Things fall apart: the concept of collective security in international law

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Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world

W. B. Yeats, *The Second Coming* (1920)

Introduction

In June 1919, a year before Yeats penned his sorrowful lament to the collapse of European order and Christian civilization in the First World War, Article 16 of the Covenant of the League of Nations came into force. Article 16 encapsulated the theory implicit in the Covenant and the Pact of Paris that war is illegitimate as an instrument of policy or of justice, or indeed for any purpose, except individual or collective defense against a state which has already resorted to or is immediately threatening war.¹ It provided, in part, as follows:

Should any Member of the League resort to war in disregard of its covenants ... it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not.

¹ See, e.g., Quincy Wright, "The Meaning of the Pact of Paris, *AJIL* 27 (1933); The Concept of Aggression in International Law," *AJIL* 29 (1935).

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It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.²

It would be fifteen years before these provisions would meet their first decisive test when Italy invaded Abyssinia (Ethiopia) on October 3, 1935.³ On March 17 and again on September 5, Ethiopia formally requested the League Council to consider the dispute with Italy in terms of the conciliatory procedure under Article 16. With this having failed, a Committee of six states – Portugal, Great Britain, France, Chile, Denmark, and Romania – presented their conclusion to the Council on October 7 that Italy had resorted to war in violation of the League Covenant.⁴ All members of the Council accepted this finding, except Italy. The Italian government continued to insist that such a case could not be settled by the means provided in the Covenant “[s]ince this question affects vital interests and is of primary importance to Italian security and civilization.” Thus, Italy “would be failing in its most elementary duty, did it not cease once and for all to place any confidence in Ethiopia, reserving full liberty to adopt any measures that may become necessary to insure the safety of its colonies and to safeguard its own interests.”⁵

In his speech to the Assembly on October 10, the Italian representative Baron Aloisi advanced an array of arguments in favor of his country’s position: these included: (1) the League had paid insufficient attention to Italy’s grievances against Ethiopia; (2) it had not applied Article 16 in the Manchurian and Chaco disputes; (3) Italy had “done much more for civilization than Ethiopia”; (4) Ethiopia, “because of its backwardness and failure to live up to the conditions on which it was admitted to the League” had either ceased to be a member or should be ejected from the

² Covenant of the League of Nations, June 28, 1919, Article XVI, 1 *Hudson International Legislation* 1 (1931).

³ Previously, the League had varying degrees of involvement in the Graeco-Bulgarian crisis in 1925, the Chaco dispute in 1928, and the invasion of Manchuria in 1931. But no enforcement measures or collective sanctions under Article 16 were applied in these crises.

⁴ Quincy Wright, ‘The Test of Aggression in the Italo-Ethiopian War,’ 30 *AJIL* 45, 47 (1936). For the history of the League deliberations, see John H. Spencer, ‘The Italian-Ethiopian Dispute and the League of Nations,’ 31 *AJIL* 614 (1937).

⁵ League of Nations, Dispute between Ethiopia and Italy, Memorandum of the Italian Government, I Report, II Documents (1935, VII, 11). Italy raised various arguments alleging the necessity of self-defense in response to Ethiopia’s “aggressive attitude” which was said to have become an “immediate danger, obliging Italy to adopt adequate measures of a military character.” See Wright, ‘The Meaning of the Pact of Paris,’ 27 *AJIL* 42 (1933).

League, or placed under a mandate; (5) Italy's interests in Ethiopia had been expressly recognized in treaties with France and Great Britain; (6) the League could not "force the course of history" but must balance the parts of the Covenant which relate to "evolution" with those which relate to "conservation" by a greater "elasticity"; and that (7) the League should recognize Italy's expression of this "imperative necessity of life."

Caught as she is ... in the tide of her full spiritual and material development, but confined by historical vicissitudes and international restrictions within territorial limits which are stifling her, Italy is the country which must make her voice heard in this assembly of the States as the voice of the proletariat calling for justice.⁶

Rejecting these arguments and overriding Italian intransigence, a Coordination Committee soon recommended sanctions against Italy, including arms and credit embargoes and import and export boycotts, and called for mutual assistance among those sanctioning Powers adversely affected by such measures. These sanctions, however, fell well short of those envisaged in Article 16. The main reason was British and French vacillation in light of their strategic, political, and economic interests with Italy. In the end, the export embargo did not include coal, steel or oil, the commodities most critical to the Italian economy, and with British, French and Russian fears of war with Italy increasing, the general oil embargo was never adopted. Faced with the obvious inadequacies of the sanctions regime, the League refused to take any further measures. The first real test of the postwar collective security regime – an order premised on the international rule of law prohibiting aggression by one member state against another, and formally abolishing war as an instrument of either national policy or of justice – thus ended in failure.⁷ For John Spencer, the former advisor to the Ethiopian Ministry of Foreign Affairs, this outcome was not the result of any bureaucratic or procedural failure within the League, but rather

⁶ Records, 16th Assembly, 15th Plenary Meeting, cited in Wright, "The Test of Aggression in the Italo-Ethiopian War," pp. 53–54.

⁷ The question of whether a breach had occurred, or whether there was an obligation to apply economic sanctions under Article 16(1), was ultimately dependent on each member's view of the situation. Thus, "[m]ilitary sanctions could be recommended by the Council, but the decision on whether to apply them rested with each member." D. W. Bowett, *The Law of International Institutions* (4th edn., Library of World Affairs: Sweet & Maxwell, 1982), pp. 17–18.

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was due clearly to its inability, on the one hand, to give precedence to the procedure which it had adopted for the settlement of the dispute, over the attempts made outside the League with a view to conciliation, and, on the other, to pursue consistently any one course of procedure once adopted by itself.⁸

It is now a matter of history, as events turned in the widening gyre – first with the German march into the Rhineland in 1936, then Austria in 1938, and Czechoslovakia in 1939; then with the Soviet Union's invasion of Finland in 1939; and then finally with the German invasion of Poland in 1939 – that things would fall apart, that the League would not hold. As soon as 1945, however, against the backdrop of catastrophic moral horror and the death of over sixty million people, a “new world order” was instituted. Under Article 2(4) of the new postwar Charter, the “threat or use of force against the territorial integrity or political independence of other states in any manner inconsistent with the purposes of the United Nations” was outlawed. While Article 51 confirmed that the new regime of collective security did not impair the “inherent right of individual or collective self-defense if an armed attack occurs,” under Article 24 and Chapter VII a newly created Security Council was given the authority to determine the existence of any threat to the peace, breach of peace or act of aggression, and the primary responsibility to decide what collective measures were to be taken to maintain or restore international peace or security in conformity with principles of international law.

No sooner had the delegates returned home from San Francisco, however, than a cablegram, dated August 21, 1948, arrived for the President of the Security Council regarding the “question of Hyderabad.” The relevant section read as follows:

The Government of Hyderabad, in reliance on Article 35, paragraph 2, of the Charter of the United Nations, requests you to bring to the attention of the Security Council the grave dispute which has arisen between

⁸ Spencer, “The Italian-Ethiopian Dispute and the League of Nations,” p. 640. As regards the various efforts made outside the League first to avert hostilities and later to bring them to an end, Spencer notes the statement by Sir Samuel Hoare to the House of Commons on December 19, 1935:

I have been terrified with the thought – I speak very frankly to the House – that we might lead Abyssinia on to think that the League could do more than it can do, that in the end we should find a terrible moment of disillusionment in which it might be that Abyssinia would be destroyed altogether as an independent State.

307 Parl. Deb., at 2013, cited *ibid.*, p. 641.

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Hyderabad and India, and which, unless settled in accordance with international law and justice, is likely to endanger the maintenance of international peace and security. Hyderabad has been exposed in recent months to violent intimidation, to threats of invasion, and to crippling economic blockade which has inflicted cruel hardship upon the people of Hyderabad and which is intended to coerce it into a renunciation of its independence. The frontiers have been forcibly violated and Hyderabad villages have been occupied by Indian troops. The action of India threatens the existence of Hyderabad, the peace of the Indian and entire Asiatic Continent, and the principles of the United Nations.⁹

But by September 13, a later cablegram informed the Secretary-General that India had invaded and conquered Hyderabad.¹⁰ Sir Benegal Rau, the representative of India, justified India's actions the following May on the grounds that Hyderabad was "not a State in the international sense ... and cannot be one at any time in the future if India is to live. We cannot defy or ignore geography." Accordingly, not only was this not an "international dispute" for the purposes of the Charter, but Hyderabad was not competent to appear before the Security Council and the matter had properly been dealt with by the Government of India as a "matter of domestic concern."¹¹ Although the case of Hyderabad would soon be forgotten in the pages of history, for commentators at the time it represented the worst failure ever, viewed in either political or legal terms, of the Security Council since it

⁹ U.N. Doc. S/986, Security Council, Official Records, 3rd Year, Supp., September 1948, at 5. Hyderabad stated that it was a State, albeit a "State not a Member of the United Nations," and it accepted for the purposes of the dispute the obligations of pacific settlement provided in the UN Charter. This included its intention to adhere to the Statute of the International Court of Justice in conformity with Article 93(2), and to sign the Optional Clause in Article 36 of the Statute. Despite India's objections, the Head of the Hyderabad Delegation, Nawab Moin, was received and heard by the Security Council.

¹⁰ U.N. Docs. S/998 and S/1000, *ibid.*, at 6, 7.

¹¹ S.C., O.R., 4th Year, No. 28, 425th meeting, at 7. As noted by Eagleton, these arguments ignored the effect of the Indian Independence Act which "authorized independence for the Princely States if desired ... Nor does it follow from the facts of geography that Hyderabad should legally be regarded as a domestic concern by India." Clyde Eagleton, "The Case of Hyderabad Before the Security Council," 44 *AJIL* 277, 281 n. 7 (1950). As the President of the Council, Sir Alexander Cadogan of the United Kingdom, himself replied to a request of the Soviet delegate: "I can inform the Security Council that on August 15, 1947 the suzerainty of the Crown in the United Kingdom over Hyderabad, and all other Indian States, came to an end. None of the powers previously exercised by the Crown was transferred to the Government of the two new Dominions, that is, India and Pakistan." S.C., O.R., 3rd Year, No. 109, 357th meeting, September 16, 1948.

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was not due, as in other cases, to uncertainty as to legal rights, or to the extrinsic difficulties of the problem. The legal rights were embarrassingly clear; and a satisfactory political settlement could have been agreed upon with little difficulty. In all other cases, the Council has tried, and has frequently achieved a solution; in this case it did not even try.¹²

Writing in 1950, Eagleton suggested that the case of Hyderabad raised the question whether the United Nations was to be a "constitutional system or not."

Thus far, its trend has been away from law; the Security Council (and the General Assembly as well) has overridden the restrictions set by the Charter where it has desired to take an action, and has disregarded both its obligations under, and the principles of, the Charter when it did not desire to take action ... It is in this connection that the case of Hyderabad deserves study by those who are interested in achieving a system of international law and order in the world.¹³

In seeking to respond to Eagleton's question, how do we understand the two cases of Ethiopia and Hyderabad? What might they reveal about the problems and prospects today of achieving a "system of international law and order in the world"? What, in other words, are the purposes of international law and how do they relate to any notion of collective security? It is to these conceptual questions which this chapter now turns.

