CHAPTER 4

The End of the United Nations?

The Demise of Collective Security and Its Implications for International Law

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Abstract

A dynamic shift in global power balance and the rapid pace of technological advances are likely to pose an existential threat to the United Nations ('UN') and its collective security system. The political impasse at the Security Council has undermined its ability to address international security crises in recent years. Proceeding with the assumption that the UN collective security system ceases to perform its function, this article provides a thought experiment (*Gedankenexperiment*) on how international law might operate and evolve in the absence of collective security enforcement. The primary focus of this inquiry is to what extent the fundamental structure of international law might revert to the pre-Charter era and how the modern development of international law achieved under the UN Charter might survive and set a course for normative restructuring. This article tests the hypothesis that the receding institutional capacity to contain destabilising behaviour will have a normative impact on the existing rules of international law, insofar as their modern development has depended upon the institutional framework for collective security. It does so by examining the normative impact in the following three areas of international law: (1) *jus ad bellum*; (2) the legal authority of regional institutions for collective security; and (3) restrictions on military support to a belligerent involved in international armed conflict under the law of neutrality. It finds that the legal implications of the demise of collective security are likely to be limited, with a gradual shift in State practice and an associated change in *opinio juris* as States interact with specific instances of security threats.

Keywords

Collective security – jus ad bellum – use of force – regional institutions – law of neutrality

1 Introduction*

Since its establishment in 1945, the United Nations ('UN') has weathered dynamic changes in power politics, with varying degrees of success as a global collective security institution.[1] Its role for the maintenance of international peace and security has waxed and waned, reaching its heights in the 1990s after the end of the Cold War. With the rise of China and the resurgence of Russia, there is a renewed prospect for entering into a 'New Cold War', in which mutual distrust impedes multilateral cooperation.[2] Moreover, technological advances in areas such as information and communication, artificial intelligence, and space environment exploitation have created new challenges to the maintenance of international peace and security.

This dynamic shift in global power balance and the rapid pace of technological advances are likely to pose an existential threat to the UN and its collective security system, upon which the modern development of international law has hinged. The demise of collective security has previously been envisaged due to the crisis of legitimacy arising from inconsistency and double standards in the exercise of powers by the Security Council.[3] The challenge confronting the UN today is qualitatively different to those that constrained its role for collective security during the Cold War period in that the political impasse has arisen, at least partly, from the practice of the Security Council itself. The impasse thus reached has undermined the Security Council's ability to address international security crises in recent years, such as the civil war in Syria,[4] the 2016

* The thoughts and opinions expressed are those of the author alone and do not necessarily represent those of the US Military Academy, the US Naval War College, the US Government or any of its agencies.

1 See generally T.G. Weiss and S. Daws (eds), *Oxford Handbook on the United Nations* (2nd edn OUP 2018).

2 See e.g. L. Elliott, 'Xi Jinping Warns of "New Cold War" If US Keeps up Protectionism', The Guardian (25 January 2021), available at https://www.theguardian.com/world/2021/jan/25/china-xi-jinping-warns-of-new-cold-war-us-protectionist-policies (accessed 31 March 2021).

3 See e.g. J. Morris and N.J. Wheeler, 'The Security Council's Crisis of Legitimacy and the Use of Force' (2007) 44 International Politics 214; T.M. Franck, 'Is Collective Security Through the U.N. Still Feasible?' (1998) 9 Finnish Yearbook of International Law 29; D.D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 AJIL 552.

4 See e.g. A. Cohen, 'Syria: International Use of Force and Humanitarian Intervention' in H. Moodrick-Even Khen, N.T. Boms, and S. Ashraph (eds), *The Syrian War: Between Justice and Political Realty* (CUP 2020) 11; J. Gifkins, 'The UN Security Council Divided: Syria in Crisis' (2012) 4 Global Responsibility to Protect 377.

ethnic violence in Juba,[5] the foreign intervention in Yemen,[6] and most recently the resumption of hostilities over the Nagorno-Karabakh conflict.[7] These systemic failures of collective security may prompt renewed calls for UN reforms.[8] However, in the absence of a realistic prospect for recovery of the ailing collective security system, the UN will face a day of reckoning regarding its relevance to contemporary security challenges and what the demise of collective security means for the future development of international law.

Proceeding with the assumption that the UN collective security system ceases to perform its function, this article provides a thought experiment (*Gedankenexperiment*) on how international law might operate and evolve in the absence of collective security enforcement. The primary focus of this inquiry is to what extent the fundamental structure of international law might revert to the pre-Charter era and how the modern development of international law achieved under the UN Charter might survive and set a course for normative restructuring. Therefore, this inquiry is not intended to examine its impact across different areas of international law, such as human rights, the protection of the environment, international trade, the law of the sea, and the law of armed conflict. Rather, this article focuses on the fundamental legal architecture constituting the normative and institutional foundations of the UN collective security system.

To that end, this article begins with a brief review of the authorisation practice that the Security Council has developed, with the expeditious application of Chapter VII powers. This brief review is designed to identify potential causes for damaging the credibility of collective security, which set the parameters of relevant considerations as the basis for examining the legal implications of the demise of collective security. Within these parameters emerges a hypothesis that the receding institutional capacity to contain destabilising behaviour will

5 UNSC 'Executive Summary of the Independent Special Investigation into the Violence in Juba in 2016 and the Response by the United Nations Mission in South Sudan' (1 November 2016) UN Doc. S/2016/924.

6 See J.M. Sharp, 'Yemen: Civil War and Regional Intervention' (US Congressional Research Service, 8 December 2020), available at https://fas.org/sgp/crs/mideast/R43960.pdf (accessed 31 March 2021).

7 M. Mehdiyev, 'Azerbaijani President Slams International Organizations for Ineffective Approach to Nagorno-Karabakh', Caspian News (31 October 2020), available at https://caspiannews.com/news-detail/azerbaijani-president-slams-international-organizations-for-ineffective-approach-to-nagorno-karabakh-conflict-2020-10-26-28/ (accessed 31 March 2021).

8 See e.g. H. Corell, 'UN Security Council Reform – The Council Must Lead by Example' (2019) 22 Max Planck Yearbook of United Nations Law 1; N. Kalantar, 'The Limitations and Capabilities of the United Nations in Modern Conflict', E-International Relations (10 July 2019), available at https://www.e-ir.info/pdf/79174 (accessed 31 March 2021).

have a normative impact on the existing rules of international law, insofar as their modern development has depended upon the institutional framework for collective security. This hypothesis is then tested in the following three areas of international law: (1) *jus ad bellum*; (2) the legal authority of regional institutions for collective security; and (3) restrictions on military support to a belligerent involved in international armed conflict under the law of neutrality. The article concludes by finding that the legal implications of the demise of collective security are likely to be limited, with a gradual shift in State practice and an associated change in *opinio juris* as States interact with specific instances of security threats.

2 The Rise and Limits of the Authorisation Method for Collective Security

The UN collective security system consists of normative and institutional foundations at its core. The normative foundation is derived from Article 2(4) of the UN Charter, which prohibits the use and threat of force in international relations, whereas the institutional foundation centres on Article 24 of the Charter, according to which the UN Security Council is vested with the primary responsibility for the maintenance of international peace and security.[9] It is a particular form of collective security, designed to rectify the flaws of the previous collective security mechanism established under the League of Nations that led to the Second World War.[10] On the basis of lessons learned from its predecessor, the UN collective security system has devised more centralised institutional procedures for legalising collective response to threats to international peace and security.

The key function of the system was soon made defunct due to the failure to conclude special agreements under Article 43 of the Charter, which was considered as a requisite condition for the Security Council exercising its authority to take military action in accordance with Article 42 of the Charter.[11] However, this failure did not prevent the UN from preforming its function

9 M. Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 Mich. J. Int'l L. 455, at 456.

10 For details, see N. Tsagourias and N.D. White, *Collective Security: Theory, Law and Practice* (CUP 2013), at 12–19.

11 See L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations: Commentary and Documents* (3rd rev. edn Columbia University Press 1969), at 315–317, 629–632; H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Praeger 1951), at 756.

through institutional practices, especially in the field of peacekeeping operations deployed in the imperative interest of international security.[12] As the International Court of Justice observed in the *Certain Expenses* advisory opinion, 'it cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded'.[13] Such a flexible approach paved the way for the development of an authorisation method, as a means of justifying collective military enforcement action, with general reference to Chapter VII of the Charter.[14]

The modern authorisation practice emerged in 1990 when the Security Council agreed to take military action against Iraq for repelling its invading forces from Kuwait under Resolution 678.[15] Since then, this method has been expansively applied in different contexts: for example, to provide effective protection for UN missions in conflict areas;[16] to establish transitional administrations in war-torn territories;[17] to authorise the use of force by peacekeeping forces for the protection of civilians;[18] and as the means of implementing the

12 See especially N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn Manchester University Press 1997), at 207–223.

13 *Certain Expenses of the United Nations* (*Advisory Opinion*) [1962] ICJ Rep 151, 167. See also G. Kirk, 'The Enforcement of Security' (1946) 55 Yale L.J. 1081, at 1088.

14 On the development of Chapter VII powers, see H. Nasu, 'Chapter VII Powers and the Rule of Law: The Jurisdictional Limits' (2007) 26 Australian YBIL 87, at 90–94. On the legal limitations and control of Chapter VII powers, see especially E. de Wet, *Chapter VII Powers of the United Nations Security Council* (Hart 2004).

15 UNSC Res 678 (1990) 'Iraq-Kuwait' (29 November 1990). On the early precedent of military enforcement action ostensibly under UN authority during the 1950–53 Korean War, see N.D. White, 'The Korean War – 1950–53' in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 17.

16 See UNSC Res 836 (1993) 'Bosnia and Herzegovina' (4 June 1993) para. 9; UNSC Res 837 (1993) 'Somalia' (6 June 1993) para. 5.

17 See UNSC Res 1244 (1999) 'Kosovo' (10 June 1999) paras 5, 7–9; UNSC Res 1264 (1999) 'East Timor' (15 September 1999) para. 3.

18 See UNSC Res 1270 (1999) 'Sierra Leone' (22 October 1999) para. 14; UNSC Res 1291 (2000) 'Democratic Republic of the Congo' (24 February 2000) para. 8; UNSC Res 1464 (2003) 'Côte d'Ivoire' (4 February 2003) para. 9; UNSC Res 1509 (2003) 'Liberia' (19 September 2003) para. 3(j); UNSC Res 1528 (2004) 'Côte d'Ivoire' (27 February 2004) para. 6(i); UNSC Res 1542 (2004) 'Haiti' (30 April 2004) para. 7(I)(f); UNSC Res 1590 (2005) 'Sudan' (24 March 2005) para. 16(i); UNSC Res 1925 (2010) 'Democratic Republic of the Congo' (28 May 2010) para. 12(a); UNSC Res 1990 (2011) 'Reports of the Secretary-General on the Sudan' (27 June 2011) para. 3(d); UNSC Res 1996 (2011) 'Reports of the Secretary-General on the Sudan' (8 July 2011) para. 4; UNSC Res 2100 (2013) 'Mali' (25 April 2013) para. 16(c); UNSC Res 2149 (2014) 'Central African Republic' (10 April 2014) para. 30(a); UNSC Res 2350 (2017) 'The Question concerning Haiti' (13 April 2017) para. 13.

responsibility to protect doctrine.[19] However, the expansion of this practice, with the expeditious application of Chapter VII powers, has caused the collective security system to fracture over time.

First, the authorisation practice has been developed without clear agreement regarding its operational rules. Devised as a tool of diplomatic compromise to circumvent legal technicality,[20] the authorisation method heavily relies on shared political understanding among Council members without a clear legal foundation or framework. This has meant that there is considerable room for ambiguity with the way in which it can be invoked, the limits of authorisation and its legal effect.[21] This flaw was most prominently highlighted when the coalition States attempted to justify their involvement in military action against Iraq in 2003, by arguing that the previous authorisation for military action under Resolution 678 had been 'revived' due to the finding of material breaches in Resolution 1441 in relation to the ceasefire with Iraq which came into effect under Resolution 687.[22] This 'revival' theory, ostensibly drawing on Article 60 of the Vienna Convention on the Law of Treaties as a ground for treaty suspension and termination,[23] was relied upon to circumvent

19 UNGA Res 60/1 (2005) 'World Summit Outcome' (16 September 2005) para. 139; UNSC Res 1973 (2011) 'The Situation in Libya' (17 March 2011).

20 B. Woodward, *The Commanders* (Simon & Schuster 1991), at 333–335.

21 See M. Byers, 'Still Agreeing to Disagree: International Security and Constructive Ambiguity' (2021) 8 J. Use of Force & Int'l L. 91; I. Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the "Unreasonable Veto" ' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 227; F. Berman, 'The Authorization Model: Resolution 678 and Its Effects' in D.M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 153; M. Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 Global Governance 165; J. Lobel and M. Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 AJIL 124; N. Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) 3 Max Planck Yearbook of United Nations Law 59; J. Quigley, 'The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism' (1996) 17 Mich. J. Int'l L. 249, at 264–277.

22 UNSC, 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (21 March 2003) UN Doc. S/2003/351; 'Attorney General's Advice on the Iraq War – Iraq: Resolution 1441', reproduced in (2005) 54 ICLQ 767 and (2006) 77 BYBIL 819; 'Memorandum of Advice on the Use of Force against Iraq to the Commonwealth Government: 18 March 2003', reproduced in (2003) 4 Melbourne J. Int'l L. 178.

23 Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

the Council's decision-making authority for the use of force.[24] Irrespective of its technical soundness, this justification was problematic in the absence of a shared understanding about the effect and limits of authorisation under Security Council resolutions.[25]

Second, the authorisation model of collective security consists of a centralised decision-making process through the Security Council and a decentralised system of its implementation by Member States.[26] Once military action is authorised, there is no centralised mechanism for coordinating military action as envisaged in the Charter.[27] Rather, operational decision-making is outsourced to implementing States or international organisations without clear rules about how the text of a resolution is to be interpreted for implementation.[28] The decentralised mode of implementation has proven problematic in practice, allowing divergent interpretations among Council members and sowing the seeds of distrust with the system. This problem indeed caused the crack in the system to develop into a rupture in 2011 when the Security Council authorised military action 'to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya'.[29] The coalition forces, led by the North Atlantic Treaty Organisation ('NATO'), interpreted this resolution broadly by supporting Libyan rebel forces in their struggle for regime change, which went beyond what some countries considered to be within its

24 As it had been previously, to a limited extent, against Iraq's failure to comply with the terms of Security Council resolutions: see M. Weller, *Iraq and the Use of Force in International Law* (OUP 2010), at 115–119 and the literature cited therein.

25 For detailed analysis, see C. Henderson, 'Reading Between the Lines: The Iraq Inquiry, Doctrinal Debates, and the Legality of Military Action against Iraq in 2003' (2017) 87 BYBIL 105, at 108–116; Weller, *Iraq and the Use of Force in International Law*, at 152–173; D. McGoldrick, *From "9–11" to the "Iraq War 2003": International Law in an Age of Complexity* (Hart 2004), at 53–67; S.D. Murphy, 'Assessing the Legality of Invading Iraq' (2004) 92 Geo. L. J. 173.

26 See generally N. Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015), at 202–216 and the literature cited therein.

27 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 46–47 [hereinafter UN Charter].

28 For discussion, see M. Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2016) 20 Max Planck Yearbook of United Nations Law 3; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 487–492; E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 ICLQ 83; M. Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73.

29 UNSC Res 1973 (2011) 'The Situation in Libya' (17 March 2011) para. 4.

remit.[30] NATO's readiness to instigate regime change on the basis of a Council resolution, even when it is narrowly formulated for specific purposes of protecting civilians, raised alarm in the eyes of other States, especially China and Russia.[31] The rift, thus widened, threw the Security Council into disarray when the decade-long civil war began unfolding in Syria.[32]

Third, the upsurge of Chapter VII operations over the last few decades has shifted the focus of Council activities to enforcement action through authorisation. As a result, the Council has lost opportunities to explore alternative means of conflict management, outside the realm of Chapter VII, to prevent the escalation of conflicts and create a political space where belligerent parties are encouraged to contain the conflict or seek a peaceful solution.[33] Even peacekeeping missions, which were originally designed to prevent the escalation of conflicts,[34] have increasingly become interventionist, with an authorisation for the use of force.[35] This has meant that peacekeeping could not serve as a viable option to bridge the rift among Council members and break the deadlock over their response to the unfolding crisis in Syria. The Council acted upon the advice of Kofi Annan's 'six-point' peace plan for Syria by deploying

30 For detailed analysis, see G. Ulfstein and H.F. Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62 ICLQ 159; M. Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 Va. J. Int'l L. 355, at 387–391.

31 See C.J. Fung, *China and Intervention at the UN Security Council: Reconciling Status* (OUP 2019), at 101–103; R. Allison, *Russia, the West, and Military Intervention* (OUP 2013), at 189–203.

32 See UNSC Verbatim Record (4 October 2011) SCOR 66th Year 6627th Meeting, especially at 4 (Russia observing that the situation in Syria cannot be considered separately from the Libyan experience), 11 (South Africa expressing concerns about the hidden agenda aimed at once again instituting regime change); UNSC Verbatim Record (31 January 2012) SCOR 67th Year 6710th Meeting, 24 (Russia arguing against the Council's authority to impose parameters for an internal political settlement), 25 (China firmly opposing the use of force to push for regime change); UNSC Verbatim Record (7 April 2017) SCOR 72nd Year 7919th Meeting, 15 (Ethiopia pointing out the danger of the Council losing whatever remaining credibility it might have), 17 (Ukraine observing that the continued failure by the Council to discharge its duties undermines its moral standing and credibility).

33 'Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People' (17 June 2015) UN Doc. A/70/95-S/2015/446, para. 72. See also Nasu, 'Chapter VII Powers and the Rule of Law', at 96; S.D. Murphy, 'The Security Council, Legitimacy and the Concept of Collective Security After the Cold War' (1994) 32 Colum. J. Transnat'l L. 201, at 269–275.

34 See generally H. Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Nijhoff 2009), ch. 3.

35 See generally J. Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart 2011).

the UN Supervisory Mission in Syria,[36] but this decision was motivated by very different reasons – for Western States, it was meant to be a trigger for more severe measures against Syria, whereas for Russia, it was meant to reduce pressure on the Assad regime.[37] On the ground, NATO's intervention in Libya and the associated rhetoric of the responsibility to protect generated high hopes and false expectations among rebel groups that the international community would intervene and help them institute regime change.[38]

These flaws, thus accumulated through authorisation practice, have damaged the UN's credibility as a global collective security institution. This has, on the one hand, undermined the UN's ability to authorise military action even in cases where there is a shared interest in combatting a common threat. Illustrative of this is Resolution 2249, which was unanimously adopted in support of military action against the so-called 'Islamic State' without a clear indication of authorisation for the use of force.[39] The UN has, on the other hand, retained the ability to confer a degree of legitimacy for unilateral military action in a specific situation, especially where the legal basis for it is precarious. Resolution 2249, for example, gave a degree of legitimacy to the claim of self-defence, based on the contentious 'unwilling or unable' doctrine, as a justification for unilateral military action in Syria without its consent.[40] The Security Council has also performed such a regulatory function by identifying the rightful representative of the State where governmental authority is challenged or fractured, as it did for the transitional governments in Mali and Yemen. The legality of military intervention in these countries was predicated

36 UNSC Res 2043 (2012) 'Middle East' (21 April 2012) para. 1.

37 R. Gowan, 'The U.N. Mission in Syria: Heading for Heroic Failure?', World Politics Review (2 May 2012), available at https://www.worldpoliticsreview.com/articles/11909/the-u-n-mission-in-syria-heading-for-heroic-failure (accessed 31 March 2021).

38 J.-M. Guéhenno, *The Fog of Peace: A Memoir of International Peacekeeping in the 21st Century* (Brookings Institution Press 2015), at 279.

39 UNSC Res 2249 (2015) 'Threats to International Peace and Security Caused by Terrorist Acts' (20 November 2015). See Wood, 'The Interpretation of Security Council Resolutions, Revisited', at 15–18; D. Akande and M. Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', EJIL Talk! (21 November 2015), available at https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ (accessed 31 March 2021).

40 For detailed analysis, see J. Brunnée and S.J. Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?' (2018) 67 ICLQ 263, at 270–272; P. Hilpold, 'The Fight against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or a More Kantian International Society?' (2015) 55 Indian J. Int'l L. 535, at 544–550.

upon the legitimacy of the transitional government to provide consent for it.[41] The credibility of the UN collective security system thus damaged is not easy to restore and scepticism grows over the UN's authority when it is relied upon to justify unilateral military action by one party to a conflict.

Within these parameters of a credibility crisis, potential concerns emerge about its impact on the UN's ability to deter States from engaging in destabilising behaviour that threatens international peace and security. One of the lessons drawn from the Security Council's action against the Iraqi invasion of Kuwait in 1990–91 was the failure of deterrence. Michael Reisman articulated this lesson as follows:

> A collective security system is supposed to be prospective and deterrent rather than retrospective and corrective. In other words, a collective security system works best when the credible prospect that it will respond to acts of aggression leads a would-be aggressor to reconsider its plans in advance and to abort them.[42]

The demise of collective security therefore means that States find themselves less restrained from employing military forces to advance their national interests – for example, suppressing democratic protests, taking control over disputed territory, or supporting separatist movement in other States.

As a result, international relations could become (or perhaps have already become) increasingly unstable, with incentives for a revisionist movement growing stronger than those for maintaining the status quo. In such an environment, it can be easily imagined or even logically inferred that States may begin to consider themselves free from legal constraints on the use of force, which are premised upon the effective operation of the UN collective security system. The hypothesis thus drawn is that the receding institutional capacity to contain destabilising behaviour will have a normative impact on the existing rules of international law, insofar as their modern development has depended upon the institutional framework for collective enforcement against threats to international peace and security. However, as will be discussed below, this normative impact is more likely to involve a gradual shift in State practice through

41 UNSC Res 2085 (2012) 'Mali' (20 December 2012) paras 1–2; UNSC Res 2216 (2015) 'Middle East (Yemen)' (14 April 2015) para. 1. For detailed analysis, see M. Hakimi, 'The Jus ad Bellum's Regulatory Form' (2018) 112 AJIL 151, at 169–175 and the literature discussed therein.

42 W.M. Reisman, 'Some Lessons from Iraq: International Law and Democratic Politics' (1991) 16 Yale J. Int'l L. 203, at 209.

the implementation of existing rules over a long period of time, rather than an instantaneous breakdown of the global legal order.

3 Legal Implications

3.1 *Jus ad Bellum*

Collective security is a product of law, based on the delegation of power by sovereign States to an international organisation,[43] providing the collective means to regulate the conduct of Member States and disputes among them. At the core of this collective regulation of conduct is the prohibition of the use or threat of force in international relations, as enshrined in Article 2(4) of the UN Charter.[44] As such, it has traditionally been considered that the normative force of Article 2(4) of the Charter is premised upon the effective operation of the collective security system.[45] Based on this understanding, Thomas Frank perceived the ineffective system of collective security as eroding the normative status of the principle of non-use of force.[46] Similarly, adopting a pragmatic perspective to international law, Michael Glennon argued that the Security Council's failure to fulfil its responsibility had undermined the normative foundation of collective security.[47] In justifying military action against Syria to deter the indiscriminate use of chemical weapons, Nikki Haley as the US representative to the UN advanced the position that 'when the international community consistently fails in its duty to act collectively, there are times when States are compelled to take their own action'.[48]

On the other hand, it is generally accepted that the prohibition of the use or threat of force has established its normative status under customary

43 A. Orakhelashivili, *Collective Security* (OUP 2011), at 2.

44 See generally O. Dörr and A. Randelzhofer, 'Article 2(4)' in B. Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn OUP 2012) Vol. 1, at 200.

45 For a summary of the debate, see C. Michaelsen, 'Collective Security and the Prohibtion on the Use of Force in Times of Global Transition' (2021) 38 Australian YBIL 78, at 79–86; D. Wippman, 'The Nine Lives of Article 2(4)' (2007) 16 Minnesota J. Int'l L. 387; J.D. Becker, 'The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force' (2004) 32 Denver J. Int'l L. and Pol. 583.

46 T.M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809. Cf. L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated' (1971) 65 AJIL 544.

47 M.J. Glennon, 'Why the Security Council Failed' (2003) 82(3) Foreign Affairs 16, at 22–24. Cf. E.C. Luck, A.-M. Slaughter, and I. Hurd, 'Stayin' Alive' (2003) 82(4) Foreign Affairs 201.

48 UNSC Verbatim Record (7 April 2017) SCOR 72nd Year 7919th Meeting, at 17; UNSC Verbatim Record (5 April 2017) SCOR 72nd Year 7915th Meeting, at 18.

international law.[49] Indeed, the International Court of Justice observed that this principle, whilst having developed under the influence of the Charter, had 'acquired a status independent of it' and, as such, 'not … conditioned by provisions relating to collective security'.[50] From such a normative perspective, this principle continues to regulate the conduct of States by imposing the legal obligation central to the modern regime of *jus ad bellum*, irrespective of whether or the extent to which the collective security system is effectively operating.[51] However, as a rule of customary international law, its status is subject to the dynamic development of State practice and *opinio juris* as States interact with specific cases in a decentralised and disorganised manner. In this decentralised process, the normative status of the principle and its ambit are derived from the convergence of legitimate expectations among States,[52] rather than from the legitimising authority of collective decision-making.

Monica Hakimi and Jacob Katz Cogan describe this tension between competing positions as a site of ongoing contestation and compromise between different visions of the international legal order, represented by two 'codes' – the 'institutional code' derived from a centralised and structured collective decision-making process and the 'State code' that emerges from a disorganised and horizontal normative process through interaction among States in specific cases.[53] Matthew Waxman, on the other hand, observes that these competing approaches reflect different sets of interlocking, foundational assumptions about international law and the conditions for its effectiveness.[54] With the receding institutional capacity to reach a collective decision, it is conceivable that this balance becomes skewed towards a more decentralised normative process as a dominant force in the further development of the *jus ad bellum* regime.

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49 *Military and Paramilitary Activities in and around Nicaragua* (*Nicaragua v. United States*) (*Merits*) [1986] ICJ Rep 14, at 99–101, paras 188–190.

50 Ibid., at 96–97, para. 181 and 100, para. 188.

51 See e.g. O. Schachter, *International Law in Theory and Practice* (Nijhoff 1991) 129–131; B. Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2(4)* (Iustus Förlag 1991) 44–59; L. Henkin, 'International Law: Politics, Values and Functions' (1989-IV) 216 RdC 9, at 145–146; I. Brownlie, 'The Principle of Non-Use of Force in Contemporary International Law' in W.E. Butler (ed), *The Non-Use of Force in International Law* (Nijhoff 1989) 17, at 21–22.

52 See generally M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999), at 106–107, 147–151.

53 M. Hakimi and J.K. Cogan, 'The Two Codes on the Use of Force' (2016) 27 EJIL 257.

54 M.C. Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24 EJIL 151.

It is thus unlikely to see an immediate collapse of the entire regime of *jus ad bellum* due to the demise of collective security. Rather, its normative impact will be more limited, with a gradual shift in State practice and an associated change in *opinio juris* where legitimate expectations among States converge. This also suggests that the mere deviation from normative standards in specific cases does not (and should not) carry considerable weight in determining the normative status and its scope under customary international law. The normative status of the principle of non-use of force has traditionally found empirical support in the proposition that 'no state has invaded or used force against another State without providing a legal justification'.[55] Yet, contemporary practice shows a number of military operations conducted without plausible justification – for example, Ethiopia's military intervention in Somalia in 2006,[56] Russia's military operations in Crimea and eastern parts of Ukraine since 2014,[57] and Israel's air strikes against Iranian affiliated groups in Iraq, Lebanon, and Syria,[58] to mention but a few. Caution must be exercised against drawing hasty conclusions about the normative impact thatthese individual incidents may have on the *jus ad bellum* regime.

These deviations in State practice have generated academic debate about the meaning of 'force' prohibited under international law.[59] It has been suggested that small-scale or targeted forcible acts below a minimum threshold of intensity do not fall within the scope of the prohibition.[60] However, the

55 O. Schachter, 'The Nature and Process of Legal Development in the International Society' in R.St.J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Nijhoff, 1986) 745, at 756.

56 See e.g. A.A.M. Khayre, 'Self-Defence, Intervention by Invitation, or Proxy War? The Legality of the 2006 Ethiopian Invasion of Somalia' (2014) 22 African J. Int'l & Comp. L. 208; A.K. Allo, 'Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defence in Response to the Threat of Terrorism' (2010) 39 Denv. J. Int'l L. & Pol. 139.

57 See e.g. R. Geiß, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind' (2015) 91 Int'l L. Stud. 425; V. Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) 75 ZaöRV 27; C. Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 ZaöRV 367.

58 See e.g. C. Martin, 'Questions on Legality of Israeli Strikes in Iraq and Lebanon', Just Security (10 September 2019), available at https://www.justsecurity.org/66120/questions-on-legality-of-israeli-strikes-in-iraq-and-lebanon/ (accessed 31 March 2021).

59 See T. Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 AJIL 159; M.E. O'Connell, 'The Prohibition on the Use of Force' in N.D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (Elgar 2013) 89, at 102–107; O. Corten, *The Law Against War* (Hart 2010), at 50–92.

60 See Independent International Fact-Finding Mission on the Conflict of Georgia, 'Report' (September 2009) Vol. II, at 242.

mere existence of such incidents, or the failure on the part of other States to invoke this obligation for condemnation, does not offer conclusive evidence of normative change because multiple factors may motivate States when making these decisions.[61] Indeed, there are numerous factors, such as the military character of the operation, the severity of its consequences, its directness and invasiveness, and the prevailing political environment, which influence States when assessing whether a particular operation amounts to a use of force.[62] On the other hand, States may find in these academic debates some room for theoretical justification to launch small-scale or targeted military operations. There is a danger of norm erosion at the foundation of the *jus ad bellum* regime when legal ambiguity, created in these debates, makes concerted condemnation difficult.

The same risk of norm erosion may arise from the expansive exercise of the right of self-defence. For example, when hostilities in Nagorno-Karabakh resumed on 12 July 2020, Armenia and Azerbaijan both invoked the right of self-defence to justify their respective military action.[63] As a result of the hostilities, Azerbaijan regained control over parts of Nagorno-Karabakh and seven districts around it.[64] This episode raised serious concerns about the idea that self-defence could justify forcible acquisition of disputed territory (even if the territory is considered to be under an illegal occupation).[65] It is well established, as articulated in the 1970 Friendly Relations Declaration, that States must not use force 'as a means of solving international disputes, including

61 See Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum', at 169–170; International Law Association, 'Final Report on Aggression and the Use of Force' (Sydney Conference, 2018), at 6.

62 See *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017), r. 69, paras. 8–10; M.N. