

## NOTES & COMMENTS

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# UN Collective Security and the Transitional Period: A Myth over the Founding and Aims of the United Nations

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*UN Secretary General Kofi Annan in the 2004 Report of the High-level Panel on Threats, Challenges and Change, "A more secure world: Our shared responsibility" (under the heading "A more effective United Nations for the twenty-first century" stated: "The United Nations was never intended to be a utopian exercise. It was meant to be a collective security system that worked." However, several authors in recent years have asserted that the victorious powers merely wanted to maintain the status quo and their privileged positions, and never intended the system to work and give up those privileges. This paper, however, argues the contention that the UN was never designed to function effectively, is a myth, and it does not take into account important aspects and innovations that presented decisive new developments that originated with the United Nations. Thus the international court, which had in the interwar period been an institution outside the framework of the League of Nations Covenant, became an integral part of the UN system, making it more closely resemble a government with legislative, executive and judicial functions. Even more prominent, concerning the executive branch, the Security Council, unlike what had been the case with the League Council, opened itself to instigate members to delegate powers for its effective functioning. This was a most significant innovation that would allow for democratic process in the organization and defence of peace. Finally, a new principle in international law, i.e. the concept of a "transitional period" for world organization, was conceived.*

### Keywords

Dumbarton Oaks, San Francisco Conference, United Nations Reform, disarmament, Article 106 of the Charter, Collective Security, Transitional Security Arrangements

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## 1. Introduction

I want to write of the ... history ... of a world that is treated virtually as a forbidden subject in an increasingly parochial culture that celebrates the virtues of ignorance, promotes a cult of stupidity and extols the present as a process without an alternative ... A world in which disappointment breeds apathy and, for that reason, escapist fantasies of every sort are encouraged from above.<sup>1</sup> - Tariq Ali -

Certain subjects are so holy that it becomes an act of virtue to lie.<sup>2</sup> -V.S. Naipaul -

This article aims to clarify some of the portentous issues related to the history, the purpose and the underlying principles upon which the United Nations was founded. It will be argued that the dynamics inherent in the idea of the organization of the world for perpetual peace, since the first union of the Hague Peace Conference in 1899, has propelled peoples and nations towards progressive international cooperative union, aimed first and foremost at outlawing war as an institution, and ensure peoples' freedom, prosperity and progress. As a historian, I am disturbed and dumbfounded when I find that relevant literatures, including history school books, fail to mention issues pertinent to international peace and security. One such example are the Hague Peace Conferences in 1899 and 1907, which constituted the "International Union of The Hague,"<sup>3</sup> as the German jurist and neo-Kantian Walther Schücking (1875-1935) called it, and which were the first "truly international assemblies meeting in time of peace for the purpose of preserving peace."<sup>4</sup> Remarkably, the Hague Conferences already aimed at disarmament and abolishing war by making resort to an international court with adequate binding powers for the resolution of conflicts obligatory. Among the Great Powers in favour of "obligatory arbitration," as it was then called, were the United States, Great Britain, France, Russia, Persia and China. In fact, the great majority of nations participating in the conferences concurred. The International Union or Hague

Conference of the International Peace Research Association (IPRA), in Leuven, Belgium, on July 15, 2008, and updated. The author may be contacted at: kschlichtmann@law.email.ne.jp/Address: Nakakayama 452-35, Hidaka-shi, Saitama-ken, 350-1232 Japan.

<sup>1</sup> TARIQ ALI, THE CLASH OF FUNDAMENTALISMS. CRUSADES, JIHADS AND MODERNITY 1-2 (2003).

<sup>2</sup> STEWART L. UDALL, THE MYTHS OF AUGUST 173 (1994).

<sup>3</sup> WALTHER SCHÜCKING, THE INTERNATIONAL UNION OF THE HAGUE PEACE CONFERENCES (1918). Schücking asserted that: "a definite political union of the states of the world has been created with the First and Second Conferences," the reason being that various agencies were created by the Conferences, like the Permanent Court of Arbitration, which acted as "agents or organs of the union." *Id.* at vi.

<sup>4</sup> FRANCIS HARRY HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES 139 (1963).

“Confederation of States,” dubbed the assemblies, was the forerunner of the United Nations, and the League of Nations (1919-1946). A Third Peace Conference was planned for The Hague in 1914 (subsequently rescheduled for 1915), where in addition to the question of obligatory arbitration, an international executive, conceived as an “international police of the seas,” as the Dutch jurist and diplomat Cornelis van Vollenhoven and others proposed,<sup>5</sup> was also to be discussed.<sup>6</sup> The question of obligatory arbitration that had previously required a consensus would, it was expected, be agreed upon by a majority vote. These ideas, however, were something that those opposed to The Hague were preparing to prevent by all means.

The First World War put an end to the dream of disarmament and realizing the idea of an international executive in 1914. With the founding of the League of Nations in 1919 a system of Collective Security was created, meant to replace the precarious balance-of-power system<sup>7</sup> that Woodrow Wilson had denounced: “[T]here must be,” Wilson said, “not a balance of power, but a community of power; not organized rivalries, but an organized common peace.”<sup>8</sup> That was significant. However, an issue that needed to be addressed was the question of sovereignty.<sup>9</sup> Collective security, as the experience of the interwar period eventually would show, could only function if nations agreed to limitations of their national sovereignty in favor of an “organized common peace.” However, this was not something the powers could or wanted to impose.<sup>10</sup> Yet it would eventually, after the Second World War and the failure of the League, become

<sup>5</sup> C. van Vollenhoven, *The Enforcement of Sanctions in International Law By Means Of an International Police System*, Paper sent to the International Peace Bureau for transmission to the Hague Peace Congress, Publications of the International Peace Bureau 7 (August 1913): “[O]ne could begin with an international navy, as the sum of all ... individual navies.” Also, see House Joint Resolution adopted on June 4, 1910, stating: “Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that a commission of five members be appointed by the President of the United States to consider the expediency of utilizing existing agencies for the purpose of limiting the armaments of the nations of the world by international agreement, and of *constituting the combined navies of the world an international force for the preservation of universal peace*, and to consider and report upon any other means to diminish the expenditures of government for military purposes and to lessen the probabilities of war.” [Emphasis added]

<sup>6</sup> LA PALAIS DE LA PAIX: MEMOIRE PUBLIE PAR LA REDACTION DE “VREDE DOOR RECHT” A L'OCCASION DE L'INAUGURATION SOLENNELLE DU PALAIS DE LA PAIX A LA HAYE, LE 28 AOUT 1913 (1913).

<sup>7</sup> For details, see F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES 1920-1946* (1986).

<sup>8</sup> SUMNER WELLES, *THE TIME FOR DECISION* 378 (1944).

<sup>9</sup> *Bardo Fassbender, Sovereignty and Constitutionalism in International law*, in NEIL WALKER (ED.), *SOVEREIGNTY IN TRANSITION* 129 (2003): “[s]overeignty is a collective or umbrella term, denoting the rights which, at a given time, a state is accorded by international law, and the duties imposed upon it by that same law. These specific (‘sovereign’) rights and duties constitute ‘sovereignty’; they do not flow from it.”

<sup>10</sup> COMMISSION TO STUDY THE ORGANIZATION OF PEACE, *SECOND REPORT: THE TRANSITIONAL PERIOD*, at No. 379 (International Conciliation) 164 (April 1942): “It is conceivable that the power of the victors would be so great that they could compel other nations ... this, however, would be the same type of world order that the Nazi regime seeks ... The only alternative which accords with democratic principles is that which has been adopted by the United Nations, voluntary organization and control by the majority of the community.”

part of many nations' democratic constitutions, especially those promulgated in liberal Europe. Furthermore, collective security required a consensus among the Great Powers, who were to be given the task of guarding the democratic process of the evolution of a supranational authority, required, it was believed, to achieve a permanent and positive peace.<sup>11</sup> Given that the Great Powers of the Hague Union had already agreed amongst each other concerning the most pressing questions of the organization of peace, this did not seem to be an insurmountable problem. The UN Charter after the Second World War was designed to adequately address these problems.

## 2. War Aims 1942-1945

To demonstrate the purpose that inspired the Allies during the Second World War with regard to their ambition to create an effective post-war world organization a few examples are in place. Since this was already the third attempt, the ideas expressed by both official and academic opinion were informed by pragmatism and realism.<sup>12</sup> US Secretary of State Cordell Hull (1871-1955) also emphasized that the era of pacts, military alliances and the traditional balance-of-power system was over.<sup>13</sup> To ensure the new paradigm's success, as political scientist and pacifist Quincy Wright (1890-1970) asserted in an article to the Commission to Study the Organization of Peace in 1942, it

<sup>11</sup> *Id.* at 162. However, "they must ... make it clear that ... they seek for themselves no special material or political advantage. They must leave no doubt of their intention to turn over their power to institutions created and maintained by the community. The permanent institutions of the world order should evolve from consultation with and consent of the peoples who are to be subject to them. Only in this way can they be expected to command the loyalty and support of all."

<sup>12</sup> Walter Lippman believed the United States should "consolidate the strategic and diplomatic connections, already existing, of the Atlantic Community: that is to say with the British Commonwealth and Empire, with Pan-America, with France and her empire with Belgium, the Netherlands, and their colonies, with Luxembourg, Norway, Denmark, Iceland." The United States should "strive to extend" these links in the direction of Portugal, Spain, Italy, Greece, Ireland and Sweden. Lippman was both pragmatic and idealistic, and had as a young man "written an interpretation of Wilson's Fourteen Points." He had also, in 1915, been in favor of a 'world state' as the "ultimate objective for a peaceful and prosperous world," and as historian Joseph P. Baratta has shown, was "typical of sophisticated internationalists who retained all his life the standard of ultimate world federation." See JOSEPH PRESTON BARATTA, *THE POLITICS OF WORLD FEDERATION* 39 (2004); WALTER LIPPMAN, *THE STAKES OF DIPLOMACY* (1915).

<sup>13</sup> WALTER LIPPMAN, *U.S. FOREIGN POLICY AND U.S. WAR AIMS* 216 (1944). With respect to the defeated Axis powers Cordell Hull thought that the United States "should make it the primary aim of the Far East settlement that Japan shall not hold the balance of power in the Far East among China, the Soviet Union, and the United States; [the US] should make it the primary aim of the German settlement that Germany shall not hold the balance of power between the Atlantic Community and the Russian Orbit." *Id.* at 217.

would be necessary to envision a “transitional period” for the time after the war.<sup>14</sup>

Already in 1924 the Fifth League Assembly had adopted the Geneva Protocol which endorsed certain measures that were later included in the UN Charter, i.e. a general, comprehensive scheme of arbitration, comprising “three distinct sets of policies: the regulation of armaments, the pacific settlement of disputes, and collective action.” These were henceforth considered the “three essentials of security.”<sup>15</sup> The Geneva Protocol was to give the League teeth.<sup>16</sup> Although it was not ratified, the trend was clearly toward a supranational, universal system. To achieve this, an initial impetus was required, an input by national lawmakers in the democratic countries committing to delegate powers to the world organization—an act of sacrifice in a process of relinquishing the right to prepare for and make war. Although this principle also found expression in the Japanese Constitution, this was to be a task especially for the Europeans, who were more unequivocal in this regard.<sup>17</sup>

Positions taken by prominent leaders of the United Nations in and after 1942 were regularly published by the United Nations Information Office in New York under the heading “War and Peace Aims.” In accordance with what Quincy Wright had stated earlier, the engulfing understanding was “to start a new conception of world organization.”<sup>18</sup> Paul Henri Spaak (1899-1972), the Belgian Foreign Minister expressed this view on February 26, 1943 as follows:

The absolute sovereignty of states, economic isolation [and the like] ... are outworn conceptions today. If the world of tomorrow were to cling to them we should soon be witnessing another breakdown, with another war as the ultimate consequence.<sup>19</sup>

<sup>14</sup> QUINCY WRIGHT, POLITICAL CONDITIONS OF THE PERIOD OF TRANSITION, INTERNATIONAL CONCILIATION 266 (1942) Wright stated that: “[T]he problem is not to restore an earlier situation but to build a more adequate world order.” See also ROBERT P. HILLMAN, QUINCY WRIGHT & THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 4 GLOBAL GOVERNANCE 486 (Oct.-Dec. 1998): “The Commission’s influence on the soon-to-be-created UN is beyond question.”

<sup>15</sup> Andrew Martin, *Collective Security*, in A PROGRESS REPORT OF UNESCO 9-10 (1952). “Psychologically the system of collective security has two functions to perform: it should act as a deterrent to potential aggression and at the same time impart a sense of security to all participating States.” *Id.* at 130.

<sup>16</sup> Unfortunately it was not ratified, due to a change in the British government. This was a “serious setback to the cause of collective security.” *Id.* at 114.

<sup>17</sup> Japan is the only country that has in its constitution already limited its sovereign powers and ‘abolished war.’ See Klaus Schlichtmann, *The Constitutional Abolition of War in Japan. Monument of a Culture of Peace?*, 32 INT’L ASIENFORUM-INT’L Q. ASIAN STUD. 123-149 (2001).

<sup>18</sup> WLADYSŁAW SIKORSKI, WAR AND PEACE AIMS (1942), Extracts from Statements of United Nations Leaders: Special Supplement No. 2 to the UNITED NATIONS REVIEW, December 1, 1943. United Nations Information Office, New York, 76. The Polish Prime Minister in exile further stated: “[W]e must strive for a constructive ideal, the idea of confederation.”

<sup>19</sup> *Id.* at 76.

On April 15, 1943, Britain's Viscount Cranborne (1893-1972), a member of the House of Lords, pinpointing the basic problem the future society of nations would have to tackle, asserted:

The League was an association of sovereign States. How far can an association of sovereign States achieve the objects which we all have in view ... This question of sovereignty in my view ... is probably the hardest one the nations will have to face after the war.<sup>20</sup>

Quincy Wright had similarly declared after the war national governments would have to subject themselves to the "limitations of sovereignty necessary," to ensure that the new world organization, including Europe, would "function successfully."<sup>21</sup> According to the plan, a "unified directorate of the transitional period should have the primary responsibility" and power, to guarantee that "all national military air forces" were eliminated<sup>22</sup> and sea power would be transferred "to a world authority."<sup>23</sup>

The Netherlands Foreign Minister-in-exile Dr. John Loudon (1866-1955), during an address in Cincinnati, U.S., on April 17, 1943, stressed the global dimension of international security:

Any solution of the European problem with Great Britain and Russia is no longer a European solution, Britain and Russia being not only European, but world powers. A solution of the European problem without Russia would inevitably result in German hegemony over all the other European countries. A strictly continental European solution is decidedly not possible.<sup>24</sup>

In addition, the Czech President, Edvard Beneš (1884-1948), addressed himself in Chicago to the "principles of collective security in Europe" with these words:

The organization and tasks of the future system of collective security is likely to be a practical, political structure, built up in course of time, step by step in accordance

<sup>20</sup> *Id.* at 80.

<sup>21</sup> Wright, *supra* note 14, at 273.

<sup>22</sup> *Id.* at 276. The full sentence reads: "It seems probable that permanent maintenance of national security in Europe will require the establishment of a European union with powers extending at least to the maintenance of an air force to protect frontiers against aggression, to the limitation of national armaments, probably eliminating all national military air forces..."

<sup>23</sup> *Id.* at 278. "General disarmament arrangements" would permit "each government [only] to maintain adequate land forces to police its territory and defend its frontiers." *Id.*

<sup>24</sup> Mr. Loudon: Address on International Security in the Post-War World Delivered before the National Defense Meeting of the Daughters of the American Revolution, Cincinnati, Ohio, April 17, 1943, in LOUISE W. HOLBORN (ED.), WAR AND PEACE AIMS OF THE UNITED NATIONS: FROM CASABLANCA TO TOKYO BAY, JAN. 1, 1943 - SEPT. 1, 1945, 939 (1948).

with practical requirements, *not from the top down but, proceeding from practice.*<sup>25</sup>  
[Emphasis added]

This was close to what the British historian E. H. Carr had in mind, when he postulated that the postwar “agreements, definitions and rules” were to be “determined, not theoretically according to some *a priori* conception of a league, alliance or federation, but empirically as the outcome and expression of a practical working arrangement.”<sup>26</sup> The Danish Foreign Minister Henrik Kaufmann (1888-1963) was speaking in the same vein when he said,

it will be necessary ... to curtail what is called the ‘sovereign rights’ of the individual nations. This will be comparatively easy for the small nations. Denmark ... had already gone far in this respect, and had agreed to submit any question without exception to international arbitration ... The Danes, you may say, have gradually changed, out of sheer necessity, from Vikings into more peaceful souls, otherwise they would not exist today...<sup>27</sup>

These voices were echoed in the United States:

This does not mean creating overnight a world government with sweeping and general power to invade the domestic affairs of sovereign states. It does mean the delegation to some international organization of certain carefully defined and restricted powers.<sup>28</sup>

Margaret Mead also put it in 1942: “[W]e must work in terms of a sense of direction, not a finished plan.”<sup>29</sup> It is this kind of open-endedness and people-orientedness that was to become the hallmark of the United Nations.