The concept of collective security

The concept of collective security is notoriously difficult to define. Like democracy, human rights and the rule of law, the term is associated with a loose set of assumptions and ideas and its continued existence rests in no small measure on its remaining an essentially contested concept. In

¹² Eagleton, "The Case of Hyderabad Before the Security Council," pp. 301-302. As Eagleton notes, apart from questions of law, the strategic and economic implications in the case were obvious. An Indian Government White Paper on Hyderabad stated in 1948: "India could live if its Moslem limbs in the North-West and North-East were amputated, but could it live without its heart?" Cited in *ibid.*, p. 277 n. 1. An Editorial in the Karachi newspaper, *Dawn*, stated on November 12, 1949 (*ibid.*, p. 302 n. 71):

The Hyderabad complaint remains on the agenda of the Security Council and India has been rewarded for her "police action" with a seat on that body - a reward that the Dutch could not have expected in their wildest dreams for their repeated "police actions" in Indonesia. Inscrutable, indeed are the ways of Western democracy - and of its most boosted compeer, the Indian.

¹³ Eagleton, "The Case of Hyderabad Before the Security Council," p. 302.

basic terms, we might define collective security as an agreement between states to "abide by certain norms and rules to maintain stability and, when necessary, band together to stop aggression."¹⁴ This definition captures three distinct ideas: the purpose or end of stopping "aggression"; the reliance on legal norms to determine both the meaning of that term and the appropriate form of response; and the rejection of self-help in favor of collective action. Collective security thus rests on the idea of institutionalizing the legal use of force "to reduce reliance on self-help as a rather crude instrument of law enforcement."¹⁵ Bringing these ideas together, the concept of collective security may be further defined as:

an institutionalized universal or regional system in which States have agreed by treaty jointly to meet any act of aggression or other illegal use of force resorted to by a member State of the system.¹⁶

The concept is thus primarily directed against the illegal use of force *within* the group of states forming the collective security system rather than against an external threat. This idea is well captured in Johnson and Niemeyer's definition of collective security as constituting:

a system based on the universal obligation of all nations to join forces against an aggressor state as soon as the fact of aggression is determined by established procedure. In such a system, aggression is defined as a wrong in universal terms and an aggressor, as soon as he has been identified, stands condemned. Hence the obligation of all nations to take action against him is conceived as a duty to support *right* against *wrong*. It is equally founded upon the practical expectation that the communal solidarity of all nations would from the outset make it clear to every government that "aggression does not pay."¹⁷

In order to understand the underlying logic, it is useful to distinguish collective security from two closely related terms: *balance of power* and *global government* (or, in more anti-formal terms, *global governance*). A balance of power arrangement between states rests on the idea of decentralization, a kind of *laissez-faire* within a sphere of power politics. States act as separate units without subordinating their autonomy or sovereignty

¹⁴ Charles A. Kupchan and Clifford A. Kupchan, "The Promise of Collective Security," *International Security* 20 (Summer 1995), pp. 52-53.

¹⁵ Jost Delbruck, "Collective Security" in Bernhard, R. (ed.), *Encyclopedia of Public International Law* (1992), p. 646.

¹⁶ *Ibid.*, p. 647.

¹⁷ Howard C. Johnson and Gerhart Niemeyer, "Collective Security: The Validity of an Ideal," *International Organization* 8 (1954), pp. 19-20.

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to any central agency established for the management of power relations. In this way, states function as "coordinate managers" of the power situation. Thus, "[s]ingly or in combinations reflecting the coincidence of interests, [S]tates seek to influence the pattern of power distribution and to determine their own places within that pattern."¹⁸ Under this conception, states may form defensive alliances such as under the NATO Treaty against actual or perceived *external* threats. These sorts of flexible alliances allow for recurrent shifts of alignment to take place. The promise of order lies in the expectation that competing claims to power will somehow balance and thereby cancel each other out to produce "deterrence through equilibration."¹⁹

On the other hand, global government or notions of "global constitutional order" posit the creation of a centralized institutional system superior to individual states with a monopoly on power and the use of force akin to that of a well-ordered national state. This conception rests on depriving states of their "standing as centers of power and policy, where issues of war and peace are concerned," and superimposing upon them "an institution possessed of the authority and capability to maintain, by unchallengeable force so far as may be necessary, the order and stability of a global community."²⁰ Global government is thus a normative vision of international political community under a universal law which does not currently, and arguably is unlikely ever, to exist.

The concept of collective security sits uneasily between and incorporates elements of both these ideas functioning as a dialectical notion of "order without government"²¹ in an effort to manage the problem of power relations between states by "superimposing a scheme of partially centralized management upon a situation in which power remains diffused among national units."²² This hybrid system involves a centralization of *authority* over the use of force to the extent that states are deprived of the *legal right* to use violence at their own discretion. That states give up this discretion and agree to follow objective rules governing

¹⁸ Inis L. Claude, Jr., "The Management of Power in the Changing United Nations," *International Organization* 15 (Spring 1961), pp. 219-221.

¹⁹ *Ibid.*, p. 222. ²⁰ *Ibid.*

²¹ The term is from Inis L. Claude, Jr. "Comment on 'An Autopsy of Collective Security,'" *Political Science Quarterly* 90 (Winter 1975-6), p. 715. Koskenniemi also suggests a dialectical view of the competences of the UN which "seeks to accommodate concerns of power [order] and of authority [justice]". Martti Koskenniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectical View," *EJIL* 6 (1995), p. 328.

²² Claude, "The Management of Power in the Changing United Nations," p. 221.

the threat and use of force requires an international organization with authority not only to determine when a resort to force is illegitimate but also authority to require states to collaborate under its direction in suppressing such use of force. This system of collective security falls short of creating an institution with a centralized monopoly of force in the full sense implied by world government. The power wielded by a hybrid collective security system thus can reach no further than that given to it by the sovereign will of its members.

Given its dialectical nature, such a conception of international law and organization has two fundamental purposes which simultaneously rely on and deny each other.²³ We can see this, for example, in the paradoxical structure of the Charter of the United Nations. On the one hand, article 2(1) of the Charter states that the Organization is based on the "sovereign equality of its members." The Charter is thus based on a presumption of initial state freedom, but as soon as states are regarded as members of an *international community* this initial freedom is limited by the normative demands of the "equal" freedom of other states. The Charter in this sense posits a *social ethics* expressing the freedom of each state as a function of community values and justice. In the absence of a world government or global sovereign, however, it constructs a collective security system intended to foster collaboration and cooperation rather than competition between states.

On the other hand, article 2(7) provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." While international law is normatively universal and binding on all states, and while Chapter VII of the Charter provides the Security Council with extensive enforcement powers, both the law and its enforcement are held to be limited by the factual existence and unique "internal" identity (sovereignty) of each state. In this respect, the Charter posits an *individualistic morality* which expresses the international community as a function of each state's unique identity and awareness. Given the inevitability of conflict and violence between states, the Charter's collective security system is intended to ensure peaceful coexistence by obliging states to band together to halt aggression and thus imagines a solidarist international community with the authority to constrain state egoism, but only on the basis of and in accordance with objective law and procedure.

²³ See David Kennedy, "Theses about International Law Discourse," *GYIL* 23 (1980), p. 364.

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In this picture, we can recognize the essential paradox of the liberal structure of international law itself.²⁴ Koskenniemi describes the distinctive “double-bind” of international legal argument in the following terms:

In the one case, community is interpreted as negative collectivism and autonomy (independence, self-determination) is presented as the normative goal. In the other, autonomy is interpreted as negative egoism and community (integration, solidarity) as what the law should aim at. Neither community nor autonomy can be exclusive goals. To think of community as the ultimate goal seems utopian: as there is no agreement on the character of a desirable community, attempts to impose it seem like imperialism in disguise. To think of autonomy as the normative aim seems apologist: it strengthens the absolutist claims of national power-elites and supports their pursuits at international dominance.²⁵

The international legal project of collective security is driven by this dialectic which creates a dynamic of contradiction and constant oscillation between patterns of argument seeking to legitimate social order against individual state freedom. The result is that international law – and its application and practice in and by international organizations – provides a site of deliberation and hegemonic contestation by which “international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents.”²⁶

From this conceptual structure, we can isolate three necessary but insufficient conditions for the effective functioning of any collective security system. The first is a certain degree of political solidarity or consensus among member states.²⁷ The second is a sufficiently strong peacekeeping force which, at a minimum, is strong enough to “balance the military power of the aggressor(s) in order to render military success for the aggressor impossible,” or be “stronger than the strongest single

²⁴ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), reissued as *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a new Epilogue* (Cambridge: Cambridge University Press, 2005).

²⁵ *Ibid.* 424.

²⁶ Martti Koskenniemi, “International Law and Hegemony: A Reconfiguration,” *Cambridge Review of International Affairs* 17 (2004), p. 199. Contestation is “hegemonic” because the goal of the contestants is “to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*.” *Ibid.*

²⁷ Thus, if a “great number of member States should not live up to their obligations to join in collective action against an aggressor, the system as a whole would be doomed to failure.” Delbruck, “Collective Security,” p. 648.

military force mobilized by an aggressor, or ... group of aggressors."²⁸ And the third element is sufficiently determinate criteria to enable the objective determination of when an act constitutes "aggression" or "self-defense."

At the same time, however, once the purposes of collective security are joined together with the elements necessary for such a system actually to function in practice, an inherent tension is immediately visible. The more the control of force and enforcement of the law is centralized, the greater the restrictions on the preexisting autonomy and sovereignty of states will be and the greater the danger that the collective security system itself will be seen as an aggressor. Conversely, the more the control of force and enforcement of law remains decentralized, the greater the potential danger of the outbreak of war and interstate aggression and the more difficult it will be to mobilize effective and consistent collective action. Thus, the "key question is whether regulated balancing predicated upon the notion of all against one, or unregulated balancing predicated upon the notion of each for his own, is more likely to preserve peace."²⁹ Competing conceptions of collective security provide different answers regarding how best to mediate these contradictory forces.³⁰

Finally, it is important to observe that collective security systems are premised to some extent on the so-called "domestic analogy" – the assumption that principles considered valid for interpersonal relationships may also have application to inter-state relations.³¹ If states are viewed as subjects of international law in much the same way as individuals are held to be subjects of domestic law ("States-as-Individuals,") then sovereignty may be seen to play an equivalent function at the international level as that played by rights at the domestic level. Thus, international law allows a state the right to act *externally* in self-defense or to protect its anterior liberty from external domination; at the same time it protects a certain *internal* autonomy for a state's people to conduct its own affairs free of interference. The former is the international equivalent of the individual's natural or "fundamental" right to self-defense and liberty; the latter is the mirror image of the distinction between public and private

²⁸ *Ibid.* ²⁹ Kupchan and Kupchan, "The Promise of Collective Security," p. 53.

³⁰ See further below, note 114 and accompanying text.

