehem ed., 1991).

30. *See* Koskenniemi, *supra* note 22, at 345–46; *infra* note 92.

31. Some of these difficulties were taken up by the Secretary-General in early 1995. *See Supplement to An Agenda for Peace: Position-Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 15, ¶¶ 66–76. The Council responded by indicating certain measures to "make the procedures of the Sanctions Committees more transparent[.]" *Note by the President of the Security Council*, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/234 (1995).

III. The Realist Critique of Collective Security

These various critiques suggest the foundation for two conclusions usually associated with the doctrine of international Realism. First, they imply that the Council's activity should not be understood in terms of a functioning collective security system. It does not involve rule-application in the way that would differentiate it from "normal" hegemonic or balance of power policy. All aggressors are not, in fact, being hit by the system. Some states that are not aggressors are being hit by it because that seems to be in the interests of the hegemonic powers. I call this critique the *interpretative thesis.* Its point is that we cannot interpret or understand the recent United Nations actions as applications of collective security.

Second, the critiques also support the more general Realist position according to which collective security is impossible — that it simply cannot work (the case of the Cold War) or works only as a camouflage for power policy. Whether peace exists is not dependent upon the presence or absence of rules about collective reaction, but upon the application of power by those states in a position to do so in the advancement of their interests. I call this critique the *causal thesis.*[32]

The two theses rely on a clear differentiation between legal "rules" and political "interests" and on the priority of the latter over the former. Since the great powers' interests are protected by Articles 24 and 27 of the Charter, the mechanism seems already defined so as to defer to them. Nor are other interests irrelevant. It is not difficult to conceive of cases in which the interests of a member state that has a special relationship with the target state or which is vulnerable to retaliation seem so important as to override conventional obligations.[33] Jordan's continuous and widely accepted breach of sanctions against Iraq is one example. A variation of this theme links it to the logic of state behavior. Whatever rationally calculable long-term advantage there might be for a state to abide by a collective measures norm will not offset the more immediate harm that it will seem to suffer as a result of obedience. So even if a purely rational calculation of interests might speak in favor of obedience, considerations relating to, for example, the unwillingness of political elites to make "hard decisions" will overrule such calculations. This is a variant of the argument from the "tragedy of the commons" — that even

32. For a forceful reformulation, see Mearsheimer, *supra* note 5, at 28–33.

33. The doubts about the reality of the American nuclear umbrella in case of an attack on Western Europe, and its consequent readiness to set itself as a target for a similar attack, illustrate this point. So does the hypothesis of a Russian attack on the Ukraine. It is not plausible to believe that small European states will risk their safety by joining in a campaign to support Ukraine's independence.

if it were rational for all participants in a common good ("security" in this case) to take action to safeguard it against danger, there are always some who choose to become free riders — with the effect that it will appear rational for others to choose a similar policy as well.[34] Collective security, Realists have insisted, relies upon trust between the partners. In the absence of trust (a fact that defines the condition of international "anarchy"), it seems both rational and responsible to place immediate self-interest before an uncertain and fragile common interest.[35]

Moreover, procedural difficulties may seem daunting. Within an agreement to react to aggression some members will receive more protection than others. Selectivity is unavoidable. Much may depend on whether the aggressor is able to invoke the support of a permanent member. Even if members of a security pact had parallel interests, a collective reaction procedure could still not be applied consistently. Political choices will have to be taken when interpreting, for example, who the aggressor is, or whether there has been a "threat to the peace." We are not entitled to assume that the historic, ethnic, or political, affiliations or hostilities between particular members of such a pact are irrelevant when making those choices. But even if there were no divergent affiliations, we may hardly hold as irrelevant factors such as the likelihood that retaliatory action against one aggressor would expose pact members to attack by another aggressor or drive the aggressors into each others' arms, a fear that hampered the League's sanctions policy against Italy in 1935–36. Who decides when to react and how? Who pays for reaction or the costs of preparation? Who will command the collective force or decide on the objectives of common action and when they have been attained?[36] If everything depends on the particular facts and circumstances, the rule-governed character of the procedure will disappear and, with it, the system's deterrent force. It will start to seem like just another context for politics.[37]

IV. THE LIMITS OF REALISM: THEORY V. ENGAGEMENT

The above theses are powerful. They show that decisionmaking within the Security Council cannot be described as rule-application in the

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34. *See* Josef Joffe, *Collective Security and the Future of Europe: Failed Dreams and Dead Ends*, SURVIVAL, Spring 1992, at 36, 42.

35. See the discussion in JUSTIN ROSENBERG, THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS 27 (1994).

36. *See* Adam Roberts, *The United Nations and International Security*, SURVIVAL, Summer 1993, at 3, 23–26.

37. These questions reflect the different position in which members to a collective security pact are *vis-á-vis* each other. Some will have to lead, others will have to follow. It is not self-evident that parties will be ready to accept the assessment of the largest potential contributor — but if they do not, will the contributor contribute?

abstract fashion in which "collective security" has often been portrayed. However, the theses are also limited. They operate with a very narrow notion of "rule-application" and fail to see to what extent their determining concepts such as "interest," "power," or "security" are themselves defined and operative within a normative context.

Realism receives its strength from its focus on empirical-instrumental questions such as "what happened?" or "what can be made to happen?" But it avoids posing normative questions such as "what should happen?" or "what should have happened?" Or more accurately, Realism deals with the latter set of questions on the basis of its responses to the former. Having committed itself to a descriptive sociology of the international world characterized by the struggle for "power" by "states" in the pursuit of "national interests," Realism marginalizes normative questions into issues of "ethics," oscillating between the private (and thus inscrutable) morality of individual statesmen and the public morality of states in which it seems necessary sometimes to dirty one's hands in order to prevent the system's collapse into anarchy. Realism is avowedly instrumentalist, that is, concerned with the effects of particular policies on the world. However, its instrumentalism is not that of the situated participant but that of the external observer, the rational calculator, the theory-builder. To the external observer, the statesmen and states are atomistic subjects, equipped with a predetermined bag of interests or "values," standing outside the international polity on which they seek to employ various diplomatic, economic, and military management techniques. However, since the basic tenents of its sociology turn out to be normatively loaded, Realism seems compelled to defend itself on normative terms: one's "security" will appear as another's domination, one's "intervention" as another's "protection of sovereignty."[38] In this debate, there is no privileged realm of pure description.

A. *The Normative in the Empirical*

The *interpretative thesis* argued that legal or political principles "are not sufficient to explain either the past history of collective security or the course of events in the Gulf."[39] The determinant factors in recent Council actions were not Charter provisions or international law, but the new rapport between the United States and the Soviet Union/Russia, the strategic and economic significance of Kuwait to the Western allies, and

38. For this latter theme, see Cynthia Weber's collapsing of the two apparent opposites into a single term she refers to as "sovereignty-intervention," a term which can characterize any conceivable inter-state relationship. CYNTHIA WEBER, SIMULATING SOVEREIGNTY: INTERVENTION, THE STATE AND SYMBOLIC EXCHANGE 123–27 (Cambridge Stud. Int'l Rel. No. 37, 1995).

39. Hurrell, *supra* note 2, at 49.

so on. I have no great problem with this thesis. It opens a critical perspective that refuses to take at face value the suggestion that United Nations action represents communal interests merely because it has been decided by the Security Council. Nonetheless, the thesis' usefulness remains limited precisely because its hermeneutic suggestion excludes reference to international norms.

During the past years, the foundational character of the hard facts of state power and interest to our understanding of international politics has been questioned from a wide variety of perspectives. The "level of analysis" approach already modified Realism's strong reliance on *states* as the basic units by which international acts should be explained.[40] Structural constraints and non-state actors seemed to create effects as well. Yet, even structural Realism's analytical priority for states may seem like an ideological move, justifying conservative policy and failing to account for the determining agency of class, economic system, or religious faith in the geopolitical, just as in the national, space.[41] Perhaps less controversially, liberal Internationalists have long insisted that the "globalization of politics" has formed interest groups and lines of battle that cannot be reduced to the application of power by states.[42] To "explain" the United Nations action in Somalia, for instance, in terms of a power play between members of the Security Council would undermine the extent to which humanitarian perceptions, institutional programs and ambitions, the legacy of East African colonialism, and the character of the Siad Barre regime account for the relevant events. Aside from states, we see both metropolitan (United Nations) and peripheral (Somali) actors, ideas, and interests as relevant.[43] To argue that things went so bad because there was no clear national interest to protect is a *non sequitur*: things went as they did because the events showed factors other than a "national interest" as relevant.

The concept of "power" is likewise famously contested. Realists' over-identification of power with military power was undermined by the end of the Cold War. Inasmuch as "power" is seen in larger terms of

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40. For the classic neo-Realist work which introduced the "level of analysis" concept, see KENNETH N. WALTZ, MAN, THE STATE AND WAR (1959). The level of analysis approach, however, is only a temporary resolution of the problem of adjusting theory to observable facts. A more fundamental problem relates to the constructive aspects of observation itself: whether we tend to see individual states, economic systems, ideologies, individuals, or transnational communities as the relevant actors seems dependent on our prior choice of the relevant "level" (matrix). The choice of the level, however, must be independent from the thing to be explained, i.e., on a pre-empirical evaluation of significance.

41. *See generally* ROSENBERG, *supra* note 35.

42. The ideas of "common security" and "comprehensive security" seeks to capture this image. For one recent reformulation, see COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD 78–84 (1995).

43. The argument draws inspiration from MICHAEL W. DOYLE, EMPIRES 22–30 (1986).

structure and knowledge, its embedment in other *explicanda* becomes evident.[44] Power is a matter of perspective. It receives meaning as threat or support depending on how we relate to it. It is applied as a means to an end different from itself. A study of ends, however, introduces normative elements into the explanatory matrix that cannot be grasped by the sort of empiricism that Realists espouse.[45] The establishment of economic sanctions on Libya by the Security Council in 1992 as a result of Qaddafi's unwillingness to extradite the suspects for the 1988 Lockerbie terrorist attack can clearly be seen as an application of power by the Western allies. But this is more the starting point than the end of the analysis. It would be difficult to understand the action without further reference to the role "terrorism" plays in Western political discourse, enabling the taking of extraordinary means — in this case the non-application of a valid treaty (the 1971 Montreal Convention against aerial terrorism) and the overrunning of the International Court of Justice. It is the normative construct of a specific "terrorism discourse" that makes possible the organization and application of physical power against Libya.[46]

Nor is "national interest" any more transparent. Whose interest is that? States, just like individuals, live in a network of partly overlapping, partly incompatible interests. Choosing an interest to base a policy is, as feminists have always argued, a normative act, and not something one automatically discovers after one has decided to further national interests. In any case, the assumption of a unitary national interest fails to account for, and even less articulate, the contrasting interest of a local population, minority, or women, for instance.[47] To say that Yemen supported Iraq in the Council during 1989–90 because that was in its interests is not only questionable insofar as Yemen's economic or diplomatic position was concerned (and undermines the effect of the ideological and religious links involved), but lifts the policy of the Yemeni male elite to a representational position inimical to other Yemeni interests.[48] In fact, a refer-

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44. Alexander Wendt, *Constructing International Politics*, INT'L SECURITY, Summer 1995, at 71, 73–75.

45. For the expanding literature challenging the empiricist/positivist bias of international relations studies and stressing the need to undertake normatively focused analyses, see generally CHRIS BROWN, INTERNATIONAL RELATIONS THEORY: NEW NORMATIVE APPROACHES (1992); MERVYN FROST, TOWARDS A NORMATIVE THEORY OF INTERNATIONAL RELATIONS (1986); MARK A. NEUFELD, THE RESTRUCTURING OF INTERNATIONAL RELATIONS THEORY (1995).

46. *See* Ileana Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119.

47. Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373 (1996); *see generally* AMERICAN SOC'Y INT'L L., STUDIES IN TRANSNATIONAL LEGAL POLICY NO. 25, RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda G. Dallmayer ed., 1993) [hereinafter RECONCEIVING REALITY].

48. The point is strikingly illustrated by the fact that in the first post-Gulf War elections in Kuwait in October 1992, only 14% of the country's 600,000 citizens were eligible to vote.

ence to "interests" is often no more than a sweeping gesture toward the truism, present since Vattel, that states act in accordance with their self-interest. However, the important point is that even "[s]elf-interest cannot be an unproblematic concept if the self is conceived as a set of constructed identities that need not be stable over time."[49]

Arguing that normative factors are either irrelevant or only marginally relevant to Security Council action undermines the degree to which any social action, including international activity, makes constant reference to normative codes, rules, or principles. Political events are never simply physical acts or people behaving empirically in this way or that.[50] They exist in relation to a shared normative code of meaning. Sending troops into another country is not a full description of an event: normative terms such as "aggression," "self-defence," "counter-measure," "territorial sovereignty," or "peacekeeping" are not solely disinterested descriptions of the events. They refer back to more general, systemic theories, assumptions, world-views, and prejudices that provide the implicit matrix that makes description possible. An account of the Gulf War that makes no reference to such notions but is content to refer to United States military or economic interests would be no understanding at all. It would fail to grasp the difference between that sequence of military moves and those to which they were a response, or between Kuwait and Panama, or Kuwait and the Soviet attack on Finland in 1939. The distinctions are normative and characterized as such by the various participants involved.

Let me illustrate these remarks by reference to the comprehensive conception of security. That an understanding of "security" should not be limited to military security, but should also encompass non-military threats to states and people, has become a commonplace of post-Cold War diplomatic language.[51] This expansion of the operating concept of "security" highlights the fact that explaining international action by reference to "security needs" remains an empty phrase unless "security" is first given a meaning. This involves an appreciation of what is signifi-

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Orford, *supra* note 47, at 390 & n.71.

49. Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT'L ORG. 73, 88 (1995).

50. See PETER WINCH, THE IDEA OF SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 108–11 (1958), and more recently, with special reference to modern international theory, NEUFELD, *supra* note 45, at 70–94.

51. *See* GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990s AND BEYOND 15–16 (1993); OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE, *supra* note 42, at 80–82; Barry Buzan, *New Patterns of Global Security in the Twenty-First Century*, 67 INT'L AFF. 431, 439–51 (1991).

cant to the identity of political communities called "states."[52] Again, an answer to that question depends on whether we see a state's identity in territorial, economic, institutional, ideological, gendered, religious, or constitutional terms.[53] Besides, the links between security and statehood are increasingly questioned, and diplomatic rhetoric has resorted to notions such as "common security," "comprehensive security," or even "human security" to describe the objectives of international policy. A reference to "security needs" as an explaining factor or an agreed principle of policy encounters, on the Realist side, the same difficulties that the attempt to define "aggression" has always (and famously) met on the Idealist side: the notions remain both overdetermining and underdetermining. On the one hand, every event that modifies the state's external environment poses a threat to the state, and may therefore be deemed to constitute "aggression" or "intervention." On the other hand, no event can permanently remain within these categories since the principle of inclusion may always be challenged by constructing the state's identity or its sphere of sovereignty in a novel fashion. The controversy is therefore normative — "what is significant for the identity of this state or for the furtherance of this type of policy?" — and not empirical.[54]

The matrix that describes the international world in terms of statal power policy has been challenged by interdependence theory and more recent research into the roles of culture, class, gender, and tradition for international affairs.[55] Nonetheless, as R.B.J. Walker notes, "a large proportion of research in the field of international relations remains content to draw attention to contemporary innovations while simply taking a modernist framing of all spatiotemporal options as an unques-

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52. *See, e.g.*, J. Ann Tickner, *Re-visioning Security*, *in* INTERNATIONAL RELATIONS THEORY TODAY 175 (Ken Booth & Steven Smith eds., 1995); Ole Waever, *Identity, Integration and Security: Solving the Sovereignty Puzzle in E.U. Studies*, 48 J. INT'L AFF. 389 (1995).

