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Elihu Root and International Legalism: Legalist Remarks on Collective Security and American Realism

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Abstract

Elihu Root was the paragon of the legalist era in American foreign policy, which saw the strengthening of international law and institutions as the keys to world peace. In the battle over the Versailles Treaty in US Senate, Root denounced the newfound collective security system because of the political nature of the process. Legalists deemed law and courts as best suited to settle the conflicts arising from irrational power politics in world affairs.

This article examines the League of Nations and UN collective security systems, as well as American standpoints on them, from a Rootist perspective. A legalist might argue that the UN inherited the fundamental flaws of the League because the institutional balances of the organizations are very similar. Prevailing American realist approaches to collective security and international law, in turn, have come a long way from Root's time.

While recognizing the inevitable taking out of context such a study entails, I am going to propose that through legalist eyes, the UN could benefit from a more balanced structure. Welcomed developments could include restraining the dominance of the Council in decision-making. In US foreign policy, legalists might advocate an American commitment to the UN collective security system and international court projects.

1 A third year law student at the University of Helsinki. The article is based on my Bachelor's Thesis. I would like to thank my supervisor Paolo Amorosa, as well as my editors Heini Tuura and Elisa Suokko, for their comments and other contributions to the article.

Full Article

1 Introduction

When President Obama made the case for a military strike against the Assad government in Syria last fall, he did not lean on legal arguments in order to justify possible military action. Instead, the President stressed that the United States must act because "our ideals and principles, as well as our national security, are at stake".[2] The statement was preceded by other permanent members of the Security Council vetoing a stronger presence of the international community in the conflict. Although the Americans changed their mind on the use of armed force in the last minute, the Syrian civil war remains a showpiece of an international crisis, where the US government turns to unilateral actions in the face of a deadlock in the UN collective security system. President Obama's rhetoric above embodies the contemporary American realist approach to world politics, in which ideals and interests prevail over formal international legal rules.

This curious union between ethics and power has not, however, always been the predominant starting point in American approaches to collective security or other international legal questions. In this article, I intend to examine the League of Nations and United Nations collective security systems as well as American standpoints on them from a radically different perspective, the legalism of former Secretary of State Elihu Root. By assessing the two systems through legalist eyes, I hope to highlight some controversial areas of both collective security and American foreign policy today. In the process, the study serves as an illustration of the influence ideologies and political projects have had in shaping the American relationship with the wider world.

Root was the paragon of the legalist era in American foreign policy, which saw the strengthening of international law and institutions as the keys to world peace. I find his thinking particularly topical because of his deter-

2 "Remarks by the President in Address to the Nation on Syria", 10 September 2013. Available at http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.

mination to separate morals and politics entirely from law, as it provides a stark contrast with present practices in both the US and the UN. Moreover, many of the issues Root and the international community faced during the drafting of the League are still sources of heated debate to this day. Therefore, to me, the legalism of Root provides an excellent perspective for reflecting upon the current state of affairs. While recognizing the context of Root's framework, as well as its possible shortfalls to the contemporary reader, legalism provides interesting ideas that still resonate in present-day discussions.

The article will start off by introducing Root's background in classical legal thought, which formulated the foundation of his criticism against the League's collective security system. Next, I will make brief notions on the battle over the Versailles Treaty in US Senate, focusing on elaborating the central roles of legalism and partisan politics in the events that resulted in the US rejecting League membership. Root denounced President Wilson's League because of the political nature of the institution. While a political body essentially controlled the League's arsenal, he believed that international conflicts were primarily caused by legal disputes, which ought to be resolved apolitically via arbitration and adjudication. After presenting Root's thoughts, I am going to take a look at the UN collective security system and American standpoints on it through Rootist eyes. As Root's criticism over the League culminated in the weakness of courts and law in world affairs, such issues as judicial review will also be touched. The article will be concluded by considerations on what Root has to offer to contemporary international legal and American foreign policy debates. Respect for legal procedures and restraining power with rules and responsibility emerge as perhaps his most timely legacy.

2 Root's Roots in Classical Legal Thought

From the point of view of international legal history, Root stands out first and foremost as a keen proponent of strong international courts and international law. Today, Root's assurance on international law's capacity to resolve conflicts may seem excessive or even naïve. Such a commitment to legality and stability in foreign affairs was, however, the rule rather than the

exception in early 20th century America.[3] The legalistic nature of the era is manifested for instance in the US Department of State, which was headed by a lawyer from 1889 to 1945. It should not come as a surprise, then, that the beliefs and assumptions of lawyers profoundly influenced the nation's foreign policy.[4] Root was arguably the paragon of these diplomat-lawyers, and one of the most influential American politicians of his time especially in the field of foreign affairs. Among other prestigious positions, he served in the Cabinets of McKinley and Roosevelt, co-founded and chaired the American Society of International Law, and was awarded the Nobel Peace Prize in 1912.[5]

Root and other diplomat-lawyers of the time were imbued with classical legal ideology, which was implanted through legal education to practically all elite lawyers in the US.[6] The ideology's premises on the nature of society were instrumental in formulating the legalist worldview.[7] Most importantly, classical legal thought held that law was capable of resolving disputes through its neutral expertise and apolitical character. Applied to the international context, this indicated that international conflicts were solvable through the application of objective and determinant legal rules, and thus international law and institutions could effectively regulate the international arena.[8] Characteristically for common law thought, courts – and thereby lawyers – instead of governments or codification were the central players in defining these rules.[9] Due to these outlooks legalists saw international law as something inherently different from international politics, which enabled it

3 Landauer Carl (2007), *The Ambivalences of Power: Launching the American Journal of International Law in an Era of Empire and Globalization,* Leiden Journal of International Law 20, at 354.
4 See Zasloff Jonathan (2003), *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, NYU Law Review 78:239, especially at 4.
5 For a comprehensive illustration of Root's career, see Leopold Richard (1954), *Elihu Root and the Conservative Tradition*.
6 Zasloff 2003, at 13.
7 For an extensive review of classical legal thought and its influence on foreign policy, see *ibid.,* at 9-45.
8 *ibid*., at 18-19.
9 Koskenniemi Martti (2007), *The Ideology of International Adjudication,* at 16-17.

and the international lawyer to arise above conflicts and neutrally mediate them without controversy. Many lawyers do not share this view today, as international law is often rather seen merely as a continuation of international politics.[10]

Moreover, classical legal thought presupposed similar interests between different groups in society. The state was seen as a factionless entity where no fundamental conflicts of interest existed, and therefore the task of governments was to remain neutral *vis-à-vis* social groups and promote general welfare instead. In the global context, this led to legalism rejecting the anarchical Hobbesian worldview with fundamental conflicts of interests and a constant threat of war between nations.[11] By contrast, the legalist starting point was that no such conflicts existed, and international confrontations were in fact irrational and false in nature.[12] A peaceful symbiosis between states was attainable because conflicts originated in principle from misunderstandings and irrational nationalistic ambitions. Were states to act rationally, global stability and world peace could be reached. Consequently, it would fall upon neutral legal institutions to resolve the apparent conflicts arising in international affairs.

These two key classical legal premises, namely the irrationality of conflicts and the potential of law to resolve them via courts, form the basis for understanding Root's criticism against the League. A third important element of classical legal thought to be mentioned here is its insistence on the importance of public opinion in creating law. Quite interestingly, Root held in a legal peripheralist spirit that should law and public opinion "point different ways, the latter is inevitably stronger".[13] Therefore, laws were "capable of enforcement only so far as they are in agreement with the opinions of the community".[14] Peripheralism emphasized, *inter alia*, customs and social norms as sources of law instead of codification.[15] Despite seeing public

10 See e.g. Koskenniemi Martti (1990), *The Politics of International Law*, European Journal of International Law 1.
11 See e.g. Hobbes Thomas (2012), *Leviathan*.
12 Zasloff 2003, at 19.
13 Root Elihu (1908), *The Sanction of International Law* in The American Journal of International Law, Vol. 2:3, at 452.
14 *ibid*., at 453.
15 Zasloff 2003., at 19-25.

opinion as the ultimate source of law, Root, however, was generally deeply skeptical of the power of the people and advocated a strong professionalized administration in order to restrain the people.[16] He believed, for instance, that governments were often irrationally "driven into war against their will by the pressure of strong popular feeling."[17] Consequently, Root argued that for democracy to work, public opinion must be "educated" and the government headed by "competent leaders".[18]

While Root did underline the importance of democratic governments as a foundation of a durable law between nations especially during the War,[19] his conservative ethos led him to focus more on pursuing a system of checks and balances in government and restricting the man in the mass throughout his career.[20] Portraying legalism generally as a cosmopolitan idealism would also be fallacious, since, in spite of its language, it served through various people and forms to promote US national interests as well.[21]

3 A Foreign Policy Guru in a Stormy Political Scene

Before moving on to Root's views on the League of Nations Covenant and its collective security system, brief remarks will be made on the political context in which the Treaty of Versailles entered the US Senate for ratification. Keeping in mind the purpose of this paper, some of the more important political components of the Treaty fight were Root's immensely influential position in the Republican Party and a tumultuous political situation. One could argue that, excluding President Wilson, Root was the single most important person in the political battle resulting in the fall of the Treaty in the Senate.

16 Landauer 2007, at 332-335.
17 Root Elihu (1907), *The Need for Popular Understanding of International Law* in the American Journal of International law I, at 1.
18 Dubin Martin David (1979), *The Carnegie Endowment for International Peace and the Advocacy of a League of Nations 1914-1918* in Proceedings of the American Philosophical Society 123:6, at 346.
19 See e.g. Root Elihu (1917), *The Effect of Democracy on International Law* in Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917), Vol. 11.
20 Leopold 1954, at 8-9.
21 See Coates Benjamin (2010), *Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919*, especially at 7-8.

It would be an understatement to refer to the political scene of the time as meddled. Wilson's Republican rivals had achieved a narrow Senate majority in the 1918 midterm elections, which did not bode well for any Wilsonian policies entering the Senate, let alone a proposal as controversial as the Versailles Treaty. Politics were characterized by hostile personal relations, as the Republican leaders cordially loathed Wilson, and these feelings were mutually returned by the President.[22] In addition to hostile relations between the left and right, party unity was also remote. The fundamental issue arousing ideological disagreement was the role the US should play in the postwar world. Senators were divided from League enthusiast international activists to isolationists, while the majority was positioned somewhere in between with more or less reserved or receptive feelings toward League membership.[23] Crucially, Republicans were particularly divided into factions and unable to agree on any alternative postwar plan to Wilson's Treaty.[24] This is where the prestige of Root stepped in, as the leaderships of both parties looked to him as the determining person in formulating the Republican postwar program.[25]

As far as Root's influence in the political scene is concerned, one can hardly overemphasize his extraordinary political leverage. Root's career had been one of spectacular success ranging from a lucrative corporate law business into the front row of American politics. At the time of the Treaty fight, he was widely regarded as the pre-eminent Republican foreign policy guru. His influence can be illuminated for instance by his relationship with the future Secretary of State Frank B. Kellogg, who sought Root's advice on a daily basis in office, and was in general hesitant to act at all without conciliating

22 Cooper John Milton (2001), *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations*, at 7. The degree of contempt between the key players can be illustrated in Wilson's response to a proposal of appointing Root as legal adviser to the League Council. While others endorsed Root's candidacy, Wilson stated: "I have absolutely no faith in Mr. Elihu Root and feel sure that he would do something to prove his falseness if we delegated him to act." Wilson quoted in Leopold 1954, at 35.
23 Cooper 2011, at 4-5.
24 Zasloff 2003, at 99.
25 Cooper 2011, at 77.