³¹ The domestic analogy can be seen, for example, in Hobbes, Rousseau and Locke. Thomas Hobbes, *Leviathan* (C. B. Macpherson (ed.), 1982), pp. 187–188; Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston (trans.), 1986), bk. I, ch. 7, 63; John Locke, *Two Treatises of Government* Second Treatise (W. S. Carpenter (intr.), 1984), sect. 183, 211. See Koskeniemi, *From Apology to Utopia*, p. 68, n. 66.

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spheres.³² "State sovereignty" in this sense mediates between the claims of legal subjects *inter se* in a public international community while at the same time demarcating a private national sphere.³³

Finally, however, we should observe a critical distinction between the domestic and international levels. As a matter of history, natural rights evolved at the domestic level in large response to the *factual absolutism* of the Hobbesian Leviathan, which increasingly came to be seen as a threat to individual freedom. As the centralization of state power and the monopoly on the use of force was consolidated (and exercised) within nation states, it was doubted whether life in such circumstances was really preferable to the *bellum omnium* which the sovereign was intended to replace.³⁴ At the international level, however, the situation is normatively similar but factually inverse. Advocates of collective security regard the absence of any equivalent to the Hobbesian Leviathan as guaranteeing an ever-present danger to the freedom and autonomy of states. Similarly, the perceived weakness and partiality of balance of power alliances in opposing aggression are often seen to necessitate the move towards the greater inclusiveness and legal objectivity of a collective security system. In this respect, the defining feature of any collective security project is the need to justify *limitations* and impose *constraints* on the unrestricted power of state sovereignty in the name of political community. We should thus take care to ensure that the domestic analogy's equation of sovereignty to fundamental rights does not obscure the inverse correlation between facts and norms in the two cases.³⁵

³² For discussion of the distinction between non-interference and non-domination in international legal theory, see Philip Pettit, "A Republican Law of Peoples," *European Journal of Political Theory* (forthcoming). See generally Quentin Skinner, *Liberty Before Liberalism* (1998).

³³ I further develop this theme in "Whose Public? Which Law? Mapping the Internal/External Distinction in International Law," in J. Farrall and K. Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalized World* (forthcoming 2009).

³⁴ We see this in the rights theories of Locke and Rousseau which sought to guarantee liberty within social order and for whom "consent is not only an initial authorization but also a continuing constraint on power." Koskeniemi, *From Apology to Utopia*, p. 63.

³⁵ See, e.g., Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1990), p. 29 (suggesting for these reasons that "international liberalism is more contradictory and ambivalent than domestic liberalism"). See also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 2001), p. 9 (arguing that the liberal politics of Locke and Vattel in international society was compatible with "international adventurism and exploitation" as the "model of the independent moral agent upon which their liberalism was based was precisely the belligerent post-Renaissance state").

The historical evolution of collective security

These general theoretical ideas find their historical origins in the gradual evolution of both conceptual and institutional forms of collective security from the late-seventeenth century onwards. In normative terms, the term can be traced back to the various schemes for perpetual peace proposed by William Penn, Abbé de St. Pierre and Immanuel Kant. Penn's *Essay Towards the Present and Future Peace of Europe* in 1693 and Abbé de St. Pierre's *Projet pour rendre la paix perpetuelle en Europe* in 1713 each advocated, for example, a legal organization of the European powers in a League comparable to modern international organizations such as the League of Nations and the United Nations.³⁶ A century later, Kant's famous essay *On Perpetual Peace* argued in 1795 that peace was an aim that mankind could realize, but only incrementally. In each of these works, the essential ideas of collective security began to take shape: in the absence of a central authority for the enforcement of law and the maintenance of peace, it was necessary to provide a substitute solution; a substitute can only be created by organizing the common defense of all states against the illegal use of force; and the right of states to use force as a form of self-help or law enforcement must be reduced to a minimum or limited as an interim measure.

These ideas drew on deeper currents and shifts set in motion by the classicism born in the wake of the 1648 Peace of Westphalia which sought to justify normative order by building on the equal right to sovereignty and independence of states.³⁷ This moment in history is said to mark the "great epistemological break" when religious medieval unity under Pope and Emperor gave way to a secular system of plural, territorially limited sovereign states. Between the sixteenth and eighteenth centuries, this shift led to the emergence of what Koskenniemi has termed the "liberal doctrine of politics" in international legal thought, the driving force of which was the attempt to "escape the anarchical conclusions to which loss of faith in an overriding theologico-moral world order otherwise seemed to lead."³⁸ In this process, just war doctrine was transformed from the ethical to the formally *legal* as the use of force was recast in legalistic terms as a self-help remedy of last resort.

³⁶ Delbruck, "Collective Security," p. 646.

³⁷ As Kennedy notes, traditional scholarship in the post-Grotian era "sprang from the ruins of primitive scholarship" and [r]ather than assuming social order, it allows for disorder and conflict." David Kennedy, "Primitive Legal Scholarship," *Harv. Int'l LJ* 27 (1986), p. 97.

³⁸ Koskenniemi, *From Apology to Utopia*, p. 52.

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The institutional origins of collective security may be traced to the efforts of the European powers to maintain peace and security within the nineteenth-century international system known as the Concert of Europe. The Concert provided not only for the common defense against *external* dangers in the classical form of a defensive alliance, but also for collective action by the European Great Powers against any potential enemy *within* their own ranks.³⁹ As this structure gradually collapsed, the peace movement began to advocate at the turn of the century for renewed conceptions of collective security. Walter Schucking, for example, a leading German international lawyer, was a prominent advocate of an institutionalized peacekeeping machinery which "he visualized as a universal organization of states for the purpose of collective action and responsibility in the maintenance of international peace and security."⁴⁰

It was not until after the First World War, however, that an institutionalized system of collective security was realized by the formation in 1919 of the League of Nations. The creation of the League built on longstanding efforts since the late nineteenth century to reduce the effects of war on belligerents and civilians alike by adopting new rules of humanitarian law and outlawing war and interstate aggression under international law.⁴¹ While intended to be a collective security arrangement, the League was in reality closer to a balance of power arrangement as it lacked a coordinated, centralized decision-making procedure capable of applying sanctions against aggressors internal to the system itself.⁴² As discussed above, the

³⁹ The Congress System or Concert of Europe comprised the Holy Alliance between Austria, Prussia and Russia and the Quadripartite Alliance between Austria, Britain, Prussia and Russia, with France entering in 1818 via the Treaty of Aix-la-Chapelle. F. Knipping, H. von Mangoldt and V. Rittergerger, *The United Nations System and its Predecessors* (Oxford: Oxford University Press, 1997), pp. 7-9.

⁴⁰ Delbruck, "Collective Security," p. 647. ⁴¹ *Ibid.*, p. 649.

⁴² The League was effective in the 1923 Corfu crisis between Greece and Italy; Great Britain and Turkey over Mosul (in the British mandate of Iraq); Greece and Bulgaria over border incursions by both parties; and Lithuania and Poland. The only deployments of League of Nations Forces were in the 1935 Saarland Plebiscite and in a 1933-34 Colombian Force acting under League authority in the upper Amazon. In each of these cases, the League was able to bring about a successful resolution without recourse to actively coercive measures. However, these "successes were due, in no small part, to the fact that the disputes were of a relatively minor nature and either concerned two weak states which lacked powerful allies within the League Council, or alternatively involved one party with such a preponderance of power that the other had no practical alternative but to acquiesce in a settlement which the League felt able to endorse." H. McCoubrey and J.C. Morris, "International Law, International Relations and the Development of European Collective Security," *Journal of Armed Conflict Law* 4 (1999), 195, 199-200.

inability of the League to prevent Italy from invading Ethiopia in 1936 provides the classic illustration of this deficiency.⁴³

After the League's failure in the period before and during the Second World War, the United Nations emerged in a renewed effort to realize the idea of collective security. The United States, the United Kingdom and the Soviet Union, united in political terms as the victorious powers emerging from the war, sought to overcome the weaknesses of the League of Nations through two main innovations: first, through the drafting of a new Charter that completely prohibited the use of force except as a means of individual and collective self-defense; and second, by creating a new Security Council with the authority to determine whether an act of aggression had occurred and what measures ought to be taken by its member states in response.⁴⁴ These improvements in the legal framework of collective security were soon diminished, however, by the onset of the Cold War and ensuing collapse of whatever political solidarity had previously existed between the Soviet Union and the West.

This brief history allows us to make four tentative observations. First, the historical development of the idea of collective security can variously be interpreted and is not the product of any simple or singular process. The development of international legal norms pertaining to collective security in Europe and more generally should rather be seen as a succession of responses to war crises with which existing normative structures have adequately failed to cope. As McCoubrey and Morris observe, this process "may be traced historically through the traumas, *inter alia*, of the Thirty Years War, the French revolutionary and Napoleonic wars and the First and Second World Wars."⁴⁵ In this respect, the most recent efforts of United Nations reform are part of a far longer historical continuum of normative and institutional change occurring in the immediate aftermath of catastrophe.

Second, even though the United Nations was intended to be a new collective security arrangement remedying the various deficiencies of the

⁴³ Thus, the lesson drawn from the failure of the League was that without a "centralized authoritative determination of whether an act of aggression has occurred or not, and of the measures to be taken against an act of aggression, collective security may not become effective." Furthermore, it was "essential that the use of force be completely outlawed, except for the purpose of self-defence, in order to exclude any possibility for a State legally to assume an aggressive policy." Delbruck, "Collective Security," pp. 650–651.

⁴⁴ See Ruth B. Russell. "Review: 'The United Nations and Collective Security: A Historical Analysis' by K. P. Saksena," *AJIL* 69 (1975), p. 928.

⁴⁵ McCoubrey and Morris, "International Law, International Relations and the Development of European Collective Security," p. 196.

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League of Nations, its structure retained central elements of the balance of power paradigm. We see this most clearly in the veto rule which allows each of the permanent five Great Powers the capacity to prevent any Chapter VII enforcement measures directed towards either themselves or any state which they choose to support or protect, or in any other case in which they prefer not to participate or to have others participate in enforcement measures under UN auspices. The veto provision, in short, "renders collective security impossible in all the instances most vital to the preservation of world peace and order."⁴⁶ In this respect, the United States declared openly that "if a major power became the aggressor the Council had no power to prevent war."⁴⁷ As Claude thus suggests, the UN Charter is "a curious amalgam of collective security, dominant in ideological terms, and balance of power, dominant in terms of practical application."⁴⁸

Third, the concept of global government has always figured as a distant and unrealizable ideal in the articulation and realization of collective security. Woodrow Wilson and other early advocates of collective security rejected world federation. In this respect, World Federalists and advocates for other forms of supranational organization have long attacked collective security "precisely because it neither anticipates nor promises to bring about the drastic reduction of the role of the nation-state in the international system."⁴⁹ As we shall see, despite great changes in international relations and the emergence of new types of threat in an age of increasing interdependence and globalization, the United Nations

⁴⁶ Claude, "The Management of Power in the Changing United Nations," p. 224. The P5 members can veto/block decisions regarding (1) the determination that aggression has taken place, (2) the designation of the guilty party, and (3) the decision to use sanctions (whether military or other). Each of these decisions are fundamental to the operation of any collective security system.