53. BARRY BUZAN, PEOPLE, STATES & FEAR 57–107 (2d ed. 1991).

54. The same point may be made by highlighting the degree to which the debate about the United Nations' or individual states' competence to intervene in internal crises constantly redefines the basis of sovereign statehood. Whether we believe "sovereignty" to be located in the "people," in the Head of State, or in the state's institutions will provide us with different, and often contradictory, justifications for or against intervention. From this perspective, statehood provides no limit for intervention. On the contrary, it is an effect of our assumptions about the right form of government. *See* WEBER, *supra* note 38. The resuscitated "constitutivist" approach to the recognition of states, which conditions statehood on domestic democracy and guarantees for minority protection, works, of course, in the same direction. *See European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 31 I.L.M. 1485 (1992).

55. For a particularly strong anti-statal matrix using the "deep-structure" of the capitalist world-system in which nationalism and universalism appear as historical or local instances, see IMMANUEL WALLERSTEIN, GEOPOLITICS AND GEOCULTURE: ESSAYS ON THE CHANGING WORLD-SYSTEM 139–237 (1991) (discussing the role of "culture" and "civilization" as the "intellectual battlegrounds" of post-Cold War policy).

tionable given."[56] This is partly a result of the fact that Realism encapsulates deeply entrenched commonsense assumptions. In part, it also follows from a real difficulty to see how the "innovations" would inform political practices. After all, as I have argued elsewhere, one can reimagine the structures of the international world only now and then. For the rest of the time we seem compelled to act within an actual political community.[57]

For present purposes, it suffices to note that the need to choose the matrix highlights the normative element hidden in Realist premises, an element sometimes revealed in private positions Realists have taken on moral or political issues.[58] By failing to take its normative commitments seriously (even at best marginalizing them into a problem of "ethics and international relations"), Realism opens itself to a political criticism which alleges that Realism lacks the instruments to defend itself. Moreover, lack of sensitivity for the non-descriptive undermines the instrumentalism upon Realism bases its claim for superiority. The kind of tragic heroism embedded in Realism's attempt to confront power and vice directly, without the mediating vessels of ethics/ideology, is undermined by the equally ideological character of that posture itself; the posture being equally a role within the drama of international diplomacy that it pretends to "describe," a role that, however logically compatible with fighting the noble fight (for a lost cause), too easily becomes a justification for complacency.

B. *The Engaged Perspective*

For Realists, reference to norms, such as the obligation to participate in common action under Articles 2(5) or 48 of the Charter, in an explanation of international politics appears as it appeared to the American legal Realists of the 1930s; namely, as transcendental nonsense, an "attempt to exorcise social evils by the indefatigable repetition of magic formulae."[59] Obligations are both causally ineffectual and unamenable to scientific inquiry. By contrast, the process whereby states apply power to advance their interests seems more firmly linked with observable reality

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56. R.B.J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY 7 (1993).

57. Martti Koskenniemi, Book Review, 89 AM. J. INT'L L. 227, 230 (1995) (reviewing RECONCEIVING REALITY, *supra* note 47).

58. The two standard examples are Morgenthau's opposition to the Vietnam War and Martin Wight's private pacifism. For a discussion, see Jim George, *Realist "Ethics," International Relations, and Post-Modernism: Thinking Beyond the Egoism-Anarchy Thematic*, 24 MILLENNIUM J. INT'L STUD. 195, 205–07 (1995).

59. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 260 (1940).

and may therefore appear amenable to causal hypotheses whose verity can always be checked by experience.[60]

That Realism is the *genre* of theory, and not engagement, is clear from its emphasis on causality. The acting subject is the external observer, the policy-scientist, possibly employed by a government office to "predict" the future course of international policy in order to formulate scenarios for appropriate response. In the previous section, I argued that Realism's causal models were dependent on, or could not be applied in abstraction from, normative choices regarding desirable courses of action. Here I make the point that causal description fails to grasp the ("internal") perspective of diplomats or lawyers working within an institutional environment such as the Security Council. For them, the argument that the Council's policy is caused by interests well-represented in the Council is as relevant or interesting a point to make as the argument to government officials that governments tend to propose legislation that advances the interests represented by the governmental coalition. Such statements, whatever their status otherwise, raise at least three points. First, neither statement has a necessary bearing on whether the proposed legislation or policy is *justified.* That the United Nations has dealt with the humanitarian crisis in Bosnia in an insufficiently effective manner because the resources, interests, or policies of the great powers have militated against full-scale involvement may or may not be true. But its truth or falsity is not a sufficient response to the question of whether the United Nations has been justified in acting in the way it has, or what might be the right course of action to proceed in the future.

Second, neither statement is helpful when it is precisely what those interests are or what kind of action best serves them that needs examination. To some extent, at least, the United Nations' hesitation at the outset of the crisis in the former Yugoslavia during 1991 reflects this problem. Was it in the Western allies' interests to prevent or to facilitate dissolution? This is not only a technical question. Often interests cannot even be identified without a prior political choice. Will participation in a Common European Defense be in the interests of traditional military neutrals such as Austria, Finland, or Ireland? An answer to this question depends on an earlier choice regarding whether the "natural home" of these countries is within or without a Western political community.

Third, and most fundamental, Realism's theoretical-empirical bias compels it to treat justification as a process of "façade legitimation," the dressing of the technically necessary policy in the garb of generally acceptable norms. This leads Realism into supporting manipulative

60. *Id.* at 260–84; *see also* J.S. Watson, *A Realistic Jurisprudence of International Law*, 1980 Y.B. WORLD AFF. 265, 266–67, *reprinted in* INTERNATIONAL LAW 3, 4–5 (Martti Koskenniemi ed., 1992).

diplomatic practices, approaches to negotiation that presume the primacy of the hegemonic powers. This is not simply ethically questionable, but also bad policy. For, inasmuch as "interests" or "security" are not facts of nature but social constructions, the effects of language and political preference, they cannot be distinguished from the justifications that seek to realize them. Whether or not dealing with an internal humanitarian crisis (such as Liberia in 1992 or Rwanda in 1994) should be seen as a matter of collective security, and thus the object of concerted action, cannot be adequately discussed by invoking a presumed causal chain from the crisis to the security of other states (through the resulting refugee problem, for instance), but involves a prior redefinition of the community itself — who are "we" as subjects of security?

In order to grasp the "internal" or engaged perspective on collective security, let me discuss the Security Council's reaction to the Iraqi attack on Kuwait in the fall of 1990 in the light of personal recollections of the role that legal argument seemed to play in the process.

During 1989–90, Finland was one of the elected members of the Security Council. I was posted at the Finnish Permanent Mission in New York at the time and assigned to serve as legal advisor to the Finnish Council team. The nine-member team was headed by the Permanent Representative who was not only Ambassador and Under-Secretary of State, but also a former professor of Political Science in Finland. Most of the team came from the political department of the foreign service. My position in the delegation was relatively humble, somewhere around the middle of the list. This corresponded closely to the place of my opposite numbers, the lawyers in the other fourteen delegations. We were neither among the leading policy-makers nor among the youngest rapporteurs.

I had no formal instructions to obey as the lawyer of the team. Of course, there were general guidelines applicable to all the members regarding the direction of Finnish United Nations policy, plus some more specific instructions in particular crises. But while it seemed evident to everyone that there had to be one lawyer (indeed, one was certainly enough) among the nine, there was no articulated explanation for this certainty. The same applied, I believe, to my colleagues, at least in the WEOG ("Western European and Others' Group") delegations. None of us had any specific "legal" instructions. The place of law in the Security Council was in this respect obscure. It was perhaps assumed that since we had done quite a bit of international law previously, we would know what to do at the right moments. Our role arose from a shared professional background, not from conscious planning.

Much of the lawyer's work was identical with that of others: sitting at informal and formal meetings, participating in recurring consultations headed by the month's president, and reporting home on a daily basis. The lawyer concentrated on textual aspects of resolutions, on those aspects of particular crises that involved legal status (such as the situation

in the Palestinian occupied territories) and on the negotiation of generally formulated, "legislative" resolutions (such as a resolution on plastic explosives and on terrorism[61]). From a policy perspective, these issues were neither quite central, nor fully marginal: my diplomatic placing corresponded to the level of my tasks.

In routine matters, the law's (lawyer's) role in the Council during 1989–90 arose from two informal considerations embedded in the working culture of the Council. First, the jurist was expected to assess the domestic and constitutional implications of particular resolutions. Second, particular geographically limited disputes that had been on the Council's agenda for a long time were allocated to political officials experts on the region or on the dispute itself. Contrary to received wisdom, law's role seemed the most limited in routine issues on which everyone had fixed positions and no dramatic moves were or could reasonably be expected. Where the political framework was stable, the lawyer was the handmaid of the politician, helping out if new language for negotiation and consensus was needed. That role depended on pragmatic considerations, not on any shared or articulated theory regarding the delimitation of legal and political matters.

However, things looked different when a non-routine issue emerged. On the night of August 2, 1990, Iraqi troops invaded Kuwait. I was on holiday in Finland on that day but returned to New York very soon thereafter. By the time of my return, the Council had demanded immediate withdrawal of Iraqi troops, established the obligation of non-recognition on member states, and implemented the first full-scale economic embargo on any state since the League of Nations' action against Italy in 1935–36.[62]

I have been trained as a Finnish career diplomat in the belief that in matters concerning the existence of states — such as the Kuwait crisis — Finland's vital interests, as determined by the political leadership, become the basis for our diplomatic action. Trained in the spirit of post-war Realism, I had little difficulty accepting that legal norms should in such cases defer to political requirements. Indeed, Finland's own experience with the League in 1939 seemed the best argument for this necessity.

As I returned to New York in the middle of August 1990, however, I was struck by the enthusiasm with which my "political" colleagues in the delegation had immersed themselves in a controversy about the legal status of the various courses of action taken by or available to the Council and to my own delegation. How should sanctions be administered? What about the blocking of Iraq's ports? What was the status of

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61. S.C. Res. 638, U.N. SCOR, 44th Sess., 2872d mtg., U.N. Doc. S/RES/638 (1989); S.C. Res. 635, U.N. SCOR, 44th Sess., 2869th mtg., U.N. Doc. S/RES/635 (1989).

62. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990).

Western troop concentrations in Saudi Arabia? What law applied to the Embassies in Kuwait City or in Baghdad? The delegation, as well as Helsinki, clearly believed that legal viewpoints were not only somewhat relevant, but in some respects central to devising a national position.

The headquarters acted in a similar way. I found permanent representatives and political colleagues grouping in the corridors with the little blue book — the U.N. Charter — in their hands, quarreling about the meaning of the various parts of Chapter VII of the Charter, giving contrasting interpretations about the extent of the right of self-defense under Article 51, and disagreeing about whether Article 42 (military sanctions) needed to be applied in conjunction with Articles 43 and 47 on the provision of national contingents and the role of the military staff committee respectively. Even Prime Minister Thatcher at one point took pains to argue that the concentration of coalition troops in Saudi Arabia before the Council had authorized the use of military force had been a perfectly legitimate application of the right of collective self-defense under Article 51.

How should we understand the fact that in the midst of one of the most serious cases of aggression in the post-war order, diplomats at the United Nations started invoking legal norms and arguing as if whatever action the United Nations or its member states could take was dependent on rules of law? A first point to make is that I do not think anyone saw the Council's role akin to a penal court, acting in Montesquieu's image as "*la bouche qui prononce les paroles de la loi.*" Though necessary, nobody thought it sufficient to establish what the law said. Of course, this would also have been bad law. The Council is not a court. It is not obliged to react in any predetermined way to any "breach of the peace, threat to the peace or act of aggression." Nor do these concepts spell out an "international crime" akin to "theft" under national law that would require the Council to order a "sanction."[63] The Council may react even in the absence of unlawfulness; and a violation of the law does not by itself trigger Council competence. Besides, as every national judge knows, Montesquieu's image is pure fiction. There is always choice and policy involved in law application, the relevant norms being open-textured and open to exceptions. This was a fact that was easy to agree upon in the Council.

A second possibility is to think that the delegations agonized over international law in the fall of 1990 not because they felt they had to find the "one right answer," but because they needed to determine what limits were imposed by the law upon Council "discretion." This would

63. For the juristic discussion about the nature of Chapter VII "sanctions" as police measures, see, e.g., HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 732–37 (1951).

be a liberal and a realistic response, imagining Charter provisions as a neutral framework leaving ample room for political maneuver. But this is not really psychologically plausible. "Law" and "discretion" did not exist in separate pigeon-holes in our minds. The legal debate did not "stop" at any point to leave room for a separate political choice; political choices were posed the moment the legal debate started.

A better metaphor than pigeon-holing for the law/politics relationship might refer to the contemplation of a landscape. In the morning, we see the colors of the trees and the reflection of the leaves on the water; in the evening, we notice the outline of the cliffs against the grey sky, and the shadow of the forest stretches far into the sea. The landscape is the same, the messages it conveys are different. The images are equally self-contained and full. We can reproduce both separately, but we cannot mix them. Likewise, law and politics seemed coherent and separate, yet related to one single reality.

And yet reality has a temporal dimension: morning turns into day and the evening begins sooner than we had noticed. In the Security Council, law and politics developed analogously into each other. As the debate progressed each successive moment added something to our understanding, until the original image had turned into its counterpart. We saw the landscape first in the brightness of legal language: aggression, sanctions, blockade, non-recognition. This language was used to give expression to the contrasting positions of the delegations. These were positions of the evening, visible only in an obscure, shadowy form, impossible to reach in description. The further the debate progressed, the clearer became the interdependence of light and shadow, law and politics, and the focus was increasingly on the boundary. The amount of time available determined the point at which debate had to finish and action had to be taken. Thereafter, that action, and its justifications, turned into precedent, calling for formal consistency in future behavior. Legal and political simultaneously, the long line of resolutions in the fall of 1990 sought to give effect to the ambitions of their drafters as well as to the Charter. In retrospect, we interpret them from both perspectives, yet we can do this fully only from one perspective at a time, by keeping the other outside our gaze.

There is, of course, a third possible understanding about the sense of these debates; namely, that they served only to camouflage the play of ideologies, power, and interests that were "really determining" behind a *legalistic façade*. What may appear as the brightest day is in truth the darkest night! There are two versions of this understanding. First, it may be assumed that part of diplomatic training is to learn to lie about one's true aims. Under this version, the debate in New York was a fraud. It is difficult to prove or disprove this suggestion which speaks about the real, though hidden, intentions of diplomats at the United Nations. Although I have to make allowance for the odd exception, I find this psychologi-

cally implausible. Most of the diplomats "honestly" felt that arguments about the Council's competence to order a blockade of Iraq's ports, for instance,[64] had intrinsic relevance. In any case, this criticism misses the point. These are arguments whose validity in no way presupposes honesty in making them. The legality of the blockade has nothing to do with the state of mind of the person invoking it. A day is a day if it looks like one. There is no deeper reality that might prove it otherwise; even our watches provide only a conventional temporal interpretation.

The same is true of the second version which provides that, notwithstanding the states of mind of delegation members, the legal debate was intrinsically without a consequence. Under this view, the diplomats were acting under a false consciousness, a legalistic ideology which camouflaged the fact that what was going on was use of power to further national interests. This kind of "Realism" is very common and presents an extremely critical picture about the United Nations assuming that diplomats do not really understand their job but act under a legalistic spell. I find it hard to support this understanding on an intuitive basis. The Finnish delegation, for instance, was *en bloc* trained as hard-headed Realists. If there had been indoctrination, it was surely not of the legalist sort. The architect of post-war Finnish foreign policy, President Paasikivi, once remarked famously that the Kremlin is no Court of Law, meaning (among other things) that sound legal arguments are a poor substitute for clever policy when it comes to Finland's relations with its Eastern neighbor. Though the historic background is of course different, I believe that this applied to the non-lawyers in the other delegations as well.

More important, however, is that this criticism presents an exclusively external perspective on the events. Legal arguments camouflage the determining force of political or economic power. That is their very point. In the morning we see light. But we know it is inevitable that darkness will fall, and we can examine it later, but not at the same time. However determining political power may be, it is irrelevant for delegations struggling to find public justification for Council action. It may be true that "international government is, in effect, government by that state which supplies the power necessary for the purpose of governing."[65] But such a causal assumption provides nothing to those examining the justifiability of proposed courses of action within an institutional structure.

This is my point about the role of law in the Kuwait crisis. In 1990, the traditional patterns of Council decisionmaking had become irrelevant

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64. For the Council's actions regarding the blockade, see S.C. Res. 665, U.N. SCOR, 44th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990).

65. EDWARD H. CARR, THE TWENTY YEARS' CRISIS 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 107 (Harper & Row 1964) (1939).

and inapplicable. There was no anterior political agreement, no long-standing negotiation with fixed positions, and no routine language to cover the events. The situation was canvassed nowhere but in the Charter itself. As the debate took on a legal style and an engaged aspect, the rest of formalism followed suit: the search for precedent (Southern Rhodesia for the management of economic sanctions) and consistency (in the formulation of the resolutions during the autumn of 1990), the concern for human rights, diplomatic inviolability, and humanitarian law were all strikingly central to the resolutions. Placing the argument in the context of law, there seemed to be no halfway house. The Council could not just apply some law in the Kuwait crisis, leaving the rest unapplied. Long shadows would have been inconsistent with the place of the sun in our landscape. After all, this was the same time as the signing of the "Charter of Paris" by the Conference on Security and Cooperation in Europe (CSCE) which stressed the need for the rule of law in the management of political societies.

It is an uninteresting truism that delegations couch decisions in legal garb to make them look more respectable. That is the point of law. Clearly both the United States and the Yemeni delegations, like those of Finland, Canada, and Romania, sought interpretations that would be in line with their (partly differing) policies. No delegation wishes to report to its capital that it cannot pursue the instructed policy because it cannot defend it in legal terms. Those terms will be found. But though this may appear to support the Realist critique about "façade legitimation," it fails to appreciate how legitimation or justification always has a "façade" aspect to it without this making it any less necessary. Justification is only more complex, tentative, and fragile than the Realist straw-man image of "rule application" would suggest. Newton may have come up with the theory of gravity by sitting under an apple tree and being struck by a falling apple. This causal account of the events, however accurate, is no explanation of his genius nor even a beginning of a theory of gravitation defensible in the scientific community. Newton's genius was in the act of justifying his intuition to his fellow scientists in the form of a coherent theory in accordance with the rules of scientific discourse, not in the process which causally produced it.

The engaged perspective that looks for justification differs from the construction of theories about determining causes by assuming the existence of and invoking an inter-individual, international, political community in which the speaker is situated. Saying that "I believe this is aggression because it suits me to think so" emerges from a solipsism in which others exist only as objects of want-satisfaction. By contrast, saying that this is "aggression" under Article 39 of the Charter invokes a 1945 agreement and a polity in which the speaker situates herself and every person to whom the statement is directed. The road to an undistorted communal life is of course not thereby created. Much more would

be needed for that purpose. Without justifying discourse, however, social life would be reduced to manipulative relationships: security will be the security of the king while no problem will seem too small for the intervention of the security force!

Law's contribution to security is not in the substantive responses it gives, but in the process of justification that it imports into institutional policy and in its assumption of responsibility for the policies chosen. Entering the legal culture compels a move away from one's idiosyncratic interests and preferences by insisting on their justification in terms of the historical practices and proclaimed standards of the community. Even if it does not, as both Formalists and Realists may have thought, lift the burden of substantive choice, it implies a recognition of the existence of a world beyond the speaker's immediate subjectivity. Only in this way can "security" maintain its beneficial, altruistic orientation, instead of invoking the somber association with the security police — arrests after midnight, featureless officials, and insulated cellars. As opposed to technical-instrumental rationality, a legal culture involves a "situational ethics,"[66] encompassing not only rules and principles (after all Realists were right in stressing their indeterminacy) but a fairness of process, an attitude of openness, and a spirit of responsibility that implicitly or expressly means submission to critique and dialogue with others about the proper understanding of the community's principles and purposes — in a word, its identity.[67] Law is what lawyers do, said Max Weber in one of the most adept definitions of it. He was of course thinking about national societies with a high degree of professional specialization. In the international context, law is what diplomats do when they debate the meaning of the U.N. Charter, the competence of the Security Council, or Libya's duties under particular Council resolutions. There is nothing *substantive* that would distinguish those debates from political *Diktat*. An enlightened despot or a monkey might sometimes succeed in reciting the right Charter article. What makes these debates *legal* is the manner in which they are conducted: by open reference to rules and principles instead of in secret and without adequate documentation; by aiming toward coherence and consistency, instead of a selective bargaining between "old boys"; by an openness to revision in light of new information and accountability for choices made, instead of counting on getting away with it.

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66. Robert H. Jackson, *The Political Theory of International Society*, *in* INTERNATIONAL RELATIONS THEORY TODAY, *supra* note 52, at 110, 124–27.

67. For a useful redefinition of Weber's "ethics of responsibility" so as to involve a dialogical relationship between the responsible agent and the person *to whom* the agent is responsible, see DANIEL WARNER, AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS 104–16 (1991).

Realism's theoretical-empirical bias would not be too serious if Realism remained content with its status as expert knowledge. But it does not. Realists stress the practical character of their information, its role in the formation of policy and statecraft. Thereby Realism itself becomes a sociological problem. Even as it readily concedes the (theoretical) separation of "is" and "ought" as a matter of practical consequences, it answers the latter by reference to the former. It thinks about peace, security, and social order in terms of "jobs" to be carried out, or a series of "problems" to be resolved. It hopes to do this by employing resources in accordance with advice from technical, intelligence, and military experts whose expertise is limited to the narrowest possible range of relevant "issues": nuclear deterrence, arms control, peacekeeping, diplomacy. The tricky and eminently political question of the meaning of "peace" in particular circumstances, indeed, the delimitation of the circumstance itself, is never raised and *cannot be raised without immediately posing the question of the qualifications of the experts charged to deal with it.* Was the "issue" in the Gulf War the old boundary disagreement between Iraq and Kuwait? The internal regime of these countries? Peace in the Middle East? Or was the "issue" access to strategic resources? It was treated as an "aggression" of one United Nations member state against another because that is the language of the Security Council, but it was managed through a military operation because "hard" issues of sovereignty are deemed to fall ultimately under the soldiers' realm of competence. In contrast, genocide in Rwanda would trigger principally the competence of relief workers and refugee organizations.

Difficulties in reaching political agreement at the global scale (which is the United Nations' scale) on the right characterization of local political events (do they implicate "security?") and priorities for action has led to an international culture of functional specialization and compartmentalization. This is nowhere more visible than in the separation of the United Nations' hard core political activities from its economic and social activities, with each body and each department in the Secretariat jealously guarding its individual allotment of problems to solve. The justification for a particular action is always given by the non-political, technical competence of the body dealing with it. Indeed, it often seems that the crucial decision about some particular policy is which organ or department is empowered to deal with it (or succeeds in monopolizing it). Once we know the organ or department, we already have a good idea about what sort of action will be taken.

In contrast, a legal culture is never only about *how* to get there. It also poses the question of what there is to get to. The lawyers' anxiety about the proper legal basis of a Security Council resolution always implicitly refers to the institutional teleology of the United Nations. It has two aspects which a purely instrumental debate lacks. First, it implies recognition of situatedness in a political community and openness to

dialogue with other members of the community. To put one's argument in terms of Articles 42, 43, and 47 of the Charter is to reaffirm the institutional character of the problem, a readiness to bind oneself to a policy *vis-à-vis* the others, and an assumption of the responsibility for so doing. Second, it entails a redefinition of the community's (the United Nations') constitutive principles and objectives. Legal argument is never deduction from self-evident rules. It always adds to our understanding of the law, and thus to the identity, objective, and principles of the community. The periodic fluctuations of the United Nations' image between that of an economic and social development organization and that of the guarantor of "peace and security" reflect a constant redefinition of the organization's identity as a result of its institutional policies.