### 3. From Dumbarton Oaks to San Francisco

The foundations for the United Nations Organization were laid at Dumbarton Oaks,

<sup>25</sup> *Id.* at 83.

<sup>26</sup> E. H. CARR, *CONDITIONS OF PEACE* 273 (1944).

<sup>27</sup> *Supra* note 24, at 83.

<sup>28</sup> On April 30, 1943, Special Assistant to the US Secretary of State Francis B. Sayre. *Id.* at 82. [Emphasis added] See also the statement by Herbert Hoover, before the Executives’ Club and Other Clubs, Chicago, December 16, 1942, in *WAR AND PEACE AIMS OF THE UNITED NATION* 665ff (Sept. 1, 1939 - Dec. 31, 1942).

<sup>29</sup> MARGARET MEAD, *AND KEEP YOUR POWDER DRY. AN ANTHROPOLOGIST LOOKS AT AMERICA* 217 (1942).

Washington, D.C., in the late summer (from August 21 to October 7) of 1944. Here, the basic text of the UN Charter was written. A workable compromise was reached between the realists and those who confessed a more Wilsonian concept of global order. The new organization was to accept and be open to transfers of sovereign powers from its members, to “enable the Security Council” to function effectively. Any imposition of a rigid world government order was to be avoided. In this way giving the organization its future shape was left to legislators who would be expected to take the initiative, backed by public opinion. This process, once started, would compel all member States to take corresponding legislative action, sustained by the *modus operandi* of the *ius cogens*-principle of sovereign equality and reciprocity.<sup>30</sup> In the process a comprehensive system of collective security would quite naturally evolve. E. H. Carr during the war had emphatically demanded that the “political, social and economic problems of the postwar world must be approached with the desire not to stabilize, but to revolutionize.”<sup>31</sup>

In any event, the concept meant that the four, later five, big powers “worked out an arrangement whereby they would,” during the transitional period, “serve as, in essence, global policemen.”<sup>32</sup> Roosevelt’s conception of the Four Policemen implied that—as Margaret Mead had put it— “[w]hen we talk about policing the world, this is meant to be a transition from armies to police, from seeing the world as a set of warring national entities to seeing it as one civic unity.”<sup>33</sup>

However, international law at the time “recognized ... no transitional period,” and war “technically ... continue[d] until the treaty of peace goes into effect.”<sup>34</sup> By introducing this new concept, however, the powers now could meet the requirements for “laying the foundations of a permanent world order,” and achieve the aims they had pursued since the end of the 19th century.<sup>35</sup> The new principle in international law would become an instrument to be able to do away with the institution of war altogether. “The transition to be hoped for is not one from war to normalcy, but from war to permanent peace and order,” according to the Commission Report on the

<sup>30</sup> BARDO FASSBENDER, THE MEANING OF INTERNATIONAL CONSTITUTIONAL LAW, IN RONALD ST. MACDONALD & DOUGLAS M. JOHNSTON (EDS.), TOWARDS WORLD CONSTITUTIONALISM. ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 845 (2005): “There is a partial substantive identity of *jus cogens* and obligations *erga omnes* which, as is well known, the ICJ describes as obligations ‘towards the international community as a whole.’”

<sup>31</sup> Carr, *supra* note 26, at xxiii.

<sup>32</sup> IRIYE AKIRA, CULTURAL INTERNATIONALISM AND WORLD ORDER 140 (1997).

<sup>33</sup> Mead, *supra* note 29, at 248.

<sup>34</sup> *Supra* note 10, at 152: “After the last war, it was regarded as necessary to hold under arms millions of discontented men, to continue a harsh blockade, to leave nations in disorder while statesmen sought tensely and hastily to solve the vast and innumerable problems before them.” *Id.* at 152-153.

<sup>35</sup> *Id.* at 163.



Transitional Period.<sup>36</sup>

To some it seemed puzzling, however, why the Russians insisted so much on retaining the veto. The Soviet insistence derived its reason largely from the Russian prewar experience, which had shown that “collective security is dependent, at the very least, on a firm nucleus of great power agreement,”<sup>37</sup> and the League of Nations therefore would function as a system of collective security only if the great powers agreed among each other. The Russians realized that the consensus principle was a necessary *proviso* for the envisaged transition from armies to police. Indeed, the Report of the American Commission that dealt with the question of the transitional period, pointed out that “no stronger supporter of collective security was to be found in the League of Nations than Russia.”<sup>38</sup> Did the Americans believe that the transition could actually be accomplished without a consensus? That is highly unlikely, but they were perhaps overoptimistic in their belief in the persuasive power of force. At least, as Robert C. Hilderbrand conceded, the Great Powers thought “they could learn from the mistakes of the past.”<sup>39</sup>

The question of the transition from an armed to an unarmed peaceful world addressed the issue of whether the world organization should have at its disposal a “genuine international police force.” Some were afraid such an institution might “develop and pursue interests of its own,” if and when all nations had been disarmed, suggesting that, “in the present state of the world,” an ad hoc force would be “considerably more acceptable” to governments, including the United States. Since this would not have meant a “permanent surrender of autonomous military forces,” it “seemed less threatening to traditional conceptions of sovereignty.” Also, perhaps, “it would be ‘slightly easier’ to control.” However, the obvious solution, and the eventual plan included a permanent force that would allow a “consistent policy of disarmament for all nations.”<sup>40</sup>

<sup>36</sup> “The new solutions must evolve, not from the psychology of victor toward vanquished, but from the psychology of cooperation for mutual welfare.” *Id.* at 163.

<sup>37</sup> MARINA S. FINKELSTEIN & LAWRENCE S. FINKELSTEIN (EDS.), *THE FUTURE OF COLLECTIVE SECURITY* 255 (1966).

<sup>38</sup> *Supra* note 10, at 161. This, however, must be seen also against the backdrop of Russia’s internal policy of prosecutions, deportations and purges, which were taking place at the same time. See JIRI HOCHMAN, *THE SOVIET UNION AND THE FAILURE OF COLLECTIVE SECURITY 1934-1938* (1984). See also JONATHAN HASLAM, *THE SOVIET UNION AND THE STRUGGLE FOR COLLECTIVE SECURITY IN EUROPE 1933-39* (1984).

<sup>39</sup> ROBERT C. HILDERBRAND, *DUMBARTON OAKS. THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 2 (1990).

<sup>40</sup> *Id.* at 21. The author stated that: “[D]isarmament presented ... most difficult questions, which were both practical and philosophical in nature. Some members held to the traditional liberal view that disarmament itself provided the ultimate solution to the problems of aggression and war, that it alone would make any sort of an international police force unnecessary by rendering armed conflict impossible. Critics of this idea pointed out that it overlooked the question of enforcement; in their view, any attempt to prevent war – even through disarmament – would have to be enforced by an international organization equipped with a police force and armaments ... Thus the ... immediate objective should be to

In the end all agreed that the new organization would have to be able to act “both swiftly and effectively,” and that “sanctions would be included among the powers of the Security Council.” Those responsible in the governments of each of the Great Powers planning the future world organization “began their deliberations by favoring the creation of a true international police force.”<sup>41</sup> The idea of an international police of the sea was replaced in favor of an international air corps which now “dominated the debate about military questions at Dumbarton Oaks.”<sup>42</sup> The Soviets in particular believed that “the failure to provide such a force was the major reason for the downfall of the League of Nations.” This opinion was “shared by many analysts in Great Britain and the United States as well.”<sup>43</sup> Later (still at Dumbarton Oaks) it transpired, however, that the United States, Britain and the Soviet Union apparently “drew away from this somewhat visionary position.”<sup>44</sup> The main reason was, not being able to impose such an establishment as a *fait accompli*, they decided to leave its eventual realization to the transitional period. I believe this was also why the Russians subsequently put stronger emphasis on retaining the consensus principle.

The British pointed out the impossibility of a quick solution to “overcome ... the problem of national sovereignty,” more so since it was “reasserting itself everywhere, as the war moved toward its conclusion.”<sup>45</sup> One may wonder, however, why Britain had rejected Mahatma Gandhi’s and the Indian Congress’s “Quit India Resolution” in

establish both minimum and maximum armaments levels, at least for the major powers, as soon as possible after the war. Such levels would cover both dimensions of the problem: maximums would promote disarmament – and perhaps lead to further reductions in the future – and minimums would ensure a strong police force for the new world organization.”

<sup>41</sup> Hilderbrand, *supra* note 39, at 140.

<sup>42</sup> *Id.* at 144.

<sup>43</sup> *Id.* “In addition, the formation of a true international police force might make it possible for nations – perhaps even the Great Powers – to disarm and remain secure.” The Military Staff Committee in charge of the police function was to be placed at the disposal of the executive council, to “advise and assist” it, and to take on responsibility “for the strategic direction of any armed forces” under the authority of the Security Council. See U.N. Charter, art. 47, paras. 1 & 3. Shortly before the rift between the powers in 1947, it “submitted ... estimates of the overall strength required by the United Nations.” In these, “the United Kingdom, the Soviet Union and China were all thinking in terms of a land army consisting of not more than 12 divisions; the highest estimate, that of the United States, was for 20 divisions. Similarly, the United Kingdom, the Soviet Union and China would have been satisfied with an international air force totaling not more than 1,200 aircraft; the corresponding figures in the French and American estimates were 1,275 and 3,800. As regards naval forces, none of the five delegations proposed more than 3 battleships, 6 aircraft carriers, 15 cruisers, 84 destroyers and 90 submarines; the majority of them proposed a much smaller force.” U.N. Doc. S/394; 48 U.N.Y.B. 495 (1947).

<sup>44</sup> Hilderbrand, *supra* note 39, at 144. One may wonder, however, about the author’s following interpretation: “For one thing, an ad hoc force made up of national contingents would be slightly easier to control than a true international army, *minimizing the danger that the police force might itself become a threat to world security.*” *Id.* at 140. [Emphasis added] So, would it also “minimize the danger” of the police becoming a threat to national security if there were no *national* police forces?

<sup>45</sup> *Id.* at 141. They assumed, “no matter how valuable it might turn out to be in the future,” presently “‘the time had not yet come’ for the creation of such an international force under the aegis of the United Nations.” *Id.*

August 1942, containing a progressive plan for a world federation of free and independent nations, and the promise of India's continued commitment to the war effort.<sup>46</sup> In any way, quite in accordance with what the American Commission to Study the Organization of Peace had previously posed, "the Kremlin clung to the idea of a U.N. air corps that could provide the organization's enforcement efforts with the kind of speed and certainty of deployment" that was lacking in an 'ad hoc' police contingent.<sup>47</sup> The contentious issue and pivotal question to be tackled continued to be "the effect that international peacekeeping efforts, and the establishment of a world police force, would have on current notions of the sovereignty and equality of states."<sup>48</sup> However, this question would subsequently be taken up by those who drafted the new pacifist constitutions.<sup>49</sup>

While by now a regular police force as a *fait accompli* was "out of the question," the Russians were still insisting that an international air corps could easily and quickly become part of the organization.<sup>50</sup> Though Britain did at this juncture not agree with the Russians, the latter may have speculated on British support because precisely such a plan had been the famous scheme of Lord David Davies (1880-1944), for which he had campaigned and gained a considerable following already before and during the war.<sup>51</sup> Mr. Davies who had died in June 1944, had taken "a prominent part in building up the League of Nations Union" in Great Britain, and in 1932 he was "instrumental in founding" the (world federalist) New Commonwealth Movement, of which Winston Churchill was the president.<sup>52</sup> Of course, the British were not opposed in principle to the eventual use of air power by the United Nations.<sup>53</sup>

<sup>46</sup> Klaus Schlichtmann, *Mahatma Gandhi and the Quest for an Effective United Nations Organization, The Stakes 1917-1947*, 26 GANDHI MARG 55-81 (April-June 2004). Apparently, the Americans had been quite favourably disposed toward the plan. See also JOHAN GALTUNG, *THE TRUE WORLDS. A TRANSNATIONAL PERSPECTIVE* 341 (1980). Galtung confirms that "some kind of world state is bound to come about." Obviously this would have to be along federalist, democratic principles.

<sup>47</sup> Hilderbrand, *supra* note 39, at 144.

<sup>48</sup> *Id.* at 22-23. "Some ... thought that a new, more limited concept of sovereignty would have to be developed."

<sup>49</sup> Boris Mirkine-Guetzévitch, *La Renonciation à la Guerre dans le Droit Constitutionnel moderne*, 4 REVUE HELLENIQUE DE DROIT INTERNATIONAL 3-4 (July-Dec. 1951).

<sup>50</sup> Hilderbrand, *supra* note 39, at 144. [Emphasis added]

<sup>51</sup> "In 1920 ... Lord (David) Davies first advanced the idea of an international police force," i.e. an international "Air Police Force." See LORD DAVIES, *THE SEVEN PILLARS OF PEACE V*, 82ff (1945).

<sup>52</sup> *Id.* at vii.

<sup>53</sup> It did mean "that they went to Dumbarton Oaks opposed to the Soviet Union's idea of a *unique* role for air power, a position that they refused to change despite Churchill's later flirtation with the Russian scheme." Hilderbrand, *supra* note 39, at 144. [Emphasis added] Churchill had "finally taken an interest in the Dumbarton Oaks talks" and was supporting the Russian scheme at Dumbarton Oaks; in fact he "could not understand why the British delegation was resisting the Soviet proposal for an international air force, which he thought had merits that were both technical and political. In late August, after the conference had already begun, Churchill swung his considerable support behind the Russian position, which, he wrote, "raises very large questions of principle and cannot be decided on purely military

Afraid such a plan might not pass Congress, if it was all too rigid and prematurely conceived, on September 6, Roosevelt questioned: “[Y]ou mean an international air force that will have American planes with international insignia on the planes and uniforms with a United Nations insignia? I cannot agree to this.”<sup>54</sup> However, this was not what the Russians meant.<sup>55</sup> The Americans may have been cautioned by such considerations as were voiced for example by author Margaret Mead who stated the obvious when she wrote that:

[I]t would be well to inspect very carefully the character structure which is developed among police, whose principal occupation is stopping other people from doing things, guarding the *status quo* ... keeping order, but unconcerned with what that order is. In order to give ourselves the moral authority of an order which does not yet exist, we would dub ourselves police instead of setting about the job of inventing an order worth policing.<sup>56</sup>

The Chinese, too, though mainly interested in cultural cooperation among nations, supported the idea of an international air force.<sup>57</sup> As a prerequisite perhaps, V.K. Wellington Koo, the chairman of the Chinese delegation, made a plea for racial equality, like the Japanese done at Versailles in 1919.

Obviously, what was envisaged was an open, democratic process to be initiated after the war, after the organization and its charter had been universally adopted. Perhaps for this reason, and presumably on the understanding that after the conference the “transitional security arrangements” would provide the mechanism for empowering the UN, eventually Andrei Gromyko, the Russian delegate, conveyed his government’s willingness to withdraw its rigid proposal, which it did formally on September 12.

Of course, the reason the Big Three had given, and on which they all had agreed, was that it was necessary to give the UN ‘teeth,’ avoid past mistakes and effectively guarantee the future peace of the world. At the back of everyone’s mind was the prospect of the postwar “transition from armies to police,” accompanied by the

grounds.” He had, he said, favored such a force following the last war; it seemed, if anything, even more necessary now.” *Id.* at 151. Sir Alexander Cadogan, chairman of the British delegation, had difficulties making up his mind on the issue, but declared that they might be blamed for their indecision or backing off, and “the world will say ‘Where are the teeth you promised to put into the Covenant. We are back where we were before.’” For more details, *see id.* at 152.

<sup>54</sup> *Id.* at 153-154.

<sup>55</sup> “As [Andrei] Gromyko informed [Edward R.] Stettinus on 29 August, the Soviet proposal did not mean ‘a new uniform with a special insignia on the plane under command of some officer of the Council’ but only joint operations conducted by an Allied command.” *Id.* at 154.

<sup>56</sup> Mead, *supra* note 29, at 248-249. “To call ourselves police of a non-existent, unplanned order is as idle as to dream that we, by ourselves, or with any one ally, can build the best world form which could be built.”

<sup>57</sup> Hilderbrand, *supra* note 39, at 239-240.

necessary parallel disarmament. If there was also disbelief and distrust, still it was the assumption that the United Nations would eventually be geared up to function effectively, fulfilling everyone's expectations.<sup>58</sup> Because it seemed not possible to have all the benefits at once, governments of the liberal democracies, while accepting that in principle the UN was (and would be) "properly equipped for the discharge of its police functions," also recognized that "during the period of transition to the ultimate status of collective security, the system might be exposed to a few shocks," though "of measurable proportions," for which, of course, Article 106 of the UN Charter was designed to be the remedy. To the San Francisco Conference,

the acceptance of that risk seemed a reasonable price to pay for the period of time it seemed compelled to buy so that the gradual transmutation of international relations into a closely integrated system might be completed by means of an evolutionary process: the process of obtaining the surrender of further portions of sovereignty through successive amendments of the Charter.<sup>59</sup>

Or perhaps better still, a bottom-up review of the whole organization, as stipulated in Article 109 of the Charter?<sup>60</sup>

At the opening session of the United Nations Conference in San Francisco (April 25 to June 26, 1945),<sup>61</sup> Georges Bidault, the chairman of the French delegation pleaded:

We are ready, for the good of the new world, to make such sacrifices of sovereignty as may be agreed to in common and mutually recognized as necessary to collective security.<sup>62</sup>

<sup>58</sup> Indeed, "just as we would not regard as fully civilized a national system which rested not on the residuary jurisdiction of the courts but on private contracts between citizens, a network of bilateral and regional treaties is no compensation for the central organization's lack of power to impose binding terms of settlement." Martin, *supra* note 15, at 97.

<sup>59</sup> *Id.* at 24-25.

<sup>60</sup> For the plan of a revival of the original "Charter review" idea invoking Article 108 of the UN Charter see FRANCISCO PLANCARTE, ACCESS TO INTERNATIONAL JUSTICE THROUGH A NEW JUDICIAL, LEGISLATIVE AND POLITICAL INTERNATIONAL POLITICAL INTERNATIONAL ORDER, AS A RESULT OF THE TRANSFORMATION OF THE UNITED NATIONS INTO A WORLD FEDERATION OF NATIONS, available at [http://www.ne.jp/asahi/peace/unitednationsreform2007/united\\_nations\\_review\\_conference.htm](http://www.ne.jp/asahi/peace/unitednationsreform2007/united_nations_review_conference.htm) (last visited on Nov. 7, 2009).

<sup>61</sup> Franklin D. Roosevelt, whose motto had been "Peace through Law," died on April 12, 1945, just before the start of the San Francisco Conference. The new American President, Harry S. Truman, was more of a realist, who believed in "peace through strength." HANS KELSEN, PEACE THROUGH LAW viii (1944). Kelsen made this plea: "[T]here is no essential social progress possible as long as no international organization is established by which war between the nations of this earth is effectively prevented."

<sup>62</sup> THE CHARTER OF THE UNITED NATIONS: WITH ADDRESSES SELECTED FROM THE PROCEEDINGS OF THE UNITED NATIONS CONFERENCE, SAN FRANCISCO, APRIL-JUNE 1945 78 (1945). Hilderbrand wrote: "[N]ations were not prepared to surrender their identities any more than they were their sovereignty." See Hilderbrand, *supra* note 39, at 140-141.

The basic idea was that society could not advance peacefully without reliable and effective institutions. It was continuously pointed out that to achieve this purpose it was necessary and “sensible, that governments conferred certain competencies that they had controlled themselves so far [onto those institutions] ... In essence, the most substantial delegation is achieved when states accept that the new authority has the right to exercise legislative function,” although this would have to be “within certain generally binding rules,”<sup>63</sup> and perhaps limited to vital issues like disarmament and the peaceful settlement of disputes.

On June 26, 1945—the war had not yet ended in the Pacific—the Charter of the United Nations was signed in San Francisco, in the name and on behalf of the world community, starting with the words: “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war have resolved ...” On October 24, 1945 the Charter entered into force.<sup>64</sup> The League of Nations in Geneva, whose official duties had been in abeyance during the war, was officially dissolved in 1946.

## 4. Transit to the Cold War

The Security Council had held its first meeting on January 17, 1946 at Church House, Dean’s Yard, Westminster, in London. It met 23 times until it adjourned in February to move to New York-Hunter College and thereafter from August 28, 1946 to Lake Success.<sup>65</sup> In 1946, the United States, as the only nuclear power at that time, put forward the so-called Baruch Plan, a proposal for the international control of atomic energy. The Baruch Plan was conceived by many as a strategy for world government.<sup>66</sup> The United Nations would be given real enforcement powers, and the central control of atomic energy was to ensure that nations could peacefully disarm, with collective security eventually guaranteeing each nation’s safety from foreign attack and exploitation. The prospect of “vesting in the United Nations ... the monopoly of atomic weapons,” to be

<sup>63</sup> *Reuter, La Communauté* 97, in JÜRGEN SCHILLING(ED.), *VÖLKERRECHT UND STAATLICHES RECHT IN FRANKREICH* (International law and domestic law in France) 82 (1964).

<sup>64</sup> The Preamble of the Charter of the United Nations is, in the understanding of the United Nations, a constituent part of the total legal codex. See also HANS Kelsen, *THE LAW OF THE UNITED NATIONS—A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 9 (1951). Kelsen stated: “[T]he Preamble is part of the Charter. Consequently it has virtually the same legal validity, that is to say, the same binding force as the other parts of the Charter.”

<sup>65</sup> CHINMAYA GHAREKHAN, *THE HORSESHOE TABLE: AN INSIDE VIEW OF THE UN SECURITY COUNCIL*, FOREWORD BY BOUTROS BOUTROS GHALI 13 (2006).

<sup>66</sup> Baratta, *supra* note 12, at 177ff.

able to disarm and create common security, was hotly discussed in the early years after the war. Disarmament under a global nuclear umbrella, however, turned out to be a contentious and highly disputable issue.<sup>67</sup>

In the aftermath of Hiroshima and Nagasaki, Albert Einstein and others, among them U.S. Senator J. William Fulbright and Justice Owen J. Roberts pointed out that the first atomic bomb had “destroyed more than the city of Hiroshima. It also exploded our inherited, outdated political ideas.”<sup>68</sup> However, according to Einstein, although the bomb had “changed everything” it still had failed initially to change “our way of thinking.” The nuclear scientists understood the problem and its implications better than anyone else, and were prompted to help shape government policies. The peoples of the world were waiting for governments to take positive action and ensure that by harnessing the peaceful uses of atomic energy, “these awful agencies will be made to conduce peace among the nations and that instead of wreaking measureless havoc upon the entire globe, they may become a perennial fountain of world prosperity.”<sup>69</sup> In any way, it was clear that to achieve the purposes of the United Nations, member states had to eventually be “willing to delegate to the Security Council, for the performance of its police functions, a sizeable portion of their sovereignty.”<sup>70</sup>

The first General Assembly resolution on disarmament at the seventeenth plenary session on January 24, 1946 called for “elimination from national armaments of atomic weapons and of all other weapons of mass destruction.” This was followed by Resolution 41(I) of December 14, 1946, which called for “an early general regulation and reduction of armaments and armed forces” and “provision of practical and effective safeguards by way of inspection and other means.” On February 13, 1947 finally, it was the Security Council which, referring to the aforementioned Resolution 41(I) of

<sup>67</sup> “The vesting in the United Nations of the monopoly of atomic weapons would have cut right across the Charter. Admittedly, the resolution of 24 January 1946 called for the elimination of atomic weapons from ‘national’ armaments only, and left the door open to the suggestion that they should be turned into ‘international’ armaments. Yet this possibility was so remote and its adumbration so vague that it has never caught the imagination of the masses or led to any noticeable popular pressure for the modification of those national policies which were to shape the course of the negotiations.” Martin, *supra* note 15, at 68.

<sup>68</sup> Open letter published in NEW YORK TIMES, Oct. 10, 1945, quoted in Baratta, *supra* note 12, at 304.

<sup>69</sup> THE TIMES (London), Aug. 7 1945, in Martin, *supra* note 15, at 65.

<sup>70</sup> Martin, *supra* note 15, at 23. GRENVILLE CLARK, A PLAN FOR PEACE 57 (1950), wrote in 1950, justifying the American action in Korea: “In default of an established world police, we (quite rightly) organize a posse of the nations under United Nations auspices and take the lead to suppress the Korean aggression. Above all, we arm ourselves on a vast scale. All this is supposed to bring us ‘peace,’—the often-declared objective. But thoughtful people the world over know that this line of policy *alone* cannot achieve peace, and that it has some definite adverse results.” Clark also states: There is “a legitimate demand for precise information as to what powers would be delegated, how this would be done (how much ‘constitutional legislation’ and how much by grant of discretionary authority), whether and how the powers could be enlarged by amendment, how the legislative, executive, and judicial agencies would be composed, and the like.” See Clark, *id.* at 61. [Emphasis added]

December, 14, 1946 resolved to “work out the practical measures for giving effect” to that resolution. The Security Council Resolution 18 was adopted with a vote of 10 to none, with the USSR abstaining.<sup>71</sup> What brought the Russians to abstain?

As became clear with the Korean crisis in 1950, when the UN collective security system was seriously tested for the first time, UN members should have drawn attention to and invoked Article 106 of the Charter, to set in motion the process of enabling the Security Council “to begin the exercise of its responsibilities.” Obviously perhaps, this was intimately tied up with the question of the delegation of competencies to the UN. In accordance with Article 35, paragraph 2, even a non-member like Germany could have brought the matter “to the attention of the Security Council or of the General Assembly.”<sup>72</sup>

It became obvious that the UN Charter would turn out to be “a tragic illusion” unless states would be “ready to take further steps necessary to organise peace,”<sup>73</sup> as prescribed for example in the new post-war (1949) German constitution. The UN Charter and democratic constitutions, including the Japanese Peace Constitution’s proposition to abolish war, could only point the way and advocate certain measures that had to be taken as follow-up, to ensure the organization’s success. Just so, it had been “widely assumed ... that the United Nations was originally intended and expected to function as the institutional manager of a full-fledged collective security system, capable of bringing collective force to bear against any aggressor,”<sup>74</sup> and, simultaneously, oversee the process of general and complete disarmament targeted by the United Nations since 1946. It seemed obvious, as the Association of Los Alamos Scientists (“ALAS”) working in the atomic bomb laboratory of Los Alamos in New Mexico, had declared in November 1945, that a world “in which nuclear weapons are owned by many nations and their use held back only by the fear of retaliation will be a world of fear, suspicion, and inevitable final explosion.” The scientists were confident that: “we are left but only one course of action ... [to] cooperate with the rest of the world in the future development of atomic power.” The use of “atomic energy as a weapon” had to be prohibited and “controlled by a world authority.” Again, this would require the “loss of some degree of national sovereignty.”<sup>75</sup> The transfer or limitation of national

<sup>71</sup> U.N. Doc. S/RES/18 (Feb. 13, 1947).

<sup>72</sup> However, the West-Germans had previously already failed to compromise. In June 1947, e.g., when the state ministers from the four occupied zones met in Munich, they were unable to resolve their differences, causing Germany to be divided further. Apparently the West-German delegation at Munich was “not prepared to make any concessions.” Wolf D. Gruner, *Die Münchner Ministerpräsidentenkonferenz 1947*, 18 ZBLG 775 (1975).

<sup>73</sup> Martin, *supra* note 15, at 159.

<sup>74</sup> Inis L. Claude, Jr., *The Management of Power in the Changing United Nations*, 15 INT’L ORG. 223 (1961).

<sup>75</sup> All in Baratta, *supra* note 12, at 133.



sovereignty in support of the United Nations was likely to be the most important first step necessary for the organisation of peace.<sup>76</sup>

## 5. The Prospect of a Transitional Period

A complete novelty and indeed “a noteworthy departure from precedent” was the new “authority of the Security Council to enter into binding international treaties” with UN member States.<sup>77</sup> As the 1951 UNESCO Report noted: “[t]he Council of the League had no such power.”<sup>78</sup> Realizing the necessity to arrive at a functioning world organization by democratic processes, lawmakers after the Second World War were given extraordinary legislative powers, to shape and define the ultimate authority of the new institution. Authors like Robert C. Hilderbrand come to the wrong conclusions and leave out important elements of the open-ended charter plan.<sup>79</sup> In general, the purpose of the veto, i.e. consensus principle for the P5, as well as the Transitional Security Arrangements (Chapter XVII) in the UN Charter, is not recognized. Hilderbrand wrongly assumes that the victorious powers tried to eschew an effective United Nations, because they “feared the effect that such a strong body might have on their own national objectives.”<sup>80</sup> A more accurate interpretation, however, is that the victors, for obvious reasons, did not want to impose an organization that would in fact have amounted to being a world government set up arbitrarily by the victors’ volition, and not by due democratic process.

The reference to the “constitutional processes” in the UN Charter would suggest that the drafters were aware to a certain extent of the new constitutional clauses for the

<sup>76</sup> So far, however, “[t]he UN Charter notwithstanding, the bond between sovereign statehood and war has remained close.” See Fassbender, *supra* note 9, at 141.

<sup>77</sup> Martin, *supra* note 15, at 159.

<sup>78</sup> *Id.*

<sup>79</sup> Hilderbrand, *supra* note 39, at 156ff. See also CHADWICK ALGER(ED.), *THE FUTURE OF THE UNITED NATIONS SYSTEM: POTENTIAL FOR THE TWENTY-FIRST CENTURY* (1998); NEIL SMITH, *AMERICAN EMPIRE. ROOSEVELT’S GEOGRAPHER AND THE PRELUDE TO GLOBALIZATION* (2003); ERIC FAWCETT & HANNA NEWCOMBE (EDS.), *UNITED NATIONS REFORM. LOOKING AHEAD AFTER FIFTY YEARS* (1995); Gharekhan, *supra* note 65.

<sup>80</sup> *Id.* at 257. In Germany, the opinion that the victorious powers either didn’t really want the UN to work or failed to make appropriate arrangements, prevails throughout. Shortly after Germany joined the UN in 1973, the (West-) German United Nations Association published a pamphlet, explicitly stating that “the United Nations [Organization] is fundamentally different from a world federation. The [UN] Charter also cannot be seen as a step toward such a goal... A peaceful resolution of conflicts through internationally binding (obligatory) regulations is neither possible nor desirable...” HILMAR WERNER SCHLÜTER, *DER SICHERHEITSRAT DER VEREINTEN NATIONEN: HANDBUCH* (The Security Council of the United Nations: A Handbook), U.N. DGVN, Texts 22 (1977).

organization of peace. Apparently, US Under-secretary of State Edward R. Stettinus “arranged for the inclusion of a statement in the final proposals that made each agreement [under what was to become Article 43] subject to ratification by the signatories in accordance with their constitutional processes.”<sup>81</sup> Given everything that was at stake, the purpose was obviously more than merely to achieve “the lowest common denominator concerning disarmament in the postwar period,” and “creating an organization that would be strong enough to keep the Axis powers weak,” as Hilderbrand suggests.<sup>82</sup>

The transition envisaged in Chapter XVII of the UN Charter could have been accomplished with the Korean crisis, if the Europeans had taken action to transfer powers to the Security Council. If Germany, a central European regulative power, had acted conscientiously under its Constitution, it could have triggered a process to implement Article 106 of the Charter.<sup>83</sup> Was this what the Russians were aiming at,<sup>84</sup> to compel the Germans to apply the collective security provision in their constitution?<sup>85</sup> That may well have been the case and also the main reason why the Russians eventually refused to sanction the actions of the United Nations in Korea, insisting on an “invocation or implementation” of Article 106.<sup>86</sup> On October 11, 1950, the representative

<sup>81</sup> Hilderbrand, *supra* note 39, at 156. He stated: “...a provision that he also hoped would bind the Senate to an acceptance of subsequent decisions by the Security Council.”

<sup>82</sup> *Id.* at 159.

<sup>83</sup> Article 106 stipulates: “Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.” Germany, by delegating “security sovereignty” could have accomplished this.

<sup>84</sup> “Considering their reputation for *realpolitik*, the Soviets placed a surprisingly strong emphasis on disarmament ... there is no reason to doubt their sincerity ... The Americans shared the Soviet belief in disarmament ... They had spent most of their preconference efforts considering not whether but how disarmament was to be achieved ... Certainly, ‘in view of past experience,’ they knew that simply asking outright for the cooperation of all states would not work. Other ideas had also been considered in Washington, including having the Big Four disarm to set an example that other states might follow, announcing a worldwide policy of disarmament and pressuring all nations to accept ...” Hilderbrand, *supra* note 39, at 160-161.

<sup>85</sup> Konrad Adenauer, *Germany and the Problems of Our Time*, 28 INT’L AFF. 158 (Apr., 1952). Adenauer stated: “[T]he catastrophe [of the Third Reich] made the German people realize that in the past, peace had again and again been wrecked on the rocks of an exaggerated nationalism. This led to the recognition that our existence, as well as that of all the other European nations, could be preserved only within a community transcending national frontiers. This conviction found expression in Article 24 of our Basic Law of 1949. By the terms of this Article, the Federal Republic declares its readiness ‘by legislation to transfer sovereign powers to international institutions ... and to consent to limitations upon its sovereign powers apt to bring about and secure a peaceful and lasting order in Europe and among the nations of the world.’” He, however, rejected a global solution, aimed at strengthening the United Nations. *Id.*

<sup>86</sup> U.N. OFFICE OF LEGAL AFFAIRS, REPERTORY OF PRACTICE OF THE UNITED NATIONS ORGANS: EXTRACTS RELATING TO ARTICLE 106 OF THE CHARTER OF THE UNITED NATIONS 379-380/Introductory Note 1 (Vol. 5, 1945-1954). The application of Article

of the USSR submitted the following draft resolution:

The General Assembly.

Taking into account the particular importance of concerted action by the five permanent members of the Security Council in defending and strengthening peace and security among nations, [Emphasis added]

Recommends that before armed forces are placed at the disposal of the Security Council under appropriate agreements concluded in accordance with Article 43 of the Charter, the five permanent members of the Security Council ... should take steps to ensure the necessary implementation of Article 106 of the Charter for the purpose of taking such joint action on behalf of the organization as may prove to be necessary for the maintenance of international peace and security.<sup>87</sup>[Emphasis Added]

The chance was squandered; but little more than ten years later another opportunity presented itself. Although usually the years 1961 (and 1962) are remembered mostly for the building of the Berlin wall (and the Cuban missile crisis), they were also significant in terms of what they offered to achieve a lasting peace, involving Europe, the main center of international tension and confrontation. A number of creative propositions were made and discussed throughout 1961,<sup>88</sup> to strengthen the United Nations, put the

106 has been formally proposed in organs of the United Nations on two occasions. Several proposals recommending the invocation or implementation of the Article were submitted to the General Assembly during its fifth session in connection with the item 'United action for peace' ... A draft resolution submitted by the USSR at the 358th meeting of the First Committee recommending that, before armed forces were placed at the disposal of the Security Council under appropriate agreements concluded in accordance with Article 43, the permanent members of the Council should take steps to ensure the necessary implementation of Article 106," available at [http://untreaty.un.org/cod/repertory/art106/english/rep\\_orig\\_vol5-art106\\_e.pdf#pagemode=none](http://untreaty.un.org/cod/repertory/art106/english/rep_orig_vol5-art106_e.pdf#pagemode=none) (last visited on Nov. 7, 2009).

<sup>87</sup> See e.g. DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT (1969).

<sup>88</sup> 1961 was an exceptional year. This was the Kennedy era, and most of the names have a familiar ring. On the side of the US 'old hands' like former Secretary of State John McCloy who was Kennedy's Presidential disarmament adviser, and Senator J.W. Fulbright, a world federalist, were still active. Dean Rusk was US Secretary of State, Adlai E. Stevenson US ambassador to the UN, Andrei A. Gromyko was foreign minister under Nikita Khrushchev, with Valerian Zorin as vice foreign minister. Dag Hammarskjold had been the UN Secretary General and died in the Congo in a plane crash. Konrad Adenauer was German Chancellor, Charles de Gaulle French President, Harold MacMillan British Prime Minister, the voices of people like former Prime Minister Anthony Eden and diplomat Harold Nicholson were still being heard. Nehru, Nasser and Tito represented the non-aligned world as heads of state, V.K. Krishna Menon was the Indian foreign minister, Ikeda Hayato Japanese Prime Minister, Ghana's President Nkrumah, Indonesia's Sukarno, Burma's U Thant, Cambodia's Prince Norodom Sihanouk, Katanga's Moise Tshombe, etc. In a recent book review by Shane J. Maddock (History Dept. Stonehill College) of Lawrence Wittner's trilogy on *The Struggle against the Bomb*, the author points out how at that time "individual leaders [like Kennedy, perhaps] did reach out to and perhaps even rely on the [peace] movement because they saw its goals as dovetailing with what they defined as the national interests of their state, [and so] the world saw major progress toward reducing superpower tensions of the nuclear arms race (E.g., John F. Kennedy and Nikita S. Khrushchev in the 1960s). But these were exceptions." See LAWRENCE S. WITTNER, *THE STRUGGLE AGAINST THE BOMB*, Vols. 1-3 (1993-2003).

UN System of collective security into effect and start effective disarmament procedures. Notable were the proposal to relocate UN headquarters to Berlin,<sup>89</sup> and the McCloy-Zorin Accords of September 20, 1961, which were subsequently unanimously adopted by the UN General Assembly on December 20, 1961. In a related speech on September 25, US President John F. Kennedy commented the agreement with these memorable words:

Let us invoke the blessings of peace. And as we build an international capacity to keep peace, let us join in dismantling the national capacity to wage war ... Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us...<sup>90</sup>

The McCloy-Zorin Accords provided far-reaching measures. The Agreed Principles for General and Complete Disarmament, as they were officially known, emphatically declared that war should “no longer [be] an instrument for settling international problems”; “general and complete disarmament” was to be “accompanied by the establishment of reliable procedures for the peaceful settlement of disputes.” The agreement also called for the “dismantling of military establishments ... cessation of the production of armaments ... elimination of all stockpiles of nuclear, chemical, bacteriological and other weapons of mass destructions [and] ... discontinuance of military expenditures.” Member States were expected to make “agreed manpower” available to the United Nations, such as would be “necessary for an international peace force.”<sup>91</sup> Why did the plot fail?

<sup>89</sup> Eberhard Menzel, *Berlin als Sitz der Vereinten Nationen?* (Berlin as the seat of the United Nations?), EUROPA-ARCHIV Part II (1962).

<sup>90</sup> For the manuscript of the full speech, see John F. Kennedy Presidential Library & Museum, available at <http://www.jfklibrary.org/Historical%2BResources/Archives/Reference%2BDesk/Speeches/JFK/003POF03UnitedNations09251961.htm> (last visited on Nov. 15, 2009).

<sup>91</sup> See [http://en.wikipedia.org/wiki/McCloy-Zorin\\_Accords](http://en.wikipedia.org/wiki/McCloy-Zorin_Accords) (last visited on Nov. 19, 2009). See also FREEDOM FROM WAR: THE UNITED STATES PROGRAM FOR GENERAL AND COMPLETE DISARMAMENT IN A PEACEFUL WORLD (U.S. Dept. of State Publication 7277: Disarmament Series 5, Sept. 1961), available at [http://dosfan.lib.uic.edu/ERC/arms/freedom\\_war.html](http://dosfan.lib.uic.edu/ERC/arms/freedom_war.html) (last visited on Nov. 19, 2009). The Accords were negotiated between the USA and the USSR through Soviet vice foreign minister Valerian Zorin and John S. McCloy, the American advisor for disarmament questions. Incidentally, the Soviet Government apparently complained in their communication to the United Nations General Assembly on September 24, 1961 that, although the Americans had stressed the necessity for setting up an ‘international force,’ they were trying to bypass the Security Council. Strangely, neither the German ambassador in Washington at the time, Wilhelm Grewe, nor the German ambassador in Moscow, Hans Kroll, in their diplomatic memoirs mentioned the McCloy-Zorin Accords.

Apparently a positive response, to support the active diplomacy pursued by the Soviet Union and the United States, was lacking in Europe. Inertia, and prevailing misconceptions prevented its politicians from taking appropriate measures to put the UN system of collective security into effect, effectively keeping the United Nations from obtaining a monopoly of power, as provided for in the UN Charter. Some of those misconceptions become apparent today, as we look back to a past marked by fear and savage confrontation.<sup>92</sup> The Permanent Five ("P5") may have an interest to maintain their position of power, but the moment the process of delegating security sovereignty to the United Nations is initiated, their privileged status turns out to be transitory.<sup>93</sup>

Already in the planning stage for the postwar organization we have seen the Americans ask themselves if a mechanism could not be found to ascertain that the victorious powers (later the five permanent members) would behave "not as victors have in the past, but as a police power acting in the name of the community of nations."<sup>94</sup> But what if in the end the P5 refuse to give up their privileged position as world policemen? Early on the Americans had pointed out the danger that "States which assume the burden and successfully administer the task of the transitional period [might] not be willing to relinquish their position" in favor of the organization, and that they may "fail to establish the national, regional, and world institutions to which their authority should be transferred."<sup>95</sup> But this problem could be effectively prevented if

<sup>92</sup> The following points concern common misconceptions that have prevailed unto this day: (1) Contrary to what is widely believed, the Five Permanent Members ("P5") can by themselves do next to nothing to put the UN Collective Security System into effect. In fact, they are not supposed to, because their position or 'status' as permanent members is, for all intents and purposes, transitory; (2) the so-called veto power is designed and required for the transitional period, because enforcement action by the P5 is legitimate only when everyone can agree on the necessity for action; (3) On the whole UN member states have overlooked that the UN Charter and a number of democratic constitutions provide for the organization to obtain a monopoly of power, by stipulating that member states limit or transfer sovereign powers in favor of the United Nations Security Council; (4) The UN Charter conceives the establishment of an effective system of collective security as a process, not a given; (5) it is 'open-ended' and entering into the process is voluntary. However, once entered, all UN members, under the binding *ius cogens* principle of reciprocity, would be obliged *erga omnes*, to follow suit in some manner; (6) the UN Charter seems to imply that the process is meant to be democratic, involving 'We, the Peoples,' i.e. civil society's determination, applying appropriate means etc., toward achieving the purposes of the United Nations; (7) The aims are, however open-ended and democratic the process may otherwise be, general and complete disarmament under effective international control accompanied by the establishment of a system of law with binding jurisdiction and executive powers; and (8) The process will be backed up, and safe passage from an armed to an unarmed peace guaranteed, by the P5 and possibly others joining, in accordance with the relevant provisions in the UN Charter.

<sup>93</sup> In some way the former allies are no more than a "coalition of the willing" who can act on consensus or even outside the Security Council. The supposed "initiative of the Security Council," stipulated in Article 43, para. 3 of the UN Charter cannot be effective, if member states have not previously already taken steps to confer *de iure* and *de facto* primary responsibility for the maintenance of international peace and security on the Council.

<sup>94</sup> *Supra* note 10, at 162.

<sup>95</sup> *Id.* at 160.

member states who delegate executive powers to the UN Security Council under their constitution by law make appropriate specifications in their parliamentary bills; this would ensure that the permanent members will abide by the rule of law. Given the required determination and political will, disarmament can be achieved, and war be abolished. Short of a world-constituent assembly, the realistic option today is to empower the Security Council and the five permanent members to “use their military and economic power to restore order in the world,”<sup>96</sup> and see to it that all nations disarm. This is even more necessary today than it was immediately after the Second World War.

## 6. A Blind Alley

In the beginning of 1961 Inis L. Claude, a leading scholar in international relations and international organization, in a comprehensive study published his thoughts on the problem of the “changing United Nations.”<sup>97</sup> The Kennedy administration in the early 1960s was perfectly aware that the “world must be organized before you can have disarmament.”<sup>98</sup> Inis Claude realized that “the ideal scheme of collective security is not ... unlike that of world government. It involves a concentration of authority in a central organ giving that organ a government-like quality.”<sup>99</sup> In 1961, with the McCloy-Zorin Accords, the two former Allies, the Soviet Union and the United States, having suffered the effects of war twice in the 20th century, had wanted to make a sincere effort toward that aim.<sup>100</sup> After its failure, the Accords were incorporated and codified in Article VI of the Non-Proliferation Treaty (“NPT”), calling for the disarmament of nuclear and

<sup>96</sup> *Id.*

<sup>97</sup> Claude, *supra* note 74.

<sup>98</sup> *As the U.N. Meets: America's Role*, NEWSWEEK, Sept. 25, 1961, quoting a high US advisor in the Kennedy administration.

<sup>99</sup> Claude, *supra* note 74, at 221-222.

<sup>100</sup> Concerning the Berlin crisis, Khrushchev, in his famous ‘Troika’ speech before the General Assembly in September 1960 had suggested moving the UN to Europe, which was the center of international tension and confrontation. Walter Lippman wrote in the New York Herald Tribune that some UN agencies could be moved to Berlin, and US Senator Mike Mansfield and others made similar suggestions, to defuse the Berlin crisis and to employ the UN for that purpose. In December the Council of foreign ministers of the Western powers meeting in Paris also suggested to move parts of the organization to Berlin. Eberhard Menzel, international law expert, wrote a critical appraisal of the idea of Berlin as UNHQ stating that “the presence of the United Nations in Berlin would not diminish the chances for reunification, but on the contrary would enhance its possibilities.” Menzel thought it would be an “honor” for the divided city and that it was “bound to fulfill its purpose” as an equalizer between East and West, if this came to pass. Menzel, *supra* note 89, at 40.

conventional weapons under effective international control. It is the last portion of the article that is problematic, because it requires that member states delegate powers to the United Nations in order to ensure the world organization can exercise effective international control.

Unfortunately, a definitive engagement on the part of the Europeans to make the plan work was lacking.<sup>101</sup> This would have entailed giving the Security Council the monopoly of power and a legal framework to operate. The German constitution is particularly strong in that it unconditionally provides for passage of a bill in parliament, with a simple majority, to launch the project. Claude wrongly concluded that the veto provision “renders collective security impossible in all the instances most vital to the preservation of world peace and order,” and that it was “adopted with full awareness, and deliberate intent,” so that “any of the major powers might use it to block collective action.”<sup>102</sup> Claude did not fully realize the implications of the fact that the organization was still, as he himself conceded, “in the experimental stage of collective security,” and that public opinion in some countries had “not yet developed to the point<sup>103</sup> where nations are willing to delegate sufficient authority to an international organization to make it capable of coercing a great power.”<sup>104</sup> If the Europeans had ceded powers to the United Nations, they would thereby have relieved themselves and the Americans (and others) of the burden of military expenditures, and could have carried out sweeping disarmament measures. Instead, it appears that the Europeans effectively outsourced collective security first to NATO, following the failed attempt of collective security in

<sup>101</sup> In 1961, as Senator Fulbright pointed out, France had “lessened her military participation in NATO,” a sign perhaps that France was preparing and getting ready in case a political initiative might surface in Germany or Western Europe to put the UN system of collective security into effect. Indeed, Fulbright regretted the “sense of impotence” in Western Europe which he considered “unfounded” and “regrettable . . . Their impotence,” the author complained, was “largely self-imposed, a function of disunity and inadequate will to mobilize the full weight of their impressive resources.” After all, “the United States alone has neither the power, the resources nor the will to bear unaided the crushing burden of world responsibility,” and anyway, whatever it was trying to do, it was “not doing well at all.” Instead, though in principle favoring “proposals for world federation,” the illustrious Senator suggested a free concert of democratic nations, accepting that for the time being the United Nations would have to remain merely “a symbol of our aspirations.” See J.W. Fulbright, *For a Free Concert of Free Nations*, 40 FOREIGN AFF. 2-4 (October 1961).

<sup>102</sup> Claude, *supra* note 74, at 225.

<sup>103</sup> ARTHUR M. SCHLESINGER, *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 88 (2002). The author quotes Kennedy who attended the San Francisco Conference in June 1945, and commented: “[T]he international relinquishing of sovereignty would have to spring from the people—it would have to be so strong that the elected delegates would be turned out of office if they failed to do it . . . We must face the truth that the people have not been horrified by war to a sufficient extent to force them to go to any extent rather than have another war . . . War will exist until that distant day when the conscientious objector enjoys the same reputation and prestige that the warrior does today.”

<sup>104</sup> Claude, *supra* note 74, at 226. Claude here quotes from a public statement of the National League of Women Voters published shortly after the San Francisco Conference (memorandum inserted in the record of the hearings on the Charter).

the Korean War, and in the beginning of the 1990s to the Americans, with the NATO legacy still trailing behind.<sup>105</sup> It is easy to see that any enforcement action or international policing that is not based on a democratically authorized delegation of powers through proper legislation carries the odor of neo-colonialism.

As stated above, the problem could have been rectified by some country or countries taking legislative action under their constitution and invoking Article 106 of the UN Charter.<sup>106</sup> This was what the Soviet Union insisted on during the Korean crisis. Without fulfilling these preliminaries and transferring powers to the Security Council and giving the Council a legal framework to act as the legitimate world executive subject to a system of checks and balances and effective democratic controls,<sup>107</sup> the system of comprehensive, collective security remains illusive.

## 7. Conclusion

Careful in-depth analysis and a comprehensive historical review make the accounts of those who like Robert Hilderbrand have argued that the UN was never designed to function effectively, appear superficial. These accounts omit important historical precedents like the Hague Peace Union, upon which the successor organizations, the League of Nations and the United Nations were founded. Focusing solely on the “victorious powers” part, although not lacking in detail and containing much useful information, these studies overlook important underlying currents and objectives, which the powers had traditionally pursued and followed. Whether the Big Powers including the United States, Great Britain, France, Russia, and perhaps China have conscientiously and meticulously pursued and followed the great work and original idea of the Hague Conferences (1899-1915), or whether it is due to the dynamics inherent in the idea of the organization of the world for perpetual peace, the UN Charter does provide a blueprint for how to get from a negative armed peace to a positive unarmed peace.

<sup>105</sup> “For its first few years, NATO was not much more than a political association.” (Wikipedia) At that time many saw NATO as a coalition not unlike the (federal) “Atlantic Union,” which was discussed, translated and republished many times after 1945. See CLARENCE K. STREIT, *UNION NOW* (1939).

<sup>106</sup> Or initiate the process of UN Charter Review under Article 109 of the Charter. Strangely, Inis Claude does not mention Article 106 of the UN Charter at all. See *supra* note 60.

<sup>107</sup> Presently the U.N. Security Council, as Mohammed Bedjaoui, former President of the International Court of Justice has explained, is immune “from any legal censure.” See MOHAMMED BEDJAOUI *THE NEW WORLD ORDER AND THE SECURITY COUNCIL* 20 (1994). In fact, “[n]o principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient.” See JOHN F. DULLES, *WAR AND PEACE* 195 (1950).