⁴⁷ UN Information Organizations and US Library of Congress, *Documents of the United Nations Conference on International Organization* (New York, 1945), p. 514. Note also the statement of the National League of Women Voters:

If a great power becomes an aggressor, the United Nations Organization will not be able to act, and the situation will have to be handled outside the Organization. This is because we are still in the experimental stage of collective security, and world opinion has not yet developed to the point where nations are willing to delegate sufficient authority to an international organization to make it capable of coercing a great power.

The Charter of the United Nations, Hearings before the Committee on Foreign Relations, US Senate 79th Congress, 1st Session (Washington, 1945) p. 422.

⁴⁸ Claude, "The Management of Power in the Changing United Nations," p. 229.

⁴⁹ Claude, "Comment on 'An Autopsy of Collective Security'," p. 716.

and its associated organs (including the High-Level Panel) continue to view the nation-state as the dominant actor in international affairs.

Fourth and finally, the idea of collective security is premised at some level on the efficacy of the idea of the rule of law in international relations. Without determinate and objective means to interpret agreed rules governing the use of force, collective security soon collapses into the very politics it portends to transcend. State A claims that its use of force is self-defense while state B's use of force is aggression; state B claims the exact reverse. The hope of a system of collective security – a hope deeply premised on modern variants of the rationalist philosophy of the Enlightenment – is that some version of the Rule of Law in international relations can resolve this clash of interests in an objective and determinate way.⁵⁰ Whether this is a hope in vain is a critical question addressed by the chapters in Parts I and II of this volume.

Collective security in international law

Once we recognize that debates over the role of law in a system of collective security presuppose the acceptance of a form of international legal liberalism, it becomes apparent that the various contradictions and binary oppositions lying at the heart of the discipline are the same as those lying at the core of liberal theory.⁵¹ The most basic claim of liberalism is that political and social order should be based on individual consent. The liberal tradition thus assumes the separateness of individuals from each other and denies the existence of a natural, objective social order which pre-exists man's entry into it.⁵² In the absence of a controlling natural order, it logically follows that individuals are both free and equal in some essential sense. It has been in pursuit of this claim that varying ideas of social contract have evolved over the last three centuries in order to justify

⁵⁰ See, e.g., Sean D. Murphy, "The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War," *Columbia Journal of Transnational Law* 32 (1994), p. 252 (arguing that "when an act of aggression occurs, corrective action is to be taken regardless of who the aggressor is or who the victim is, and the system is to respond automatically and reliably"). More generally, see Simon Chesterman, "An International Rule of Law?," *American Journal of Comparative Law* 56 (2008), pp. 331–361.

⁵¹ Koskenniemi, *From Apology to Utopia*. For David Kennedy, the opposition between sovereign authority and community membership is the *controlling contradiction* which is then transformed into the various different opposing doctrines at other levels of argument. See Kennedy, "Theses About International Law Discourse," *GYIL* 23 (1980), p. 353, pp. 361–362.

⁵² Koskenniemi, *From Apology to Utopia*, pp. 55–56.

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principles of justice – whether “sovereignty” or “human rights” – whose primary function is to guarantee liberty within social order.

In this way, competing conceptions of statehood, self-determination, independence, consent, the rule of law, authority, legitimacy, obligation etc turn on the justifiability of (liberal) assumptions about the relationship between social description (facts) and political prescription (norms). This opposition characterizes the dilemmas of liberal theory:

How to guarantee that States are not coerced by law imposed “from above”? How to maintain the objectivity of law-application? How to delimit off a “private” realm of sovereignty or domestic jurisdiction while allowing international action to enforce collective preferences or human rights? How to guarantee State “freedom” while providing the conditions for international “order”?⁵³

The liberal response to these conflicts involves a form of paradox: “To preserve freedom, order must be created to restrict it.”⁵⁴ The basic logic of the argument is as follows: in order to avoid apologism, international law must be objective and normative such that it can bind states regardless of their behavior, interest or consent. In order to justify the objectivity of international norms, it therefore becomes necessary to invoke a normatively justifiable or “descending” pattern of argument. Whether expressed in terms of justice, common interests, progress, the nature of international community, or other similar ideas, the critical assumption here is that there is a “normative code” which is either anterior or superior to state behavior, will, or interest. But any argument advancing a natural morality or objective theory of justice is immediately vulnerable to familiar objections voiced against “formalism” or “naturalism.” At the same time, this normative

⁵³ As Koskeniemi notes, “[t]hese are all distinctly liberal problems, whose connection to domestic issues concerning the legitimation of social order against individual freedom appear evident.” *Ibid.*, p. xvii.

⁵⁴ This idea is well-captured in Kant’s conception of Hobbes’s state of nature:

As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law, which limits our freedom solely in order that it may be consistent with the freedom of others and with the common good of all.

Immanuel Kant, *Critique of Pure Reason* (Edinburgh: Palgrave Macmillan, Norman Kemp Smith trans., 1933), pp. 601–602 [this is in the biblio]. In similar terms, Duncan Kennedy has observed the “fundamental contradiction” that “coercion of the individual by the group appears to be inextricably bound up with the liberation of the same individual,” and that “relations with others are both necessary to and incompatible with our freedom.” Duncan Kennedy, “The Structure of Blackstone’s Commentaries,” 28 *Buffalo Law Review* 205 (1979), pp. 211–213.

justification conflicts with the principles of subjective consent (which itself provides the justification for the Rule of Law) and the subjectivity of values. Thus, in order to avoid utopianism, international law must turn to a concrete or "ascending" justification which provides a link to the subjective acceptance and actual will of states.⁵⁵ But, as soon as the acceptance of states is what counts – the notion that state behavior, will and interest are *determining* of the law – then the law risks losing its objectivity and normativity. The result is that neither set of arguments can consistently be preferred.⁵⁶

Adopting a descending pattern will seem political and subjective either because it assumes the existence of a natural morality or because it creates an arbitrary distinction between States. An ascending pattern will seem political and subjective because it cannot constrain at all. It simply accepts as law whatever the State will chose to regard at any moment. Both must be included in order to make law seem objective, that is, normative and concrete and, as such, something other than politics.⁵⁷

The continuing quest for the primacy of the Rule of Law in relations between states, a refrain reiterated in United Nations resolutions, is in this respect "another reformulation of the liberal impulse to escape politics."⁵⁸ But due to the logic of this conceptual structure, international legal doctrines remain at all times open to attack on two fronts. For one group of critics, usually those representing or sympathetic to the interests of smaller or weaker states, international law is too political because too dependent on states' political power, an infinitely flexible and manipulable "façade for power politics." For another group, usually representing or sympathetic to the interests of bigger or more powerful states, international law is too political because founded on "speculative utopias," and thus too far removed from the factual realities of politics to be taken

⁵⁵ "Only an ascending argument can give expression to the principles of subjectivity of value, freedom of the State, sovereign equality and the Rule of Law." Koskenniemi, *From Apology to Utopia*, p. 45.

⁵⁶ "Any doctrine, argument or position can be criticized because either utopian or apologist. The more it tries to escape from one, the deeper it sinks into the other. This will explain why familiar disputes keep recurring without their seeming to exist any way of disposing of them permanently. Law is contrasted to discretion, 'positivism' to 'naturalism,' consent to justice, sovereignty to community, autonomy to organization and so on." *Ibid.*, p. 46.

⁵⁷ *Ibid.* This dynamic has thus prompted the turn in the modern era away from theory and towards pragmatism in legal reasoning.

⁵⁸ Martti Koskenniemi, "The Politics of International Law," *European Journal of International Law* 1 (1990), p. 6. See, e.g., UN G.A. Res. 44/23, November 15, 1989 (declaring the period 1990–1999 as the "United Nations Decade of International Law").

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seriously.⁵⁹ The danger of the former for any system of social control with law-applying and law-enforcement power is that the legal regime will be used to further the subjective interests of powerful actors. The danger of the latter is that any such legal regime will be incapable of responding to the real threats faced by states, or the increasing pace of social and technological change in international relations.

In order to respond to these criticisms, international lawyers have sought to justify and explain the normative claims of international law and the law's relation to state practice by resorting to four broad doctrinal strategies which seek to reconcile, in different ways, the dialectics of normativity and concreteness.⁶⁰ In the context of the two examples above of Ethiopia and Hyderabad, the discussion below explores how each of these doctrinal strategies imagines collective security in terms of its particular conception of international law.

Formal rules

The real lesson of the Great War was the failure of balance of power politics and the inadequacy of pre-war doctrines on account of their closeness to and reliance on absolutist conceptions of sovereignty, national interest and state policy.⁶¹ Post-war jurists – whether positivists such as Kelsen⁶² or liberal cosmopolitans such as Lauterpacht⁶³ – thus

⁵⁹ Koskenniemi, "Politics of International Law," p. 9.

⁶⁰ The four categories of modern doctrine are set out in slightly different form in Koskenniemi, *From Apology to Utopia*, pp. 154–186.

⁶¹ As suggested by Simpson, the "great institutional projects of the post-Versailles order were provoked by a sense that the old politics of secret diplomacy, deterrence, self-help and legitimate warfare were bankrupt; responsible for the war which had destroyed most of Europe and condemned millions of young European men and women to unnecessary deaths." Post-war jurists assumed that international legal rules, however derived (the problem of international law being simultaneously "above" and "of" the state), had an effect on state behavior, that law and power interacted in some way, rather than marking opposite ends of the domestic-international spectrum. See Gerry Simpson, "The Situation on the International Legal Theory Front," *EJIL* 11 (2000), p. 450.

⁶² Hans Kelsen, *Collective Security under International Law* (1957, reprinted 2001), p. ii (advancing the theory that "the collective security of the state is, just as collective security of the individual within the state, by its very nature a legal problem").

⁶³ For Lauterpacht's views on the League of Nations, see "The League of Nations," in *International Law, Being the Collected Papers of Hersch Lauterpacht*, 3 (1977), p. 575. For a discussion of Lauterpacht's critique of positivism and his argument in the inter-war period for a "comprehensive and professionally administered system of cosmopolitan law and order in the image of the liberal state," see Martti Koskenniemi, "Lauterpacht: The Victorian Tradition in International Law," *EJIL* 2 (1997), pp. 215–263.

advocated the “autonomy of international legal rules ... stressing the law’s normativity, its capacity to oppose state policy as the key to its constraining relevance.”⁶⁴ This is the logic underlying both Article 16 of the League of Nations Covenant and Article 2(4) of the UN Charter. The shift in doctrine is nicely captured in Quincy Wright’s discussion in 1936 of the Italo-Ethiopian war in terms of the League Covenant and Pact of Paris which, by contrast to the old Catholic theory of the concept of war as a suitable instrument of justice,

proceed upon a different hypothesis – that war is not a suitable instrument for anything except defense against war itself, actual or immediately threatened. Thus, under these instruments, the tests of “just war” have changed from a consideration of the *subjective ends* at which it is aimed to a consideration of the *objective conditions* under which it was begun and continued.⁶⁵

For Wright, this is not an application of the old theory, but a new theory which

has developed historically, not out of the medieval concept, but out of the concepts of nineteenth century international law, which treated war not as an instrument but as an evil which, in a disorganized world, could not be controlled With the post-war effort at world organization, the *jus ad bellum* again becomes the predominating feature of international law, but with a concept which no longer attempts to distinguish between the justice or the injustice of the belligerent’s causes, but instead attempts to distinguish between the *fact of aggression* and the *fact of defense*.⁶⁶

On this basis, the only pertinent argument raised by Baron Aloisi regarding Italy’s position under Article 16 concerned the “necessity of self-defense.”