Root first.[26] It was no coincidence, then, that in the midst of one of the great political debates of the century, the Republicans would turn to Root in an attempt to draft a program the entire disunited party could stand by, and to mediate between the party wings.[27]

Due to this framework in Washington, Root's position was so strong during the Treaty fight that, in practice, he ended up formulating the Republican policy.[28] The legalist approach proved to be the ideal middle ground between the interests of the party factions.[29] Hence Root's policy was to serve the purpose of ensuring party unity, which gave the Republicans the final word in the vote because of its narrow majority in Senate seats. Root was a sophisticated political player, and while he truly held a strong faith in legalist foreign policy, he was not ignorant of its deficiencies, either.[30] One would do well to keep Root's political projects in mind when reading his criticism against the League. Even though he delivered the rival program to Wilson's Treaty, Root did not rule out the US membership in the League. While clearly not perfect, he stated that "it remains that there is in the Covenant a great deal of very high value which the world ought not to lose".[31]

Another noteworthy remark on the political nature of shaping the American relationship with the larger world is a common dissatisfaction with the result of the Senate sessions. In the end, the majorities of both parties saw that there was more to win than lose in joining the League. While Democrats stood by Wilson's original Treaty, the Republican – that is Root's – proposal was to ratify the Treaty with certain reservations for example with respect to the collective security system.[32] Even though a partially satisfying bipartisan

26 Zasloff 2003, at 117.
27 See Cooper 2011, at 77-78.
28 Zasloff., at 109.
29 See Cooper 2011, at 106-108.
30 Zasloff 2003, at 124, 128.
31 Root quoted in *ibid.*, at 108.
32 Republicans were typically more concerned with the League's impact on American sovereignty, and insisted i.a. on an absolute right to withdraw from the League, and the affirmation of the Monroe doctrine. *ibid.*, at 106.

compromise in the subject matter was attainable many times during the Senate debates, the hostile parties were not able to cooperate.[33] As a result, the US would not join the League, since neither party's stand received the required votes to enter the Treaty into force.

4 League of Nations Covenant and Root

Turning now to the Covenant of the League of Nations and Root's vision of the postwar world order, Root saw the need to strengthen international law and courts as the self-evident lesson to be learnt from World War I. He believed that the lessons of history affirmed law as the ultimate, and quite frankly, the only effective tool in restraining such independent players as nations in the international society.[34]

As law was at the heart of Root's world view, he unsurprisingly felt troubled by the inherently political nature of the Covenant of the League of Nations, and especially its collective security system under Article X. Article X proved to be the most controversial part of Treaty in the Senate debates. It provided that member states "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all States members of the League". Combined with a rule that any threat of war anywhere in the world was deemed "a matter of concern to the whole League"[35], many Americans felt that adapting the Covenant and its ambiguous obligations to wage war around the globe would endanger the nation's sovereignty and in effect turn the US into "the world's policeman".[36] Whether or not these fears were justifiable is debatable, because the binding legal nature of the collective security system can be seen as somewhat vague, at least in comparison with the UN Charter. While the actual legal effects of Article X remain debated, the Covenant certainly introduced the principle of collective security to the international community, even if the system proved to be quite unsuccessful in practice.

33 Cooper 2011, at 2.
34 Root Elihu (1916), *Outlook for International Law* in Addresses on International Subjects, at 393-395.
35 Article XI, League of Nations Covenant.
36 Zasloff 2003, at 109.

When a dispute likely to lead to a conflict between member states emerged, the Covenant imposed an obligation to submit the matter either to arbitration, judicial settlement or to the Council of the League.[37] However, few flattering words can be said of the efficiency of the system. No compulsory jurisdiction for adjudication or arbitration was set, and member states retained the final discretion in determining whether they recognize the case to be suitable for submission under the Covenant.[38] As for the Council's procedure, the Covenant urged the Council to attempt to settle the dispute first, but should this fall through, the procedure led formally only to a publication of a report of the dispute's facts and the Council's recommendations to the parties.[39] The nature of these recommendations varied theoretically between unanimous and majority reports, granting a sort of right to veto to Council members.[40]

The Covenant did not absolutely prohibit non-defensive unilateral use of force, but if a member state waged war in breach of its obligations, it declared that the aggressor shall "be deemed to have committed an act of war against all other members", which triggered various sanction resorts from financial sanctions to military force prescribed in Article XVI. However, the Covenant remained silent on which organ of the League was to take action and what sorts of measures could be taken in given circumstances. The decentralized nature of the process resulted in a system where, in the end, the individual members instead of the League decided whether or not to resort to sanctions.[41] This sort of a system obviously could not work very well in the world of international relations, especially when a strict application of even the few obligations deriving from the Covenant was not in fashion

37 Article XII, League of Nations Covenant.
38 *ibid*., Article XIII.
39 *ibid*., Article XV.
40 A unanimous report prohibited member states to go to war with a party "which complies with the recommendations of the report", while member states preserved "the right to take such action as they shall consider necessary" in face of a report backed by merely a majority of Council members.
41 Shaw Malcolm N. (2008), *International Law*, at 1217.

during the interwar years.[42] The informal practices of key League members eroded the already vague procedure even further. It did not help, either, that withdrawing from the League was made relatively easy, as Japan and Germany illustrated before the outbreak of World War II.[43]

Some go as far as claiming that the great powers never took the League quite seriously in any disputes of importance and kept all matters of significance out of it.[44] The League's role has been portrayed as "a debating society" while key players sought solutions to conflicts themselves.[45] There is some evidence that bear out this skeptical view on the League, a typical case in point being the Second Italo-Abyssinian war. This was one of the few times the League actually decided on imposing sanctions on a member state, but the enforcement of the sanctions was half-hearted because the great powers were more concerned with securing their national interests in the tensed international scene.[46] Alternatively, some deny the inherent weaknesses of the League and defend its potential, blaming disloyal national political leaders for its collapse. The more optimistic view tends to emphasize the relatively steady and successful functioning of the League in its earlier stages before the hardships it faced in the 1930's.[47]

To Root, the fundamental flaw in the League was the organization's political structure. He summarized its problems in resting "the hope of the whole world for future peace in a government of men, and not of laws".[48] Root was generally deeply skeptical of governments, which he thought were tempted to pursue power and wealth in international affairs.[49] Under the Covenant, the League Council – a political body formed mainly of the victor states of the war – operated as the executive of the organization.[50] Furthermore, the Covenant did not provide any meaningful restraint on the Council's discretion on when and how to act. From Root's legalist framework, an arrange-

42 For a case in point, see e.g. the handling of the Corfu incident in the Council in 1931 in Scott George (1973), *The Rise and Fall of the League of Nations*, especially at 216.
43 Klabbers Jan (2013), *International Law*, at 171.
44 See Scott 1973, especially at 166.
45 Carr Edward Hallett (1939), *The Twenty Years Crisis 1919-1939*, especially at 133-134.
46 For a detailed description of the events, see e.g. Scott 1973, at 339-368.
47 See Walters F.P. (1952), *A History of the League of Nations*, especially at 467.
48 Root quoted in Coates 2010, at 420.
49 Root 1916, at 394.
50 See Article IV, League of Nations Covenant.

ment where political consideration between Council members with no judicial control whatsoever determined the outcome of critical debates was plainly inadequate. He referred to the system as "an attempt to preserve for all time unchanged the distribution of power" and "an alliance of one half of the active world against or for control of the other half".[51] In sum, Root saw the system as extremely risky, and as far as Article X goes, he thought that the "whole article should be stricken out".[52]

Since irrational government endeavors caused the cracks in the international order, Root advocated shifting decision-making from political bodies to such impartial institutions as courts as a way to limit state power.[53] True to his legalist worldview, Root distinguished law and politics entirely from one another in international affairs. He held that all causes of war were either political or legal by nature, and significantly, legal disputes "cover[ed] by far the greater number of question upon which controversies between nations rise".[54] If the disputes between states were usually legal by nature, the emphasis in drafting the postwar order should have been in fortifying legal institutions, not placing a political body like the Council in the driver's seat in conflict resolution. Consequently, Root criticized the Covenant for throwing aside "all effort to promote or maintain anything like a system of international law, or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war".[55] This argument was in a sense justified, since, for example, the newfound Permanent Court of International Justice was rather weak, and international arbitration with the Permanent Court of Arbitration as its flagship rested on the agreement of the parties to function.

In Root's eyes, then, apolitical and impartial arbitration and adjudication institutions were the keys to world order and peace. While Root admitted that the War had exhibited the inadequacy of the international law of the time, he hoped that the trauma caused by the War would be strong enough to raise a common desire to subject nations to the rule of law – to "overcome

51 Root quoted in Cooper 2011, at 79.
52 Root quoted in *ibid.*
53 Koskenniemi 2007, at 12.
54 Root quoted in Zasloff 2003, at 100.
55 Root quoted in *ibid.*, at 101.

the determination of each nation to have the law suited to its own special circumstances".[56] At the heart of this legally regulated international system would be an international court with general and compulsory jurisdiction. The role of the judiciary was to be molded on the example of the Supreme Court in the US. Like the independent states in America had submitted to the jurisdiction of a court to settle disputes for the greater good, the nations of the world ought to do the same, and this would in fact also serve their self-interests.[57] Arbitration under objective and neutral rules was the definitive means of conflict resolution because a rational nation had little need for conflict with others in world affairs. Once again classical legal thought rears its head in Root's rhetoric.

In the light of the recent rise of undisguised realism and moralism in international relations, another topical aspect in Root's stance was his insistence on separating law from morals. President Wilson outraged Root by regarding in a moralist tone often linked to Wilsonian internationalism that the Covenant constituted moral obligations to act in international conflicts.[58] As a political scientist, Wilson saw international legal rules more as loose suggestions than binding law, and his liberal internationalism was based on political thought in contrast with Root's legalism. The President's belief in an evolutionary theory of political development and a teleological faith in historic progress toward democratization and corporate unity led him to believe that laws and institutions were susceptible of strangling "the spontaneous growth of society".[59] Because of the contradictory starting points of the two men, the President preferred an organization consisting of loose, evolving moral norms over the law-led proposal of Root, which the President deemed too mechanistic and rule-based.[60]

Root, in turn, saw Wilson's distinction between moral and legal obligations as disastrous for the entire system of international law. Obligations deriving from international law had to be binding even if the sanction system was not correspondingly enforceable as the national one. Root did not accept

56 Root 1916, at 402.
57 Zasloff 2003, at 82.
58 *ibid.*, at 110.
59 Wertheim Stephen (2011), *The Wilsonian Chimera: Why Debating Wilson's Vision Hasn't Saved American Foreign Relations* in White House Studies 10:4, at 344-345.
60 *ibid.*, at 352-354.

the classical Austinian argument of the nature of international law as merely positive morality because of a lack of commands enforced by a sovereign power between Westphalian states.[61] He did, however, insist that in order to impose real obligations, international law had to be backed by sanctions of a superior power.[62] Classical legal thought provided Root's answer to this dilemma as well, since in a peripheralist ethos, the general public opinion of the collective civilization held the right to exercise punishment on sovereign nations.[63]

To Root, the real sanction of international law was in the public condemnation and disgrace that followed from breaking the standards of the community. Retaining international goodwill was fundamentally important for nations, since "nonconformity to the standard of nations mean[t] condemnation and isolation".[64] In Root's words, the punishment of international law was in the "terrible consequences which come upon a nation that finds itself without respect or honor in the world and deprived of the confidence and goodwill necessary to the maintenance of intercourse".[65] Root's views on the sanction of international law, public opinion and possible coercive sanctions were complex at times, and he also left some key parts unclear.[66] His conviction of the superiority of public opinion over coercive sanctions as the core of international law was, however, unwavering: "[t]here is but one power on earth that can preserve the law for the protection of the poor, the weak and the humble … and that is … the mighty power of the public opinion of mankind".[67] But how could such an abstract concept as global public opinion be formed in complicated international disputes? Keeping

61 On Austin's theory of legal positivism, see e.g. Austin John (1832), *The Province of Jurisprudence Determined*.
62 Root 1916, at 393-394.
63 *ibid*., at 394.
64 Root 1908, at 455.
65 Root 1916, at 396.
66 See Dubin 1979, especially at 352 and 368.
67 Root Elihu (1918), *Political Addresses by Elihu Root*, collected and edited by Bacon Robert and Scott James Brown, at 6.

Root's legalism in mind, it is hardly surprising that it would fall upon courts to define it on a case-by-case basis.[68] This illustrates Root's deep trust and faith in the ability of lawyers to resolve disputes reasonably and impartially.[69]

As mentioned above, Root's criticism served to block Wilson's League by uniting the divided Republicans. Legalism had a much more far-reaching influence in American internationalist thinking as well, as it would maintain its weight for the greater part of the interwar years and direct the foreign policy endeavors of the Republican administrations. These goals included strengthening international institutions and creating a system of law in international affairs.[70] The US ended up promoting quite progressive court systems after the War, including a court for the prosecution under international criminal law, which was a radical proposal at the time.[71] The American stance on the League, however, would remain somewhat reserved throughout its existence. At times the US co-operated successfully with the League,[72] but generally it all but backed out of an active role in international politics. In the words of President Harding, America should not be involved with the political affairs of other nations, "which do not concern us".[73] The US would more or less maintain this approach until World War II, which would rearrange the board once more.

5 Anti-Legalism under the UN Charter

After the League collapsed as a result of World War II, the world got a second chance in drafting an organization to pursue world peace with the establishment of the United Nations. As Root passed away before the outbreak of the War, there is no knowing how the failures of the interwar legalist foreign policy would have affected his stance on the drafting of the premier international organization this time. While recognizing the inevitable taking out

68 *Supra note* 62.
69 See Koskenniemi 2007, at 17.
70 Zasloff 2003, at 125-126.
71 Jescheck Hans-Heinrich (2004), *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute* in 2 Journal of International Criminal Justice, at 54.
72 For a case in point, see e.g. the handling of the embargo on Bolivia and Paraguay in Scott 1973, at 246-247.
73 Harding quoted in Zasloff 2003, at 125.

of context such a study entails, the article will now take a look at the UN Charter and its collective security system from a Rootist perspective. The purpose of this study is to attempt to highlight some of its controversial aspects. One may argue that from a legalist perspective, the UN inherited the fundamental flaws of the League, since its institutions were cast in a fairly similar mold as the League's respective bodies with more or less significant revisions based on the lessons learnt from the League's fall.[74]

The Charter constitutes in principle significantly more explicit and comprehensive rules on the use of armed force in international affairs in comparison with the Covenant. The specific purpose and premise of the Charter is to limit the right of states to resort to warfare, or even use the threat of military force, in international disputes.[75] Its key starting point is to centralize the use of armed force in the hands of the Security Council in an attempt to limit the use of force exclusively to projects pursued in the common interest. Apart from action authorized by the Council, the only other exception to the prohibition of the use of force is the "inherent right of individual or collective self-defense" in the face of an armed attack.[76] Despite this change of premise, the political nature of collective security remained relatively unchanged, leaving little room for legal consideration endorsed by Root.

Similarly as under the Covenant, the process under the Charter is spearheaded by a political body, the Security Council.[77] Moreover, the victorious powers of the war would again form the core of the body, awaking Root's criticism of an attempt to preserve the distribution of power. The composition of the body is particularly vital because of the Council-led character of the UN. Under Chapter VII of the Charter, the Council has a monopoly to identify a threat to peace, a breach of peace or an act of aggression in international affairs. The collective security system is activated only if the Council determines that one of these situations is present. As none of the notions are defined in international law, the system characteristically offers great latitude to the Council in deciding whether and how to act.[78] Once

74 See Shaw 2008, at 1216.
75 Article 2, Charter of the United Nations.
76 *ibid*., Article 51.
77 *ibid*., Article 24.
78 See Klabbers 2013, at 174-176.

the system is activated by such a statement, the Council can order measures to be taken in order "to maintain or restore international peace and security". Under Articles 40-41 of the Charter, the Council should generally first take provisional measures and use sanctions without armed force. If it deems the sanctions and measures inadequate, Article 42 ultimately allows the use of military force.

Whether or not the Council is legally restrained in its consideration constitutes a point of controversy amongst international lawyers today. The supporters of an unlimited Security Council discretion tend to highlight the undefined language of the Charter with ambiguous key provisions as "a threat to peace".[79] In addition, they emphasize that determining if such a situation has occurred cannot be measured by legal criteria, as well as that no obligation can be placed on the Council to act if it does not want to.[80] Finally, the veto right granted in Article 27 to the permanent members can be abused to further national political interests.[81] In fact, the veto privileges can be depicted as the ultimate proof of the Charter's drafters' realist offset. By the provision, the drafters have been claimed to have abandoned any attempt to establish a general collective security system, and instead delimit it only to conflicts of minor importance where key players are of one mind.[82]

Alternatively, opponents of the unlimited discretion tend to emphasize that concretizing vague terms is a general feature of law.[83] Moreover, the international community aimed at crafting a careful balance of competencies between the bodies when drafting the Charter - not giving general power to adopt measures that bind everyone to an unrepresentative organ.[84] At the very least, norms of *ius cogens*, core human rights and elements of state sovereignty have been claimed to limit the Security Council in its actions.[85] The International Court of Justice has backed up this latter view by stating that

79 De Wet Erika (2004), *The Chapter VII Powers of the United Nations Security Council*, at 135.
80 *ibid.*, at 135-136.
81 *ibid.*, at 135.
82 See e.g. Claude Inis L. Jr. (1961), *The Containment and Resolution of Disputes* in Wilcox Francis O. and Haviland H. Field Jr. (eds), *The United States and the United Nations*, at 114.
83 De Wet 2004, at 136-137.
84 *ibid.*
85 See *ibid.*, at 369-372.

while "the purposes of the Organization are broad … neither they nor the powers conferred to effectuate them are unlimited".[86] All the same, the system can hardly be portrayed as the kind of comprehensive system of checks and balances embraced by Root. Nor does the distinction between law and politics that Root cherished exist in the organization's decision-making process, since the institutional balance of the organization can be seen as somewhat crooked – the executive organ has attained a hybrid role, holding also adjudicative powers.[87] Article 25 of the Charter grants the Council a right to make binding decisions on all member states. As a result, consideration by political criteria between Council members can lead to judicial outcomes for everyone.

Keeping Root's criticism against the League in mind, the subsequent question to ask is: what sort of role should courts play in all this? It is pretty safe to say that through Rootist eyes, their general status in the UN regime seems deficient. The Charter provides a principled obligation and a procedure for peaceful settlement of disputes under Chapter VI. The ICJ serves as the principal judicial organ of the UN[88], and its jurisdiction can be based either on contentious case or advisory opinion jurisdiction.[89] Still, as the Charter does not, for instance, provide any truly compulsory jurisdiction to the Court, one can hardly claim that adjudication or arbitration would conclusively limit the politics of international affairs today.[90] With respect to the Council's dominance in collective security, judicial review by the ICJ over Council resolutions has been proposed as a potential way to limit the

86 *Certain Expenses of the United Nations,* Advisory Opinion, ICJ Reports 151, 1962, at 168.
87 See Cronin-Furman K.R. (2006), *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship* in 106 Columbia Law Review 435, at 438-439.
88 Article 92, Charter of the United Nations.
89 Articles 36 and 65, Statute of the International Court of Justice.
90 For a general discussion of the role international courts and tribunals play in the international sphere today, see e.g. Klabbers 2013, at 140-164.

Security Council's virtually unlimited latitude to run plays under the Charter. Such legal review, however, is far from unproblematic in the international sphere. A paradox between law and politics exists also at the heart of any system of judicial review.[91]

The question of the ICJ's competence to judicial review has been hotly debated especially because of certain ICJ cases, most notably *Lockerbie*[92]. In the Court proceedings, controversy arose on the possibility of the ICJ to constrain the Council's discretion to determine if a particular situation constitutes "a threat to peace".[93] In other words, the debate circulated around the Court's right to review the Council's binding decisions on a legal basis. For better or for worse, the appropriateness and legality of judicial review was left open in the case, as has been done in subsequent ones, too.[94] The matter has recently been brought up quite regularly, but the institutions have been reluctant to take a final stand on the problematic interpretation of the interaction between the Council and the Court.[95]

Were the UN to accept judicial review over Security Council resolutions, the system could be developed in the context of ICJ's advisory opinions.[96] As the name itself suggests, these advisory opinions are formally non-binding, but their legal precept can in fact be seen as highly authoritative.[97] A criti-

91 While maintaining basic legal guarantees in political decision-making is often deemed desirable, leaving politics to democratically elected politicians without courts engaging actively in the process is considered preferable at the same time. See Klabbers Jan (2005), *Straddling Law and Politics: Judicial Review in International Law* in MacDonald Ronald & Johnston Douglas (eds.), *Towards World Constitutionalism,* at 809.

92 In the case, Libya contested the legality of the actions the Council took in order to extradite Libyan nationals for their alleged involvement in an explosion of a flight. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA)*, Order, ICJ Reports 114, 1992, *Questions of Interpretation and Application of the 1971 Montreal Convevtion Arising from the Aerial Incident at Lockerbie (Libya v. USA),* Preliminary Objections, Judgment, ICJ Reports 9, 1998 and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA)*, Order, ICJ Reports 152, 2003.

93 De Wet 2004, at 15.

94 Klabbers 2013, at 163.

95 Disagreements usually come down to different interpretations of the Charter. For a general review of the relationship between the powers of the ICJ and the Council, as well the case law touching the question of judicial review with an emphasis on *Wall Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 136, 2004), see Cronin-Furman 2006.

96 See De Wet 2004, Chapter 2.

97 Klabbers 2013, at 162.

cal voice might point out that the opinions would, nevertheless, in practice lead to no consequences even if the ICJ found a Security Council resolution illegal. Furthermore, some reject judicial review as too risky an enterprise: should the Council disregard the Court's judgments, the international legal system would be put to "far greater jeopardy than if the question of the lawfulness of Security Council action remained unresolved."[98] Supporters, in turn, highlight the undermining effect such an opinion would have on a resolution's legitimacy, as well as the justification for non-compliance this sort of a finding entails.[99] Calls for judicial review in the UN are also in a more general sense usually linked to concerns with the rule of law in the organization, Council resolutions being a textbook example of problematic areas from a rule of law perspective.[100]

All in all, one may argue that judicial review could contribute to developing the legal standards of Council resolutions.[101] While a review might not be suitable for situations that require subtle political valuation and are very much open to interpretation, it could provide basic legal guarantees to the process and constrain the Security Council from abusing its powers flagrantly.[102] From a legalist perspective, giving the power of review to the Court would probably be a welcomed development, since Root endorsed the equivalent right of the Supreme Court under the US Constitution.[103] Hence judicial review might answer some of the legalist concerns on the arguably unrestricted politics of collective security. In sum, however, the present collective security system under the Charter is far from the legally restrained, balanced international system advocated by Root.

98 Nolte Georg (2000), *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections* in Byers Michael, *The Role of Law in International Politics*, at 318.

99 De Wet 2004, at 58.

100 This is because resolutions can impose sanctions without comprehensive procedural requirements, and provide few mechanisms for their subjects to fight the impositions. See Klabbers 2005, 816-818.

101 In fact, some claim that the Court already does review the decisions of other institutions with some regularity even without clear authorization, and the key question is, instead, how and when this power should be used. Klabbers 2013, at 163.

102 Instead of testing "the wisdom behind a certain policy", the review would merely have the power to "test whether that policy is applied in accordance with certain requirements. With respect to the judicial review's problems of mixing law and politics, a marginal, procedural review has been put forward as possibly the most acceptable version of review. See Klabbers 2005.

103 Leopold 1954, at 75-76.

6 American Realist Standpoints on the Charter

Keeping this general discussion on the anti-legalist structure of the UN in mind, the article turns next to examining American standpoints on the Charter. One of the biggest differences between the first steps of the League and the UN was the American involvement in the projects. After World War II, the US took the driver's seat in the UN, completing a 180 degree turn in its approach to world politics in contrast with the aftermath of World War I. How does one explain this turn from political isolationism to activist international co-operation? A different political scene as well as the leadership's changed ideas on international affairs can shed some light on the question. After discussing the reasons for the relative ease of ratifying the treaty, this part will explore the prevailing American position on collective security, which has come a long way from the legalist era in US foreign policy.

The Roosevelt administration had already before the Second World War gradually attempted to abandon the US retreat tactics in foreign policy.[104] While realist concerns were on the rise in US foreign policy thought as the threat of another global war grew more imminent, traditional American isolationism was still too strong for the government to get actively involved in the international situation in the late 1930's.[105] The change of pace in the US movement to international political activism can obviously be accredited to the outbreak of World War II. This time, as war was raging on a global realm, there was early accord between American leaders that the US must be actively involved in securing the postwar peace.[106] Involving the USSR in organizing the postwar world was an equally fundamental preoccupation for American officials as the War was drawing to a close.[107] This illustrates the realist ethos of the early US standpoint on the UN – maintaining peace would only be possible if the great powers co-operated.[108] Hence, for instance, the rebuilt collective security system was only to be implemented in

104 For a case in point, see e.g. Scott 1973, at 384.
105 Russell Ruth B. (1958), *A History of the United Nations Charter: The Role of the United States 1940-1945*, at 1.
106 *ibid.*
107 *ibid.*, at 949.
108 *ibid.*, at 960-961.

conflicts where the major powers were of one mind.[109] Moreover, the importance of maintaining adequate national military strength and a balance of power were recognized as basic factors in preserving international security in addition to collective security.[110] Such starting points stand in stark contrast with Root's legalism.

President Truman faced also a very different political scene when bringing the Charter to the Senate for ratification from the one President Wilson had to deal with. World War II had finally convinced the clear majority of both parties that isolating from world politics was no longer an option for the US. Similarly as with the Covenant, many deemed the Charter a far from perfect document. This time, though, the widespread concern to avoid repeating the fate of the League ensured a bipartisan support for its ratification, as the parties were more prepared to make compromises.[111] Although many were divided on the final document, the usual doubts being that it was either too strong or weak, there was general consensus that the Charter was "better than no agreement and, in any event, the best that could be got at the moment".[112] During the Senate debates, minor controversies arose for instance on the limitations UN membership would bring on the action of US armed forces, and the jurisdiction of the ICJ.[113] In the end, however, ratifying the treaty got almost absolute bipartisan support, with only two Senators voting against joining the UN.

In the early decades of the organization, the Americans defended the strict application of the Charter and its restrictions on resorting to armed force quite vigorously at times.[114] In general, however, US policy in the UN during the Cold War has been described as a record of attempts to enhance its "usability as a Western instrument" in the midst of the contest for power with the Soviet Union.[115] After the collapse of the USSR, the US perception on the UN collective security system has been characteristically realist and

109 This was realized by the right to veto granted to all permanent members in the Council. See *supra note* 82.
110 Russell 1958, at 961.
111 For a comprehensive review of the ratification by the US, see *ibid.*, at 935-948.
112 *ibid.* at 942.
113 *ibid.*, at 942-947.
114 See Gazzini Tarcissio (2005), *The Changing Rules on the Use of Force in International Law,* at 103.
115 Claude 1961, at 122.

flexible. In the scale of this article, it is not possible to review post-Cold War American foreign policy operations extensively. One should note that the US has also operated with uncontroversial Council granted mandate, as was the case in Afghanistan after 9/11.[116] Yet the common feature in many of the heterogeneous American realist operations of late has been the undermining of international law and institutions.[117]

Explanations to the recent tendencies have been placed, among other things, on the unprecedented hegemony of the US in the international community.[118] An interesting approach to the analysis is the stressing of ideology, as prevailing American foreign policy can be seen as inherently moralist and realist in tone. Dubbed as American realism, contemporary US foreign policy doctrine makes pursuing idealist ends by realist means possible. It enables talking simultaneously in the languages of "muscular national power politics" and "activist universal moralism", and has attained a predominant position in American internationalist thinking especially after 9/11.[119] Also official American national security strategy recognizes this starting point to its approach to world politics readily.[120] The foundation of the ideology lays in the Puritan legacy of seeing the US as an exceptional City upon a Hill in the world with a special mission and responsibilities.[121] Such exceptionalist thinking is still very much alive in American internationalism.[122] In respect of collective security, American realism has paved the way to the US challenging the Security Council's authority by using armed force unilaterally without, or with controversial, Council authorization, when a deadlock in the Council has ruled out action through the UN.[123]

116 See Security Council Resolutions 1368 and 1373.
117 Gazzini 2005, at 97.
118 *Supra note* 114.
119 Tjalve Vibeke Schou (2008), *Realist Strategies of Republican Peace: Niebuhr, Morgenthau, and the Politics of Patriotic Dissent*, at 138-139.
120 See The National Security Strategy of the United States of America (16 March 2006), available at http://www.whitehouse.gov/nsc/nss/2006/intro.html.
121 See *ibid.*, at 23-26, xi-xv. Tjalve separates from one other two distinct puritan legacies in America. First, puritanism serves as the foundation of an exceptional American destiny equipped with an absolute certainty of its causes. It serves, however, also as the foundation to a more humble, self-reflective and skeptical but simultaneously optimistic attitude toward an American project as a design of its people.
122 For an illustration of exceptionalist narrative, see e.g. "Remarks by the President on the Way Forward in Afghanistan", 22 June 2011, available at http://www.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan.
123 See Gazzini 2005, Chapter III.

In addition to the Syria rhetoric cited in the introduction chapter, an obvious example of American realist policy is President Bush's *Operation Iraqi Freedom*. When the US could not obtain the Security Council's support to authorize the use of force against the Hussein government, it ended up intervening in the country anyway with rather controversial legal argumentation. The mandate for the operation was based on the argument that Iraq had breached the ceasefire conditions set out by the Council in 1991, and thus the Council's authorization in Resolution 678 to use all necessary means in the Gulf crisis authorized the use of military force against Hussein a decade later.[124] On a more realist note, President Bush justified the actions also on ideals and the need of self-defense, as the Iraqis would "achieve a united, stable and free country", and the world would be "defended from grave danger" by an American intervention.[125] The intervention stirred strong opposition in the international community, with nations demanding the respect of the Council's authorization as the exclusive procedure when resorting to war non-defensively.[126]

Apart from self-defense claims, humanitarian causes for military intervention have recently sparked controversy in respect of the Security Council's authority in collective security.[127] A representative case in point is Kosovo, where NATO forces led by the UK and US intervened in the crisis without an authorization by the Council.[128] Here the reasoning to turning a blind eye to the Charter was moralist in nature, as preventing a humanitarian disaster served as grounds to override the Council. Such rhetoric can also be seen as a manifestation of a recent general turn to ethics in international law, where formally illegal measures are justified by moral obligations to act.[129] In the case of Kosovo, many international lawyers deemed the Zagreb bomb-

124 See *ibid.*, at 78-81.
125 See "Operation Iraqi Freedom: President Bush Addresses the Nation", 19 March 2003, available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html.
126 Gazzini 2005, at 80.
127 For a general presentation on the "purely humanitarian intervention", see e.g. Franck Thomas M. (2009), *Recourse to Force, State Action Against Threats and Armed Attacks*, Chapter 9.
128 Other members would have vetoed the action had the Council been included. See *ibid.*, at 163.
129 For a presentation of the turn to ethics in international law with an emphasis on the moralistic legal reasoning in the context of the NATO bombings in Serbia in 1999, see Koskenniemi Martti (2002), *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*.

ings illegal under the Charter, but simultaneously "morally necessary".[130] To allow such humane exceptions to the collective security system is to accept that political consideration might in exceptional cases dismiss the monopoly of the Council and allow unilateral non-defensive use of force. While this might at times help further desirable goals, such as preventing a humanitarian crisis or a terrorist attack, it is important to be aware that the approach also inevitably embodies the mixing of law and morals denounced by Root. The dangers of such bendy approaches to international law in foreign policy include a crusading moral absolutism and overextension.[131]

Finally, the anti-legalist ethos in American internationalist thinking is not exclusively confined to collective security, either. It has affected the American views on other international legal issues as well, including the courts cherished by Root. While promoting international courts was chiefly "an American project"[132] in Root's time, the situation has all but turned around today. US governments have lately been very reserved toward international legal institutions. This undermining agenda peaked in the US withdrawing its acceptance of ICJ jurisdiction in the face of an unwelcomed judgment in *Nicaragua v. USA* case.[133] Another recent example of these tendencies is her backing out of the ICC despite being one of the most active drafters of the Court. In the end, the Americans opted out of the project chiefly because the Security Council did not get the final word in determining the Court's jurisdiction.[134] Consequently, permanent members did not receive the veto privileges the US had sought.

130 *ibid.*, at 5.
131 Tjalve 2008, at 140-144.
132 Koskenniemi 2007, at 3.
133 In the ruling, the court held that the US had, *inter alia,* breached its obligations under customary international law not to use force against or violate the sovereignty of other states. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, ICJ Reports 14, 1986.
134 Mundis Daryl (2004), *United States of America and International Justice – Has Lady Liberty Lost Her Way*, at 3-4.

7 Conclusion: Looking Forward through Rootist Eyes

While it would naïve to expect past thought to provide ready solutions to present problems[135], it can serve as inspiration in contemplating them. By studying prevailing practices in the UN and US in the light of Root's thinking, I hope to have highlighted some controversial areas of collective security and US foreign policy. The foregoing discussion has also aimed at illustrating the complexity of shaping US approaches to world politics. Seeing the policies of the administration in the light of both ascendant ideologies and their political contexts usually helps in understanding the actions of the government. Today, probably no one would desire a return to the legalist era in American foreign policy. Rejecting the influence of balance of power and rule of force has been highlighted as the doom of Root's framework.[136] His belief in a world of law and courts may also appear to some as a somewhat naïve formalism, which ignores the cultural and political in law. [alaviite: In contrast with Root's views, international law is these days often portrayed more as conversation than trial. For instance, the modern law of force has been depicted to serve merely as a vocabulary for argument about force as players seek to build "a large stockpile of legitimacy", the key to power in contemporary world politics.[137] Nonetheless, legalism maintains interesting thoughts on some of the issues generating controversy in the international community to this day. Root's respect for legal procedures and insistence on restraining power with checks and balances are some of the aspects that still resonate in present-day discussions.

The dominance of the political Security Council in UN decision-making is one consistent point of controversy. For a legalist, restraining the discretion of the Council could be a welcomed development, and judicial review by the ICJ over Council resolutions an apt option to do this. Legalists would also probably opt for strengthening the role of international courts in world politics, contrary to the recent opposite trend. In respect of American foreign policy,

135 Glenn Tinder, for instance, has argued that the purpose of studying past political thought for current use is rather to "learn consider questions with clarity and determination and an open mind". See Tinder Glenn (1997), *Political Thinking: The Perennial Problems*, at 21.

136 Zasloff Jonathan (2006), Commentary on Slaughter Anne-Marie, *Rereading Root* in Proceedings of the 100th Annual Meeting of the American Journal of International Law, 203-216.

137 See Kennedy David F. (2004), The Dark Sides of Virtue: Reassessing International Humanitarianism, at 266-275.

this might mean advocating an American commitment to international court projects such as the ICJ and ICC. Furthermore, Root's guiding principle of balancing power with responsibility could serve as a timely reminder to US foreign policy from a legalist perspective. The nation's pre-eminent power status has led in some ways to the fulfillment of its exceptionalist vision, since the actions of the US carry far-reaching impact for the entire world. If you will, great power is accompanied with great responsibility, as the American comic book superhero Spider-Man discovers while struggling to find his place in the world.[138] Consequently, the US has both a particularly weighty say and responsibility in the evolution of the international community of tomorrow.

A legalist would probably not approve the undermining impact American realist foreign policy has had on the UN and its collective security system. The lessons of the League's fall demonstrate that an organization can only be as strong as its members decide. Departures from the present use of force doctrine can also lead to the changing of international legal rules in the long run.[139] At stake here is, ultimately, the fundamental idea of the UN collective security system – a centralized control over the use of military force.[140] Pressure for adopting new practices has arisen from novel complications in the international sphere, such as terrorism and humanitarian intervention. Nevertheless, some argue that there is no trade-off between the Charter and the national interests of the US. These arguments include that power alone does not provide safety, and by playing by the common rules, the US strengthens her legitimacy to act, makes the world more receptive towards her causes, and can expect more in return from other players in the long run.[141]

To conclude, restraining and holding powerful players accountable is ever more challenging in an era of Security Council dominance, ethical international law and realist foreign policy. Through Rootist eyes, however, this is an objective both international law and America should strive for.

138 See the motion picture "Spider-Man" (2002), Columbia Pictures.
139 Gazzini 2005, at 82.
140 *ibid.*, at 104.
141 See e.g. Slaughter Anne-Marie (2007), *The Idea That Is America: Keeping Faith with Our Values in a Dangerous World*, 2007, at 37-40.

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