There is in fact not much difference between standard Realism and its traditional rival, Institutionalism. Both are concerned about cause and effect in a description of the international world juxtaposing uniform agents (states) within a structure of international policy in which "power" is deployed for the attainment of "interests" and in which the aggregate result is characterized in terms of "peace/war." Where Realists assume that the best causal model reproduces the structure of the balance of power, and that any institutional policy must defer to this, Institutionalists agree, but argue that the best way for the balance to operate is to defer to institutions.[68] Accordingly, any description of the international world is capable of supporting both positions: the absence of peace may always be explained either as the absence of the balance or power, or as the absence of adequate institutions through which the balance could realize itself![69]

This indeterminacy of the Realist/Institutionalist debate is one result of their theoretical-instrumental bias. The anterior choice of the determining structures in a causal description of the international world is left unaddressed in both theories and the conclusions are hidden in their premises. Realist descriptions win if one already believes in the superiority of an understanding of the world in terms of atomistic and egoistic states obsessed by a power-maximizing urge. Institutionalist portrayals seem more compelling if one sees the world in terms of an underlying structural causation that views states as instruments for an underlying histori-

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68. Charles A. Kupchan & Clifford A. Kupchan, *The Promise of Collective Security*, INT'L SECURITY, Summer 1995, at 52 (a response to the criticism by Mearsheimer, cited *supra* note 5).

69. The same applies to international lawyers' standard response to the Realist challenge. To argue that most states do follow most of the rules most of the time may seem to rescue international law's "relevance" by showing the wide scope of application of its rules — but it does this only at the cost of their normative nature. The result is a description of international reality that underwrites both politics *and* law — obscuring the normative aspects of both in the process. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 143–53 (1989).

cal, economic, or military logic. To repeat: any fact situation can always be described in terms of either matrix while the choice of the matrix — indeed, the question whether the choice is more apparent than real — seldom enters the picture.

V. The Work of the Security Council

The European Congress system that was set up after the Napoleonic wars during 1814–15 is usually regarded as the first attempt at collective security. It was based on a statist ideology that held all threats against the *status quo* as security threats to be counteracted as necessary by collective force. Even Castlereagh was able to defend Austrian intervention against the revolution in Naples in 1820, which evoked much sympathy in Britain, by reference to Austrian security interests that had been sanctioned by the Alliance. The main interest was an undefined "security" to which other normative concerns had to defer. The fundamental problem of that system was clearly explained in an early British memorandum:

> The idea of an "Alliance Solidaire," by which each State shall be bound to support . . . all other States from violence and attack, upon condition of receiving for itself a similar guarantee, must be understood as morally implying the previous establishment of such a system of general government as may secure and enforce upon all kings and nations an internal system of peace and justice. Till the mode of constructing such a system shall be devised the consequence is inadmissible, as nothing would be more immoral or more prejudicial to the character of government generally than the idea that their force was collectively to be prostituted to the support of established power without any consideration of the extent to which it was abused.[70]

During the Cold War, issues of legitimacy and justifiability such as those raised in this memorandum could not arise as it was clear that there was no such "system of general government" to which they could be dealt with by reference. Now, however, the situation may have changed. The vocabulary of the CSCE Paris Charter of 1990[71] or of the Security Council summit declaration of 1992 suggests that at least governmental rhetoric has moved to a level that has prompted observers to speak about

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70. The Concert of Europe 42 (René Albrecht-Carrié ed., 1968) (quoting a memorandum on the Treaties of 1814 and 1815, submitted by the British Plenipotentiaries at the Conference of Aix-la-Chapelle, October 1818).

71. *Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe*, 30 I.L.M. 190, 193–208 (1991).

an "emerging right to democratic governance."[72] It may appear that the Security Council is now in a position to enforce the public morals of a new order.

Many of the Council's recent actions have been seen in this light, especially its readiness to intervene in civil wars[73] and its increasing resort to statements about the illegality of particular forms of state behavior.[74] Closely related are the Council's decisions to set up two war crimes tribunals[75] and a war reparations procedure,[76] as well as the authorization to use force to apprehend criminals.[77] The Council has demarcated and guaranteed boundaries,[78] enforced its own decisions by recourse to economic sanctions,[79] and authorized the use of force to ensure the departure of a military regime.[80] All of this seems justified through a redefinition of "security" by reference to a background conception of an international law, or of a public morality that has become the Council's business to enforce.

The most remarkable action in this respect has been, of course, the Council's much belabored economic boycott to force Libya to extradite

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72. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

73. *See, e.g.*, S.C. Res. 929, *supra* note 14, at pmbl. para. 10 ("[d]etermining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region"); S.C. Res. 794, *supra* note 14, at pmbl. para. 3 ("[d]etermining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security"); S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg. at pmbl. para. 5, U.N. Doc. S/RES/788 (1992) ("[d]etermining that the deterioration of the situation in Liberia constitutes a threat to international peace and security").

74. On the illegality of forcible territorial acquisitions and on the violation of the 1949 Geneva Conventions, see, e.g., S.C. Res. 836, *supra* note 14; S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992); *see also* S.C. Res. 941, U.N. SCOR, 49th Sess., 3428th mtg., U.N. Doc. S/RES/941 (1994) (all declarations concerning property made under duress are void). For an extensive overview of the Council's practice in condemning violations of international humanitarian law, see SIDNEY D. BAILEY, THE UN SECURITY COUNCIL AND HUMAN RIGHTS 59–89 (1994); *cf. supra* note 21.

75. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/RES/955 (1994); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993). It is particularly noteworthy that these resolutions also contain the statutes of the two tribunals (on former Yugoslavia and Rwanda) that *define* what law should be applied — a real legislative power.

76. S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th mtg. at 2, U.N. Doc. S/RES/692 (1991); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 7, U.N. Doc. S/RES/687 (1991); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg. at 3, U.N. Doc. S/RES/674 (1990).

77. S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 2, U.N. Doc. S/RES/837 (1993); *see also* S.C. Res. 978, U.N. SCOR, 50th Sess., 3504th mtg. at 2, U.N. Doc. S/RES/978 (1995) (call for all states to apprehend suspects accused of participating in the Rwandan massacres).

78. S.C. Res. 833, U.N. SCOR, 48th Sess., 3224th mtg., U.N. Doc. S/RES/833 (1993).

79. S.C. Res. 687, *supra* note 76.

80. S.C. Res. 940, *supra* note 14.

two Libyan citizens suspected of the terrorist attacks on the Pan Am flight over Lockerbie in December 1988 and the French UTA flight over Niger in September 1989.[81] The Council defined Libya's refusal to extradite the two men "as a threat to international peace and security."[82] There was no threat or use of force by Libya against any state. Libya's policy was simply too unacceptable, and therefore definable as a security threat, a position that overruled the provisions of an international convention in force between all the parties that would have allowed Libya to refuse extradition.[83]

For the Realists, these developments are just more power policy in disguise. Because the world remains as it was in Castlereagh's day, it would be illusory to think that the Council is acting to enforce some new code of morals or law. But, as I argued in the foregoing section, this is certainly not so from an engaged perspective. Whatever the Council does appears as an institutional activity and calls for an institutional justification. However, as recent debates on the concept of "threat to international peace and security" (and hence of the Council's competence) have shown, how such justification should be construed is by no means clear. Lawyers have sought 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 to try to create a link between them.[84] But the principles and purposes of the Charter are many, ambiguous, and conflicting. In particular, they are no less indeterminate than the original concept of "threat to the peace" that they pretend to clarify. If the Security Council takes action, does that not, by *fiat*, suffice to determine the issue? What more is there to say? For this reason, some have em-

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81. *See* S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/RES/731 (1992).

82. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at pmbl. para. 7, U.N. Doc. S/RES/748 (1992).

83. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126–27 (Apr. 14) [hereinafter Lockerbie Case]. For background and comment, see Fiona Beveridge, *The Lockerbie Affair*, 41 INT'L & COMP. L.Q. 907, 907–09 (1992).

84. Lockerbie Case, 1992 I.C.J. at 155–56 (Judge Bedjaoui, dissenting); *id.* at 170–75 (Judge Weeramantry, dissenting). Of the large commentary on the Lockerbie case, see, e.g., Jean Chappez, *Questions d'interprétation et d'application de la Convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie*, 1992 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] (Centre National de la Recherche Scientifique) 468, 477–79; Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 EUR. J. INT'L L. 184, 186–87 (1993); *see generally* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 399–400 (1991); HAGUE ACAD. INT'L L., THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING (René-Jean Dupuy ed., 1992).

braced the Kelsenian point that "[i]t is completely within the discretion of the Security Council to decide what constitutes a 'threat to the peace.' "[85] However, others have pointed out in impeccable legal logic that "the United Nations is the creature of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers which the treaty parties have assigned to it."[86]

In this controversy, law and politics keep deferring to each other in an endless search for authority and normative closure: texts constrain (law) — but need to be interpreted (politics); interpretative principles need to be applied (law) — but they are conflicting and ambiguous (politics); the International Court of Justice could perhaps decide the matter (law) — but the Court has no jurisdiction in "political" matters (politics); but is not the possibility for such judicial control implied in the Charter (law) — well, that depends on how it is interpreted, and so on.[87]

Yet the question about the justifiability of Council action under Chapter VII does not really pose itself in the abstract tone of whether or not the Council is "bound" by legal principles. It is much more concretely linked to the Council's handling of particular problems. If there is a problem about the legitimacy of Council action, as many argue,[88] it

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85. KELSEN, *supra* note 63, at 727; *see also* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 219 (6th ed. 1992) ("[A] threat to the peace is whatever the Security Council says is a threat to the peace.").

86. Thomas M. Franck, *The Security Council and 'Threats to the Peace': Some Remarks of Remarkable Recent Developments*, *in* THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING, *supra* note 84, at 83.

87. It is interesting how *all* the parties in the Lockerbie Case subscribed both to the view that law and politics were part of the same hierarchical structure as well as to their being hermetically isolated from each other. *Libya* claimed that the Council's resolutions "infringe . . . the enjoyment and the exercise of the rights conferred on Libya[,]" Lockerbie Case, 1992 I.C.J. at 125, and that there is "no competition or hierarchy between the Court and the Security Council, each exercising its own competence[,]" *id.* at 126. The former argument assumes that law and politics are part of the same structure, and that law (namely the law of the Montreal Convention) predominates — the second argument assumes that law and politics are separate, and that the Court should only be concerned with the former. The *United States* claimed that protecting Libya's rights "would run a serious risk of conflicting with the work of the Security Council[,]" *id.*, and that "Libya has a Charter-based duty to accept and carry out the decisions in the resolution," *id.* The former argument assumes again that law and politics are separate and that it is precisely because they are separate that they may conflict — and it is the Court's business to avoid such conflict. The latter argument links both into a hierarchical structure where law predominates — this time the law of the Charter (instead of that of the Montreal Convention). Neither party answers its opponent directly: If law should prevail, should it be the law of the Charter or that of the Montreal Convention? If law and politics are distinct, does this mean that the Court should ignore the possibility of conflict or prevent it?

88. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 293–94 (June 21) (Judge Fitzmaurice, dissenting); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

is precisely in its practical approach to its task. There are at least five broad groups of problems in this respect.[89]

The first problem is secrecy. Since the late 1980s the Council's practice of holding informal consultations has expanded rapidly.[90] Today, practically all the Council's substantive discussions take place outside the official meetings. Council delegations meet at the horseshoe table in front of the public only when substantive agreement has already been attained or proved impossible. There is in general no access to the *travaux préparatoires* of particular resolutions.

Secrecy is, of course, a general problem of the political activities of the United Nations. One example concerns the work of the Sanctions Committees, established for the management of the sanctions regimes (at the moment altogether six).[91] The Committees do not publish their records or even their interpretative decisions. With the insignificant exception of the Iraqi sanctions committee, and only with respect to the Iraqi arms embargo, the Committees do not report to the Council. As a result, there is no access for member states or the public to data that is crucial for an evaluation of the success of the economic measures, with the further implication that they will continue to be used as an article of faith, not as a rational policy measure.[92]

A second problem concerns the lack of procedural safeguards when the Council is acting in a judicial or quasi-judicial role. For example, its determination of Libya's guilt for complicity in the Lockerbie terrorist attack and its liability in resolution 731 in January 1992 fell below all standards of procedural fairness.[93] Nor did the Council take into account Iraq's claims when in 1993 it determined the place of the long-disputed Iraq-Kuwait boundary.[94] And the basis on which the Iraqi Compensation Commission distributes compensation is far from clear.[95] In fact, the Council has so far been unable to put its provisional rules of procedure

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89. *See also* Koskenniemi, *supra* note 22, at 345–47.

90. *See* G.R. BERRIDGE, RETURN TO THE UN: UN DIPLOMACY IN REGIONAL CONFLICTS 3–11 (1991); *cf.* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 95 AM. J. INT'L L. 83, 86 (1993).

91. For descriptive overviews, see *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 49th Sess., at 5, U.N. Doc. A/49/1 (1994); Nico Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective*, *in* INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 123 (Harry H.G. Post ed., 1994).

92. For descriptions and criticisms, see Paul Conlon, *Legal Problems at the Centre of United Nations Sanctions*, 64 NORDIC J. INT'L L. (forthcoming 1995); Martti Koskenniemi, *Le comité des sanctions (crée par la résolution 661 (1990) du Conseil de Sécurité)*, 1991 A.F.D.I. 119; Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L. 771 (1993).

93. *See* Graefrath, *supra* note 84, at 187–91, 196, 204.

94. S.C. Res. 833, *supra* note 78.

95. *See Report of the Secretary-General Pursuant to Paragraph 19 of the Security Council Resolution 687 (1991)*, U.N. SCOR, 46th Sess., at 7, U.N. Doc. S/22559 (1991).

into a definite form. However, since most of its activity takes place in informal consultations, a mere formalization of its public procedures would be of little avail. It has traditionally been argued that it is not the Council's business to engage in the material settlement of disputes. Practice has shown, however, that in cases where an argument can be found based upon the Council's primary responsibility to uphold or restore peace and security, even the imposition of a binding settlement does not fall outside the Council's competence.

A third group of problems relates to the Council's lack of accountability both within the United Nations system and beyond. Much discussion has centered on the possibility of judicial control over the Council's actions by the International Court of Justice. It may be more relevant for the General Assembly to use its powers, for instance its budgetary powers, to seek to influence or override the policy of the Council.[96] In addition, a revitalization of the "right of last resort" of member states might be a non-negligible means to enhance the Council's accountability.[97] However, none of these means answers the need to enhance the Council's accountability to the groups of individuals and populations that are affected by its actions.[98] It is not easy to see how this might take place, aside from increasing the transparency of the Council's activity. The suggestion to reserve a right of participation in the Council's debates for the representatives of local and other special interests would be a step in a positive direction, although its impact would of course be much diminished by the practices of secrecy.

A fourth set of problems is related to the Council's lack of commitment to the policies it has chosen. The weakness of its reaction to the crisis in the former Yugoslavia is a famous example. The practice of authorizing member states to take military action on the Council's behalf is another abdication of its responsibility; however, many delegations explain it as a lack of resources on the United Nations' part. The same explanation is given for the Council's lack of adequate political and material support to the two war crimes tribunals. Much publicity has concentrated on the situation of the Yugoslavian war crimes tribunal. The Rwandan case seems even worse. By the end of August 1995, some sixteen months after the genocide, the work of the war crimes tribunal had not even commenced, while 51,000 prisoners were being held in

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96. For a skeptical view in this respect, however, compare Francis Delon, *L'Assemblée générale peut-elle contrôler le Conseil de sécurité?*, *in* LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES, *supra* note 21, at 239.

97. *See* DAN CIOBANU, PRELIMINARY OBJECTIONS RELATED TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS 173–79 (1975) (discussing a state's right of last resort under the laws of the United Nations).

98. *See* Orford, *supra* note 47.

Rwandese prisons in facilities meant for 12,500.[99] A technical reason, such as lack of resources, cannot function as a justification here. The resources do exist in member states but are not allocated for a purpose that might seem marginal or risky to potential contributors.

Finally, there is the much belabored question of the representativeness of the Council as reflected in its composition. Most member states and many observers view this as the Council's main problem, and suggest amending the Charter so as to enhance its democratic legitimacy. Aside from the diplomatic impossibility to agree on the amendment, I am uncertain about the suggestion itself. As I have argued more fully elsewhere, the Council's role is to co-opt military power for the service of the organization. Enhancing its democratic image supports even more expanded powers for it, a consequence which I find objectionable.[100] Inasmuch as it makes sense to speak of democracy in a statist international political system (which is by no means self-evidently beneficial rhetorical strategy), it is surely the job of the General Assembly to imagine the political community whose boundaries are then to be policed by the Council. A number of suggestions to review the Council's working patterns have been dealt with recently by United Nations bodies. The Council itself initiated a number of minor, but still beneficial, amendments to its procedures.[101] The Secretary-General has suggested reviewing the practices that relate to the management of economic sanctions.[102] In 1994, the General Assembly stressed the need to increase the transparency of the Council's activity and requested more detailed information from the Council for this purpose.[103] A working group was set up to look into the composition of the Council and its working practices. While the democracy problem has, in the course of 1994 and 1995, proved as intractable as in the past, without any agreement emerging on how the Council's composition could be amended, a number of proposals have

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99. *Letter Dated 29 August 1995 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/762 (1995); *see also Third Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, U.N. SCOR, 50th Sess., U.N. Doc. S/1995/741 (1995).

100. Koskenniemi, *supra* note 22.

101. These include regular briefings by the president of the Council to the president of the Assembly and the chairmen of regional groups, consultations with troop-contributing and other "interested" countries, daily publication of the agendas of the Council's informal consultations, monthly circulation among the permanent missions of its program of work, "orientation debates" open to all members as the Council begins the consideration of new items, and the reconsideration of the format of its reports to the Assembly. *Question of Equitable Representation on and Increase in the Membership of the Security Council*, U.N. GAOR, 49th Sess., Agenda Item 33, U.N. Doc. A/49/965 (1995). Not all of these, however, have yet been implemented.

102. *Supplement to An Agenda for Peace: Position-Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra* note 15, ¶¶ 66–76.

103. G.A. Res. 264, U.N. GAOR, 48th Sess., 102d plen. mtg., Agenda Item 53, U.N. Doc. A/RES/264 (1994).

been presented to the working group on the secrecy issue.[104] The thrust of the proposals is to increase the transparency of the Council's activity with regard to non-members and especially "interested states." While many proposals repeat the minor modifications already introduced by the Council itself, other proposals underline the need to clarify the division of competence among the Council and other United Nations bodies, to review the practice of economic sanctions, and to update and make permanent the Council's provisional rules of procedure.[105] The proposals do not seek to modify the statist image of collective security, but they do go some way toward strengthening legal culture within the Council.

VI. Security and Law as Institutional Cultures

If there is any single point on which Realism agrees with Institutional formalism, it is expressed in this one sentence by the most paradigmatic of the formalists, Hans Kelsen: "By its very nature, collective security is a legal principle, while the balance of power is a principle of political convenience."[106] Realists embraced this definition and rejected collective security precisely as the kind of legalistic Utopianism whose failure seemed the single most important lesson from the League of Nations experiment. *De maximis non curat praetor.* Today, most lawyers have accepted that if law has a role to play in matters of security, it is as a handmaid to state power and interest, a facilitator for politics to take its natural course "by rationalizing and stabilizing the existing and improvised means of collaboration between [the] Powers."[107] The favorite metaphor invokes traffic regulation: the law's role is based on its usefulness for states in the same way as rules of the road are useful to motorists. "But it is precisely in the vital realm of power relations that it is at its weakest."[108]

The assumed primacy of policy over law implies both the existence of fixed and verifiable state security interests and the presence of reliable information on the causal chains that allow their realization. In this image, shared by Realists and Institutionalists alike, law is purely external and instrumental, something that decisionmakers choose to ignore or apply at their will when seeking to fulfill interests and values. This is the modern image of the "gardening state," the image of public policy in the

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104. *Question of Equitable Representation on and Increase in the Membership of the Security Council, supra* note 101, Annex.

105. *Id.*

106. Hans Kelsen, Collective Security Under International Law 42 (Naval War College Int'l L. Series No. 49, 1954).

107. George W. Keeton & Georg Schwarzenberger, Making International Law Work 96 (1946) (making this point about the United Nations' role).

108. Hoffmann, *supra* note 1, at 89.

service of human betterment.[109] In this image, international security appears as a function of bureaucratic management skills in the combination of unilateral with institutional policies.

However, much of our late modern experience suggests skepticism about the ability of public decision processes to reach their goals. In the first place, there is uncertainty about those goals — whether their familiar rhetorical forms actually encapsulate shared values or interests. The present consensus about a new "world order" is not immune from the observation by E.H. Carr that "as soon as the attempt is made to apply these supposedly abstract principles to a concrete political situation, they are revealed as the transparent disguises of selfish vested interests."[110] Second, even if there were agreement on such values or interests, we seem to lack information about how they can be reached. Our science and technology no longer seem reliable guides for action. Sometimes the solution of problems creates new, unforeseen, and often more serious problems, making the very process of policy as "problem-solution" inherently suspect.

For such general reasons, there is room for skepticism about the instrumental nature of law, its ability to express and to realize values, interests, or indeed, "security."[111] This skepticism is in no way diminished by a reason specific to the law, such as the indeterminacy of its rules and principles. Instead of being an external, objective instrument for policy, law is enmeshed with the same uncertainties as policy — its application remaining simultaneously a political act.

Realism and Institutionalism both imagine the law as an instrument for political purposes. This, I argued earlier, is an offshoot of their theoretical-empirical bias, that bias itself being inseparable from the modern image of the "gardening state" and supporting an international culture of technical expertise in the manipulation of "power" for the enhancement of "interests." I want to contrast that with my favorite quote from George Kennan who once depicted international law as having "the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest[.]"[112] Despite the intended irony, the quote reveals an important truth about international law as a cultural instead of an instrumental phenomenon, highlighting the engaged aspect of the law, its being "inside" social practices instead of "outside" them as an objective language or a formal procedure. From that aspect, law acts as a spirit or an attitude that involves recognizing the communal situatedness of the speaker: hence its

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109. ZYGMUNT BAUMAN, MODERNITY AND AMBIVALENCE 20, 26–39 (1991).

110. CARR, *supra* note 65, at 87–88.

111. For one useful discussion of the significance of such (and other) anti-instrumental themes for legal practice, see Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988).

112. GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900–1950, at 54 (1951).

curious, yet typical, ability to engage the practitioner in political action while seeking distance from anyone's idiosyncratic interests. Engaging in the formalism of the legal argument inevitably makes public the normative basis and objectives of one's actions and assumes the actor's communal accountability for what it is that one is justifying. It is the antithesis of a culture of secrecy, hegemony, dogmatism, and unaccountability.

For a brief moment in the autumn of 1990, the political context within the Security Council seemed open and institutional culture might have been revised. By early 1991, that momentum was gone. The Council met only once during Operation Desert Storm, and even then in a closed session. There is no longer much debate around the meaning of collective self-defense, or the relationship among Articles 42, 43, and 47. The long list of procedural problems, however, that remain under discussion in the General Assembly as well as, to some extent, in the Council itself, remain relevant for the development of a legal culture within the Council. Many factors work against such development. The background of diplomats at the United Nations who serve in the Council has traditionally focused on the hard realities of power politics — one does not get into a Council delegation by having served in development assistance! The routines and composition of the political secretariat of the United Nations are equally resistant to legal culture, as are its administrative inertia, lack of resources, recruitment policies, and the relative isolation of the office of legal affairs from the political centre.

For me, it seems clear that law has a place in collective security as a working culture of the "gentle civilizer" by opening conceptions and practices of "security" to public debate, and by enhancing the accountability of governmental and international institutions for what goes on under the label of "security policy." That security has expanded beyond its military and statist component highlights its political and constructive aspects and the inadequacy of the practices within the United Nations (and elsewhere in international organizations) through which "security matters" have been handled. Security can no longer be seen in terms of expert knowledge managed through secret bureaucratic routines, but as one theme among others that seeks to articulate the political values on which we claim to base our communal identities.