The strength of legal formalism rests on the notion of a clear distinction between the subjectivity of politics – whether viewed in terms either of morality or power – and the objectivity of law as a system of rules. While on this approach international law has a restricted scope by insisting on strict tests of pedigree, the normativity and binding nature of the law is thus secured. Article 16 is legally binding on both Italy and Ethiopia and the other members of the League as it constitutes an agreed rule contained in a treaty ratified by states according to a verifiable law-creating process.

⁶⁴ Koskenniemi, “Politics of International Law,” p. 10.

⁶⁵ Wright, “Italian-Ethiopian Dispute and the League of Nations,” p. 55 (emphasis added).

⁶⁶ *Ibid.* (emphasis added).

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At the same time, this approach is vulnerable to two major criticisms. First, the assumed formal doctrine of sources is unable to exclude either political considerations or discretion given persistent (and good faith) disagreement regarding both the correct tests of pedigree and the means by which to construct applicable legal rules.⁶⁷ Second, the idea of an objective theory of law is vulnerable to familiar charges leveled against doctrinal utopianism and its disconnectedness from state practice given that the actual application of the law requires constant balancing, interpretation and evaluation resulting in a blurred and indeterminate law/politics distinction.⁶⁸

Policy anti-formalism

The second approach defines itself in response to the criticisms of the first. The real lesson of the failure of the League of Nations, and before that the Congress system in the nineteenth century, was the naïve belief in the “ideas of legality and collective intervention.”⁶⁹ Following Politis, Scelle and Pound, international law should be conceived not in terms of abstract rules but social ends, and should be linked more closely to the social necessities of international life. On this view, it is the effectiveness of standards – their “capacity to further social goals” – rather than their “formal validity” or “binding force” which is the relevant consideration.⁷⁰ What matters, for example, is not whether Article 16 of the Covenant or Article 2(4) of the Charter is legally binding, but rather what substantive values and policy goals are realized by and lie behind these norms.

⁶⁷ Thus, positivists tend to emphasize treaties and custom while naturalists include within their idea of sources both general principles and community values. Koskeniemi, *From Apology to Utopia*, p. 160.

⁶⁸ Whenever formal rules are applied, the need arises to delimit the disputing States' freedoms. But the law is devoid of criteria for preferring between conflicting freedoms. The construction of any solution will entail looking beyond the formal notion of “freedom” to some material criteria by which to make a preference or determine the relevant limits. “How to integrate such material criteria into the overall image of an objective law is a central problem” for the rule approach. As Koskeniemi notes, “Kelsen himself admits that the choice between a State-centered and an international community-centered systematics is a *political choice*.” *Ibid.*, pp. 28–29.

⁶⁹ Wilsonian idealism is seen to have produced the League of Nations and the Kellogg-Briand Pact, but the idea that international law and organization could vanquish war and power politics was later “held responsible for the failure to prevent a host of interventions in the 1930s before eventually being implicated in the rise of Hitler and the Second World War. Idealism's failure became realism's ascendance.” Simpson, “The Situation on the International Legal Theory Front,” p. 449.

⁷⁰ Koskeniemi, “Politics of International Law,” pp. 10–11.

The strength of the “policy” approach – with its rule-skepticism, emphasis on processes of authoritative decision making and close connection between legal norms and state behavior (effectiveness) – is its embrace of value-dependent policies and processes to construct a teleological jurisprudence thus ensuring the wide scope and relevance of international law. But this closer connection between law and policy is achieved at the cost of what is arguably distinct about legal doctrine. If law is viewed merely as a technique of social engineering and as a function of bureaucratic management skills by technocratic experts, this ignores what H. L. A. Hart once described as the “internal aspect” of rules, the fact that decision makers concern themselves with questions of formal validity. Two major criticisms of anti-formalism logically follow.

First, if law is judged only in terms of its instrumental effectiveness, it soon becomes no more than an apology for the interests of powerful states. If ends are described in terms of community values, this fails to guarantee the protection of the rights of states or peoples when social effectiveness or overall utility argues for overruling them. We see this, for example, when peace between European powers was held to be more important than the freedom of Ethiopia, or when the independence and territorial integrity of India was held to be more important than an internal humanitarian crisis and a minority people’s claim to self-determination.

Second, by emphasizing concreteness and effectiveness in this fashion, the law risks losing its objectivity and binding force altogether. As argued by Italy in response to the League’s invocation of Article 16 measures against it, international law may in this way legitimize force as “enforcement” in a manner that conflicts directly with the belligerents’ self-understanding. To correct this, the policy approach resorts to tacit naturalistic or material ideas of justice (e.g. certain “goal values of international human dignity”) which international law is held to advance. But this returns the policy approach, paradoxically, to the problem it had sought to overcome by invoking the basis on which legal formalism had itself initially been criticized.⁷¹ The problem then becomes how to justify the correctness of certain base values, especially when they come into conflict. Why, for example, in the case of Hyderabad was the decision not

⁷¹ Base values in this way become, in effect, the equivalent to the rule approach within the system of anti-formal norms and processes. But the indeterminacy affecting the law/politics distinction is equally present in the human dignity value/actual decision distinction. This raises the charge of subjectivism in any account of goal or community values. Koskeniemi, *From Apology to Utopia*, p. 175 n. 163.

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to take collective action against India premised on community prescriptions regarding peace (order) as opposed to social goals regarding the protection of fundamental human rights (justice)?

Realist skepticism

Faced with the apparently Sisyphean oscillation between these two approaches, the third approach adopts a thoroughly skeptical view that international law is neither normatively controlling nor widely applied in practice. Following the "collapse of the law of Geneva," this position is epitomized in the turn from international law towards the realism of international relations theory in the work of Hans Morgenthau.⁷² While the formalism of the rule approach may have succeeded in putting some distance between itself and early modern naturalism, the anti-formalism of the policy approach – in an effort to bridge the metaphysical nature of legal rules with sociological, ethical and other factors – resulted in international law having little binding force. In the absence of enforceable sanctions, international legal rules such as Article 16 of the Covenant and Article 2(4) of the Charter thus amount to no more than subjective wishes.⁷³ The failure of the League to act in the case of Ethiopia was due to the unbridgeable gulf between Article 16 on the one hand and the national interests of Britain and France in avoiding war with Italy on the other. Similarly, the failure of the Security Council to act in the case of Hyderabad was due to the distance between Chapter VII's formal conception of collective security and the actual security interests of the Great Powers in a newly independent India.

This critique of collective security is premised on both interpretive and causal theses.⁷⁴ What is problematic about the skepticism of the realist

⁷² See, e.g., Hans Morgenthau, "Positivism, Functionalism and International Law," 34 *AJIL* 260, 264 (1940).

⁷³ Note that the key element for the skeptic is the "enforceability" of sanctions. Under the formal rule approach of a jurist such as Kelsen, "sanction is a matter of the existence of a rule providing for sanctions. For the skeptic, this is a matter of observable fact." Koskeniemi, *From Apology to Utopia*, p. 168. While sharing the rule approach's domestically influenced "legalistic" idea of law, for the skeptic binding force emerges directly from factual coercion and law is merely an aspect of power politics. *Ibid.*, p. 169.

⁷⁴ The *interpretive* thesis is that collective security does not involve rule application in any way distinct from hegemonic or balance of power policy resulting in selective action taken according to the interests of hegemonic powers. The *causal* thesis is that peace and security do not depend on the presence or absence of rules, but rather on the use of power by States in a position to advance their interests. Martti Koskeniemi, "The Place of Law in Collective Security," 17 *Michigan Journal of International Law* 455 (1995–1996), p. 463.

position, however, is that it is premised on assumptions derived "outside the system itself" and thus from an external point of view. Skepticism does not consider the *internal* or *situated* aspect of rules, the "feeling with many statesmen and diplomats that rules exist and are binding upon them and their States."⁷⁵ By assuming that legal rules will always be overridden when vital state interests are at stake, skepticism overlooks how international law often protects and constructs state interests and identities.⁷⁶ It further overlooks how all Security Council action constantly refers to and invokes normative codes, rules, or principles creating specific modes of discourse and justification between states.⁷⁷ It thus misses what law most contributes to collective security: a form of *social* or *situational* ethics encompassing not just rules and principles but "a fairness of process, an attitude of openness, and a spirit of responsibility that implicitly or expressly means submission to critique and dialogue with others about the proper understanding of the community's principles and purposes – in a word, its identity."⁷⁸

Idealism

The fourth and final position simply *assumes* as a matter of course both the law's binding force as well as its correspondence with developments in international practice. Embodying the modern program in its original form, this is the position towards which both rule and policy approaches are constantly drawn. While classical positivism is regarded as being excessively formalistic, reliance on naturalistic "policies" is seen as either a "powerless form of moral criticism" or "reactionary imperialism."⁷⁹ The idealist argument assumes that law is both a reflection of society, assuring its material scope, while at the same time being critical of existing structures of international dominance, assuring its normative nature. The problem, however, is that these two assumptions contradict

⁷⁵ Thus by simply looking at behavior, skepticism fails to "answer the relevant question of whether and to what extent legal rules worked behind that behavior (at the level of motivations, by structuring decision-contexts, delimiting alternative ways of action etc.)." *Id.* 170.

⁷⁶ See, e.g., Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

⁷⁷ Koskenniemi, "The Place of Law in Collective Security," p. 468. The *authority* of the Council thus rests not on factual or power-dependent but normative considerations.

⁷⁸ *Ibid.*, p. 478. ⁷⁹ Koskenniemi, *From Apology to Utopia*, p. 179.

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each other.⁸⁰ This forces idealism to collapse ultimately back into either a rule or policy approach, or to succumb to the siren call of skepticism.

Thus for the idealist, who sees social life among states in terms of common needs and solidarity values, Article 16 of the League Covenant may be *assumed* to reflect the will, interest and consent of League members while at the same time providing an objective means by which to assess and criticize the conduct of any member state which violates its terms. But as soon as Italy has actually invaded Ethiopia, the argument dissolves into contradiction. Our idealist must explain, for example, whether it is Ethiopia which has been the subject of unlawful aggression or whether it is Italy which has exercised its inherent right to self-defense and, either way, why the League's interpretation of these issues is any more objective than that of Ethiopia or Italy, or indeed of any other member state. In so doing, she will have assumed a rule approach viewing international social life through a formal doctrine of "sources."

Conversely, our idealist may explain the failure of the League to act on the grounds that Article 16 does not closely enough reflect the objective interests, needs and behavior of the League's member states (viewed together as an "international society"). In so doing, she will have assumed a policy approach constructing what counts as "processes of authoritative decision" by an "anterior criterion of authority, base-values and relevance." Of course, even if Article 16 were better to reflect the actual interests and "wants" of states in protecting collective security – e.g. by increasing the effectiveness of its sanctions and enforcement regime by allowing a right of veto to a sub-set of powerful states as in the UN Security Council – our idealist will have difficulty explaining why this is not merely an instrumental façade by which certain states seek to protect and project their vital policy interests.

Faced with these partial solutions and contradictions, each vulnerable to valid criticism from the others, our idealist may finally be tempted to adopt a skeptical position seeing the behavior of states as part of a continuing pattern of self-interested violence. In this way, each of the four conceptual schemes

⁸⁰ The first element resembles the policy approach: as law mirrors society, it reflects changes in international social life and thus corresponds to the "objective character (interests, needs etc.) of the international society." But this runs the risk of apologetism and appears to foreclose any critical vantage point. A second element then is needed to explain law as a mechanism of change. But this will immediately contradict the first element. *Ibid.*, pp. 185–186.

bases its superiority on its capacity to describe more accurately the social environment of international politics ... Using apparently neutral (descriptive) language they hope to preserve the liberal theory of politics. But in their mutual criticism, they reveal the material theories of justice hidden in them.⁸¹

What this account reveals is that, while on the one hand the *actual* political interests, preferences and policies of states are both widely divergent and often in conflict, on the other hand there is no *external* or *objective* normative ideal that can be invoked to bring them into harmony. In his more recent writing, Koskeniemi has referred to this as the "paradox of objectives." It is important we recognize that this is not a "technical problem that could be disposed of by reflecting more closely on the meaning of words such as 'peace', 'security', or 'justice' or by carrying out more sophisticated social or economic analyses about the way the world is." Rather, we should realize that the founding Westphalian myth of the system

lay the basis for an agnostic, procedural international law whose merit consisted in its refraining from imposing any external normative ideal on the international society. The objectives of that society would now arise from itself: there were no religious or other transcendental notions of the good that international law should realize. If there is an "international community", it is not a teleological but a practical association, a system not designed to realize ultimate ends but to coordinate practical action to further the objectives of existing communities.⁸²

A system of international legal liberalism based on these premises will automatically give rise to two main conceptual problems which, unsurprisingly, have been strikingly evident in debates over the role of law in collective security following September 11, 2001. The first dynamic involves questions of identity and recognition: Who is the subject of the law? What is a "state" and why is it that only "state objectives" count? Why, for example, did the League Council recognize Ethiopia as a state while the Security Council refused so to recognize Hyderabad? On account of difficulties such as these, the state-centrism of the international system has long been a target of critique in the modern era. Further, the disaggregating forces of globalization and the burgeoning role of subjects apart

⁸¹ *Ibid.*, pp. 189–190.

⁸² Martti Koskeniemi, "What is International Law For?," in Evans, M. D. (ed.), *International Law* (2003), p. 89. This explains the easy application of Kantian ethics to international law: "an ethics of universalizable principles of *right action* rather than as instrumental guidelines for attaining the Good." *Ibid.*, p. 90, n. 1.

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from states (individuals, peoples, nations, minorities, international organizations, transnational corporations etc) have now led to new theories of "global" or "cosmopolitan" justice which it is said international law should encompass.⁸³ This trend has only accelerated in the post-September 11 context of "global terrorism," and the threat not of traditional state but *non-state* actors using weapons of mass destruction.⁸⁴ It is also reflected in the extent to which informal networks and epistemic communities today influence international politics well beyond the Westphalian state model.⁸⁵ Nevertheless, despite these vast economic, technological and cultural "globalizing" processes the sovereign state has maintained its status as the central subject of the international legal order.⁸⁶

The second conceptual problem is that of sovereignty: What freedom do states have and how exactly are conflicting state freedoms to be reconciled in a world deeply divided by differences of power, wealth and geography? As High-Level idealism in the Lauterpachtian mold⁸⁷ is confronted with Morgenthau-style skepticism, international lawyers have responded to this question in two ways. Some have accepted the diminished role that law can play in a single-superpower world and have sought instead to reconceive the United Nations collective security

⁸³ Koskeniemi, "What is International Law For?," p. 94. For a useful discussion, see Thomas W. Pogge, "What is Global Justice?," unpublished manuscript, Oslo, September 11, 2003 (noting the recent shift in terminology from older notions of "international justice," "international ethics," and the "law of nations," to the new concept of "global justice"). In a similar vein, see Amartya Sen, "Justice Across Borders" in Ciaran Cronin and Pablo De Grieff, eds., *Global Justice and Transnational Politics* (Cambridge, Mass.: MIT Press, 2002) pp. 37–51.

⁸⁴ The High-Level Panel Report refers to these as "threats without boundaries": High-Level Panel Report, paras. 17–23.

⁸⁵ Hillary Charlesworth, "International Law: A Discipline of Crisis," 65 *Mod. L. Rev.* 377 (2002) (noting that what constitutes a "threat" in the international system is determined by a completely Western-dominated process). Accordingly, it is difficult to justify the attention and resources allocated to the "war against terrorism" after the death of nearly 3,000 people in September 2001 while "simultaneously six million children under five years old die annually of malnutrition by causes that could be prevented by existing economic and technical resources." Koskeniemi, "What is International Law For?," pp. 95–96.

⁸⁶ See, e.g., High-Level Panel Report, synopsis p. 11: "If there is to be a new security consensus, it must start with the understanding that the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States, whose role and responsibilities, and the right to be respected, are fully recognized in the Charter of the United Nations."

⁸⁷ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004) (hereinafter the High-Level Panel Report).

apparatus and other international legal regimes as “variables dependent on a central power.”⁸⁸ Alternatively, they have developed “purely instrumental accounts of the use of law in the defense of particular interests or preferences.”⁸⁹ Both positions adopt variants of the policy approach.

Others, relying on a background conception of a “harmony of interests” which international law is to realize in conflicts between states, have advanced more sophisticated “interdependence” or “globalization” theories. Jürgen Habermas, for example, has argued for a “global domestic politics without a world government” which combines an “empowered United Nations responsible for securing peace and promoting human rights at the *supranational* level with governance institutions based on cooperation among the major world powers to address urgent problems of regional and global concern at the *transnational* level.”⁹⁰ The combined rule and idealist approaches are again here apparent.

Collective security under the United Nations Charter

Let me illustrate these two dynamics in terms of the collective security system established under the UN Charter. In the late 1980s, Stanley

⁸⁸ Hedley Bull, “The Grotian Conception of International Society,” in H. Butterfield and M. Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Relations* (London: Allen & Unwin, 1966), p. 51 (arguing for a “pluralist” rather than “solidarist” conception of international relations under which international society “will be able to enforce its law only if it can mobilize superior power in its support” and where international law “leave[s] room for the operation of those political forces, beyond the control of law, on which the existence of international society also depends”). For a classic account of this view, see George W. Keeton and Georg Schwarzenberger, *Making International Law Work* (London: Stevens & Sons, 2nd edn, 1946).

⁸⁹ United States Institute of Peace, *American Interests and UN Reform: Report of the Task Force on the United Nations* (2005) (suggesting, *contra* the findings of the High-Level Panel on the use of force, that “there is nothing exclusive about the United Nations as regards American interests” and that the “United Nations is one of the tools that America, our allies, and other democracies use cooperatively on the basis of our shared values”). See also Ruth Wedgwood, “Unilateral Action in the UN System,” 11 *EJIL* 349, 353 (2000) (arguing that “when push comes to shove, waiting for unanimity may sometimes fail to protect other values at stake”); Michael J. Glennon, “Platonism, Adaptivism, and Illusion in UN Reform,” 6 *Chicago Journal of International Law* 613 (2005–2006), pp. 613–614 (describing the recent UN reform process as a “useful project” and arguing that even if “the objective were merely to advance individual states’ national interests, the UN might be a useful tool for doing so”). See also Michael J. Glennon, “Idealism at the UN,” *Policy Review* (February and March 2005).

⁹⁰ Jürgen Habermas, *The Divided West* [this is in the biblio](Ciaran Cronin trans. and ed.) (Cambridge: Polity Press Ltd., 2006), p. xi.

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Hoffmann assessed the prospects of the emergence of an international order governed by the rule of law and collective security as follows:

Nobody seems to believe anymore in the chances of collective security; because of its constraining character, it is too contrary to the freedom of judgement and action implied by sovereignty; and ... it is in conflict with the imperatives of prudence in the nuclear age, in which the localization or insulation of conflicts appears far preferable to their generalization.⁹¹

Writing in the twilight of the Cold War, Hoffman's pessimism can today be seen to reflect the deep disillusionment of most statesmen, policy makers and international lawyers with a Charter-based collective security regime that had been paralyzed for the better part of four decades by the balance of power strategies of the two superpowers. That system, grounded as we have seen in a post-war vision of a new international order determined to overcome the "scourge of war," is premised on two basic elements: first, the prohibition under Article 2(4) on the threat or use of force between states; and second, the establishment of a Security Council bearing "primary responsibility for the maintenance of international peace and security" and thus empowered under Chapter VII, on behalf of all member states, to enforce a regime of collective security.⁹²

Each element finds its justification in the basic assumption of *sovereign equality* – the equal "sovereignty" of all "states" as the subjects of a putative legal order. The obligation not to threaten or use force applies equally to all states and thus generates a correlative right to non-interference under Article 2(7). Again, in this structure, we see the basic paradox of liberal doctrine: the attempt to reconcile what seem like opposing demands for state freedom and social order. This normative dilemma presents itself in the opposing demands of state autonomy (sovereignty) and international

⁹¹ Stanley Hoffmann, "Is There an International Order?," Janus and Minerva (eds.), *Essays in the Theory and Practice of International Politics* (Boulder: Westview Press, 1987), p. 117.

⁹² Traditionally, this regime was concerned with inter-state violence but more recently it has tackled large-scale violence and civil war within States. Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, UN GAOR, 47th Sess., UN Doc. A/47/277 (1992). During the 1990s, the question arose whether threats to international peace and security may also include nonmilitary sources of instability in the economic, social, humanitarian or ecological spheres in such a way as to trigger the Council's competence under Chapter VII. Such developments suggest an image of the Council as a "post-Cold War Leviathan" presiding over a new world order. Koskeniemi, "The Place of Law in Collective Security," p. 460. See Part II of this volume for discussion of the notion of "threats" to collective security.

community (collective security) mediated by the international equivalent of Mill's "harm principle" set out jointly in Articles 2(4) and 51. But how is this reconciliation meant to occur?

In the case of the former, each state's sovereignty is said to include an "inherent" right to individual and collective self-defense under Article 51. States are under a duty to refrain under Article 2(4) from the threat or use of force in their inter-state relations, *except* when harmed or imminently threatened by an "armed attack" by another state or group of states. In such a case, the unilateral use of force is permitted by the law to the extent necessary to repel the attack or until such time as the Security Council assumes its institutional responsibility to impose a range of collective security measures. In the case of the latter, the determination and enforcement of any collective security measure is premised on the consent, real or imagined, of all member states. The collective use of force is thus permitted by the law but only under such terms, both procedural and substantive, as provided in Chapter VII.

Interpreting the meaning of the Charter's harm principle conjoined in Articles 2(4)/51 and applying some normative reconciliation in a world of diverse and hostile sovereign states is clearly a Herculean interpretive task. On account of these difficulties, the only imagined and just solution has been thought to be the establishment of some impartial decision maker with the authority to interpret and enforce a set of neutral and objective "legal" rules which, simultaneously, protect the pre-existing autonomy and liberty of states *and* constrain that liberty in the name of the liberty of all, the collective security of the community of states. Of course, as between the principle of sovereign equality and a Security Council with five Permanent members wielding the right of veto over all other member states, the realist compromise of idealism with the post-war balance of power is evident.⁹³

The relationship between the prohibition on the threat or use of force in Article 2(4) and its two exceptions in Article 51 (unilateral self-defense) and Chapter VII (collective security) was the most controversial issue in the post-2004 UN reform process. The High-Level Panel identified two concerns, in particular, which mirror the issues underlying our

⁹³ This well illustrates the interdependence in the Charter regime between order (power) and justice (authority): "Justice as a means to uphold order, order as a means to realize justice." Koskeniemi, "The Police in the Temple," p. 329. Unlike the League, the Charter collective security system is "based on the co-option of overwhelming power." *Ibid.*, p. 338.

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older two cases of Ethiopia and Hyderabad. The first was the traditional Charter concern of “external threats” and the threat or use of force between states. Following the 2003 US-led invasion of Iraq, the critical question here was that of “anticipatory self-defense” and the lawfulness under the Charter of the Bush administration’s new national security policy which expands the notion of “preemptive” war to encompass “preventive” war.⁹⁴ On this score, the Panel did not favor rewriting or reinterpreting the formal terms of Article 51:

[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option.⁹⁵

At the same time, the Panel immediately qualified the formalism of this position on the unilateral use of force with five anti-formal “criteria of legitimacy”⁹⁶ said to be necessary in the case of collective action because

⁹⁴ President George W. Bush, “Prevent Our Enemies From Threatening US, Our Allies, and Our Friends with Weapons of Mass Destruction,” in *National Security Strategy of the United States of America* (September 2002), pp. 13–15:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries ... The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.

⁹⁵ High-Level Panel Report, para. 190. The Panel justified its preference for “collective endorsed action” on the basis of the risk to the “global order and the norm of non-intervention on which it continues to be based” of unilateral preventive action. “Allowing one to so act is to allow all.” *Ibid.*, para. 191.

⁹⁶ In considering whether to authorize or endorse the use of military force, the Security Council should address at least five basic criteria of legitimacy: (a) *seriousness of the threat* (is the threatened harm to a State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of force); (b) *proper purpose* (is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes may be involved); (c) *last resort* (has every nonmilitary option been explored, with reasonable grounds for believing that other measures will not succeed); (d) *proportional means* (are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat); and (e) *balance of consequences* (is there a reasonable chance of the military action being successful in meeting the threat, with the consequences of action not likely to be worse than the consequences of inaction). *Ibid.*, para. 207. The Panel further suggests that it would be “valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them.” *Ibid.*, para. 209.

[t]he *effectiveness* of the global security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their *legitimacy* – their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.⁹⁷

Thus if the Security Council is to “win the respect it must have as the primary body in the collective security system,” it must adopt and address such a set of agreed guidelines “going directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be.”⁹⁸

Noting the increased effectiveness of the Security Council in regulating international conflict since the end of Cold War paralysis, the Panel seamlessly wove these two positions together: on the one hand, the balance between unilateral use of force and collectively authorized force was said to have “shifted dramatically” since the 1990s with the result that today, in accordance with the rules of the Charter, there is an “expectation that the Security Council should be the arbiter of the use of force.”⁹⁹ On the other hand, although the Council did not actually deter war in Iraq, it provided a “clear and principled standard with which to assess the decision to go to war.”¹⁰⁰

Unsurprisingly, commentators have criticized the Panel both for its formalism regarding Article 51 and its anti-formalism in the application of Chapter VII. Michael Glennon, for example, has argued that the Panel’s recommended limitation on the use of force in the case of a “serious and likely threat until it becomes imminent ... is not a reasonable limit on state power.” It is not imminence, but the gravity of the threat and the probability of its occurrence that are the key factors. Accordingly, no “responsible policymaker, knowing that some rogue state or terrorist group is planning a nuclear strike, would recommend sitting tight until the attack

⁹⁷ *Ibid.*, para. 204 (my emphasis).

⁹⁸ *Ibid.*, para. 205 (emphasis in original). As opposed to a constitutionalist, rule-based approach, this is rather a mindset of “virtue ethics” – the “sensitivity to do the right thing, to act on proper motives”. Jan Klabbers, “Kadi Justice at the Security Council,” *International Organizations Law Review* (2007), p. 7.

⁹⁹ High-Level Panel Report, para. 81. The failure of the Security Council to deter the US and its allies from invading Iraq does not undermine the legal rule that the Charter prohibits unilateral preventive action. Indeed, the Panel notes, “Superpowers have rarely sought Security Council approval for their actions” and because this is not a “time-honoured principle ... what is at stake is a relatively new emerging norm, one that is precious but not yet deep-rooted.” *Ibid.*, para. 82.

¹⁰⁰ *Ibid.*, para. 83.

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becomes imminent."¹⁰¹ In the case of Chapter VII, the Panel has adopted the core assumption of just war theory: "All right-thinking people, everywhere, will somehow identify in unison, 'sufficiently clear and serious' threats to 'State ... or human security' and can in addition determine as with one mind the 'primary purpose' of a given military action." Glennon has thus criticized the Panel for what he terms its "radical adaptivism" – a "free-wheeling, outcome-oriented mode of analysis that abandons all fidelity to limitations set out in the text, views interpretation and amendment as interchangeable, and exhibits a lack of commitment to the notion of limited power and the rule of law." Where, he asks, does the Panel "extract its universally 'valuable' legitimacy criteria? Right reason? The Bible? The Koran?"¹⁰²

The second dominant concern of the Panel was "internal threats" and what is today referred to as the "responsibility to protect."¹⁰³ While the Panel insisted that "genocide anywhere is a threat to the security of all and should never be tolerated," this did not *per se* generate a right to unilateral humanitarian intervention. In the event of humanitarian catastrophes, the issue is "not the 'right to intervene' of any State but the 'responsibility to protect' of every State."¹⁰⁴ Accordingly, the Panel endorsed an "emerging norm" that there is

a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.¹⁰⁵

Here, again, Glennon has criticized the Panel for its unjustifiable mix of legal formalism and policy anti-formalism. On the one hand, reading the UN Charter formally to preclude unilateral humanitarian intervention, and thus placing sole responsibility in the hands of the Security Council with its

¹⁰¹ Glennon, "Platonism, Adaptivism, and Illusion in UN Reform," p. 615. As Glennon astutely notes, the Panel's own criteria "seem to suggest that using defensive force under such circumstances would be legitimate." Further, and paradoxically, the Panel's endorsement of the notion of "imminence" is itself a departure from the plain text of Article 51 which requires an *actual* "armed attack." Having taken the initial anti-formal step from "actual" to "imminent," why not continue to "preventive"? *Ibid.*, p. 620.

¹⁰² *Ibid.*, pp. 614, 617.

¹⁰³ The term derives from the report of a group of experts convened by the Canadian government in 2000: Gareth Evans and Mohamed Sahnoun, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).

¹⁰⁴ High-Level Panel Report, para. 200. ¹⁰⁵ *Ibid.*, para. 203.

ever-present risk of deadlock or inaction, implies that genocide and ethnic cleansing *can* sometimes be tolerated and allowed to continue. On the other hand – under the Panel’s own five anti-formal criteria of legitimacy – interventions in cases such as Vietnam in Cambodia to end the killing fields, Tanzania in Uganda to halt Idi Amin, or NATO in Yugoslavia to prevent ethnic cleansing in Kosovo, can themselves make a case for legitimacy.¹⁰⁶ As regards the former we should recall our case of Hyderabad,¹⁰⁷ while as regards the later we may point to examples such as India’s “humanitarian intervention” in 1971 into East Pakistan (Bangladesh).¹⁰⁸

The Panel’s recommendations on the use of force in relation to both external and internal threats in this way raise a host of difficult questions regarding the place of law in the UN collective security system. In general, they represent a response to the breakdown since the early 1990s of the pragmatic compromise of the Charter system in two directions. First, according to an anti-formal communitarian argument which views sovereignty as an anachronistic obstacle to humanitarian objectives and thus outweighed by the need to protect fundamental human rights. This argument is best illustrated by the discourse seeking to justify military intervention by NATO in Kosovo in the late 1990s (and which today seeks military intervention in Sudan in response to the humanitarian crisis in Darfur).¹⁰⁹ Second, according to an anti-formal autonomy argument which asserts that the sovereign right of self-defense includes the right of pre-emptive strikes.¹¹⁰ This position was asserted most directly by the US following the terrorist attacks of September 11, 2001. The first represents a shift from a formal statist conception of collective security to a new anti-formal individualistic “responsibility to

¹⁰⁶ Glennon, “Platonism, Adaptivism, and Illusion in UN Reform,” p. 615.

¹⁰⁷ See, e.g., Omar Khalidi, ed., *Hyderabad: After the Fall* (1988) (describing a catalogue of massacres, looting, rape, and abduction as India’s armed forces broke the resistance of the Hyderabad army and Muslim irregulars and sent 200,000 people fleeing to Pakistan by 1950).

¹⁰⁸ Pakistan used military force in its eastern province in March 1971 to eliminate the Bengali movement for autonomy. In what is widely regarded as a genuine case of humanitarian intervention, and despite its clear strategic and moral interests, India unilaterally intervened to stop the slaughter. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), p. 105 (arguing that India’s actions were a “rescue, strictly and narrowly defined” and that thus “circumstances sometimes make saints of us all”).

¹⁰⁹ Christine Chinkin, “Kosovo: A ‘Good’ or ‘Bad’ War?,” 93 *AJIL* 841 (1999). On Darfur, see Alex de Waal, “Darfur and the Failure of the Responsibility to Protect,” 83 *International Affairs* 1039 (2007).

¹¹⁰ Koskeniemi, “International Law and Hegemony,” pp. 202–203.

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protect.”¹¹¹ The second represents the danger of Great Power hegemony in a system predicated on sovereign equality. Three main difficulties bear observing in light of the Panel’s responses to these challenges.

First, the Panel’s reliance on armed collective action by the Security Council in cases of external aggression or internal violence is contradicted not only by history, but by the structure of the Charter itself. As a matter of history, the Cold War prevented the Council from ever negotiating the special Article 43 agreements needed to provide the “constabulary power before which barbaric and atavistic forces will stand in awe.”¹¹² The Council has thus never had at its disposal standing forces provided by member states to respond to breaches of the peace.¹¹³ Structurally, the duty of member states to make armed forces available for the purposes of enforcing Security Council resolutions in response to threats to peace and security is one requiring special negotiation and consent.¹¹⁴ This distinguishes the Charter-based conception of collective security from mutual security treaties such as NATO and the Rio Pact which are explicitly based on the notion that an “attack on one is an attack on all.”¹¹⁵ Given this cooperation-based and voluntarist conception of member state duty to the Council, how exactly is collective action to be taken in cases where powerful state interests are threatened (e.g. as against Russian military action in Chechnya) or, worse, where they are not directly implicated at all (e.g. as against Sudanese military action in Darfur, Moroccan military action in Western Sahara, or in the Congo generally)?

Second, the hopeful notion that humanitarian crises in one state are a threat to the security of all states is not a position borne out in state practice. As Glennon notes, the “reason states often do not respond to such humanitarian catastrophes is that they do not believe that such events really *are* threats to their own security.”¹¹⁶ The failure of the Council to

¹¹¹ Compare Ramesh Thakur, *The United Nations, Peace and Security: From Collective Responsibility to Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), p. 256 (arguing that while military intervention for human protection purposes “takes away the rights flowing from the status of sovereignty,” this does not “in itself challenge the status as such”).

¹¹² Winston Churchill, Chancellor’s Address at the University of Bristol, July 2, 1938, cited in Glennon, “Platonism, Adaptivism, and Illusion in UN Reform,” p. 621.

¹¹³ *Ibid.* ¹¹⁴ See United Nations Charter, Article 43, para. 1.

¹¹⁵ Glennon, “Platonism, Adaptivism, and Illusion in UN Reform,” p. 622.

¹¹⁶ *Ibid.* p. 623. The Panel correctly observes, however, that the “interrelatedness” of threats arising from situations of massive State failure and gross human rights violations such as disease, internal displacement and refugee flows is increasingly becoming recognized as a threat to collective security.

respond effectively to the disastrous humanitarian situation in Congo over the last five years is one example among many. Further, the concept of “responsibility to protect” raises formalist and anti-formalist difficulties of its own: on the one hand, the formal structure of the Charter itself does not envisage internal threats – if they were thought about at all – as threats to peace and security. The dramatic rise of the (anti-formal) universal human rights discourse in the UN Charter era has shattered the formal notion of *domain réservé* in Article 2(7) with both unintended and anti-pluralist consequences. On the other hand, the idea that the responsibility to protect now gives rise to a far-reaching right of collective action in cases of massive internal violence remains a contested question among states, especially among postcolonial countries wary of manipulation – unilateral or multilateral – of humanitarian criteria for imperial motives.

Third, despite the Panel’s protestations to the contrary, it is not clear as a matter of historical record whether realist balances of power have been less effective in maintaining peace and stopping the scourge of war as compared to collective security regimes premised on the international rule of law. This remains an issue of vigorous argument among international relations and legal scholars and is the subject of a voluminous literature.¹¹⁷ Conversely, as an empirical matter looking to the future, it is not obvious whether loosening the strictures on preemption and humanitarian intervention will result in more instability in the global order. This, too, is a question of current interest for scholars seeking to understand the empirical patterns of interstate conflicts.¹¹⁸

Conclusion

These competing positions help to explain the conceptual positions adopted by the High-Level Panel Report and its critics. Each point of

¹¹⁷ It is difficult to see the 150 million people killed in war during the twentieth century – vastly more than during the balance of power dynamics of the nineteenth century – as a sign of the effectiveness of legalistic multilateralism. Glennon, “Platonism, Adaptivism, and Illusion in UN Reform,” p. 626.

¹¹⁸ Ryan Goodman, “Humanitarian Intervention and Pretexts for War,” *AJIL* 100 (2006) (arguing on the basis of empirical studies of unintended constraints on state action that legalizing unilateral humanitarian intervention “holds the prospect of restraining some aggressive wars”); John C. Yoo, “Force Rules: UN Reform and Intervention,” *Chicago Journal of International Law* 6 (2006), p. 661 (arguing that reform of the UN Charter’s use of force rules “should begin by modifying the rules to produce higher levels of desirable uses of force” and advocating an “international public goods” approach which will “produce positive externalities to the international system by ending rogue states, flushing out international terrorist groups, or ending human rights disasters”).

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view seeks to offer interpretations of *both* the objective meaning of the UN Charter (i.e. the textual or formal rules) and the objective reasons that lie behind and justify these rules (i.e. relevant social goals and ethical principles). For the Panel, Article 51 should be read loosely enough to *imply* a right of preemptive self-defense, but formally enough to preclude a right to preventive self-defense. This is in line with the original intent of the drafters of the Charter to outlaw war (Article 2(4)) while allowing for force only in genuine emergencies or when agreed through collective decision. Similarly, the Chapter VII collective enforcement measures should be read loosely enough to *imply* a collective duty to protect in situations of genocide and ethnic cleansing, but still formally enough to require explicit authorization for any use of force (whether in self-defense or for humanitarian purposes). Thus, the non-interference aspect of sovereignty in Article 2(7) remains a bar to unilateral action, but not to legally justified collective action. This is in line with the objective meaning and purposes of the Charter to ensure both peace and justice.¹¹⁹

Conversely, from the perspective of its critics the formal and anti-formal considerations are reversed. Even if it allows narrowly for preemptive action, Article 51 remains an unreasonable formal constraint and should be read more loosely to allow for preventive action against grave and gathering threats to state security. This is in line with the objective meaning and purpose of the Charter to protect states from violence and destruction. Similarly, Chapter VII should be read narrowly not to create a collective duty to act in cases of gross human rights violations. This is in line with the original intent of the drafters of the Charter who were primarily concerned with situations of interstate conflict. At the same time, Article 2(7) and the notion of non-interference should be read broadly enough not to bar *unilateral* humanitarian intervention in cases of true tyranny and oppression by a state of its people (as in the case of Serbia regarding Kosovo or Sudan regarding Darfur).

The differences express the different social objectives and ethical principles of the two starting positions. The High-Level Panel recommendations are premised on a preference for and bias towards multilateralism and the perceived needs of the "international community" – on whose behalf the Panel portends to speak. Critics of

¹¹⁹ This is a classic liberal internationalist view of how to reconcile issues of legality and legitimacy. For such a view, see Richard A. Falk, "Kosovo, World Order, and the Future of International Law," 93 *AJIL* 847 (1999).

collective security – whether states or their apologists – premise their views on a preference for and bias towards unilateralism and the protection of national interests and values. It is not a simple matter then of the Panel illuminating the formal law of the Charter and the critics their preexisting policy preferences. Both sides rely on the formal/anti-formal dichotomy in an oscillating fashion to articulate their background biases. The critical point to observe, however, is that it is the formality of the Charter itself, and of international law in general, which allows us to critique the positions of both the Panel and its most ardent critics.¹²⁰

Why, for example, does the Panel believe itself capable of accessing the true or objective purposes of the international community in some politics-independent way? Who exactly are the eminent ones? What are their identities, backgrounds and interests? What is the source of their authority to speak on behalf of humanity? As Glennon suggests, the Panel's findings appear as another form of moral naturalism (he uses the term "Platonism and radical adaptivism") and, to the extent they are contrary to either powerful state interests or competing views of the *true purposes* of international law, a utopian illusion. On the other hand, why are the United States' or Glennon's own interpretations of the Charter not merely instrumental justifications seeking to realize their own purposes and policy objectives? Even, and perhaps especially, when articulated in universal terms¹²¹ – e.g. to promote democracy, human rights or the rule of law – why should we assume that these are the *right objectives* and not simply façades for powerful states or other actors to achieve their imperial ends?

As Koskeniemi powerfully argues, this dynamic reveals the indispensability of the *non-instrumental* or *cultural* aspects of law in international politics:

Every standard is always formal and substantive at the same time. The very ideas of treaty and codification make sense only if one assumes that at some point there emerges an agreement, an understanding, a standard that is separate from its legislative background ... The point of law is to

¹²⁰ Following the 2003 invasion of Iraq, Richard Perle stated that we should "thank God for the death of the UN," and, in particular, the idea that "only the UN Security Council can legitimize the use of force." Richard Perle, "Thank God for the Death of the UN," *The Guardian*, March 23, 2003. Even for the world's superpower then, the mere existence of the UN Charter and its rules limiting the use of force create the need for normative justification and objective reasons.

¹²¹ "Whoever invokes humanity wants to cheat." Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (3rd edn., 1988), p. 54.

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give rise to standards that are no longer merely “proposed” or “useful” or “good”, and therefore can be deviated from if one happens to share a deviating notion of what in fact is useful or good. Instead, they are assumed to possess “validity.”¹²²

This validity indicates a formal property of legal norms – a “‘flat substanceless surface’ [which] expresses the universalist principle of inclusion at the outset and makes possible the regulative ideal of a pluralistic international world.” This is absolutely critical as the form of the law

constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.¹²³

These two qualities – law’s validity and its inclusive and pluralist ideals – are pivotal to understanding the dialectics between formalism and instrumentalism in the post-2003 UN reform debates and for assessing the policy arguments of the Great Powers formulated to deal with a new gallery of rogue states and non-state outlaws.¹²⁴ While for realists and institutionalists international law may be *external* and *instrumentalist* – a means by which to realize certain political interests and values – the concept of collective security in international law requires an understanding of the *internal* or *engaged* aspect of the law which “acts as a spirit or an attitude that involves recognizing the communal situatedness of the speaker: hence its curious, yet typical, ability to engage the practitioner

¹²² Koskeniemi, “What is International Law For?,” p. 102. See also Anne Orford, “The Gift of Formalism,” *EJIL* 15 (2004) (arguing that the formality of the UN Charter’s rules on the use of force offers “resistance to imperialism (specifically of the American variety),” but also that the “notion that the UN Charter embodies an international legal order that is free of the desire for empire is complicated if we turn to those sections ... that support the trend towards constituting the UN as the manager of problems in the developing world.”)

¹²³ Koskeniemi, “What is International Law For?,” pp. 102–103. In any decision to attach meaning to legal norms, sovereign equality means that states can articulate their interpretations on conditions of equal standing. They are thus included in the “normative universe as subjects of rights and duties or carriers as distinct identities.” It is only because a regime comprises noninstrumental rules (i.e. “understood to be authoritative independent of particular beliefs or purposes”) that the freedom of its subjects to be different becomes possible. Terry Nardin, “Legal Positivism as a Theory of International Society,” in D. R. Mapel and T. Nardin (eds.), *International Society: Diverse Ethical Perspectives* (1998), p. 31, cited in Koskeniemi, “What is International Law For?,” p. 102.

¹²⁴ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

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in political action while seeking distance from anyone's idiosyncratic interests."¹²⁵ It is this distancing of political actors from their preferences which constitutes them as members of a self-creating legal and political community, itself a necessary but insufficient condition for any coherent conception of collective security.

¹²⁵ Koskeniemi, "The Place of Law in Collective Security," pp. 489–490.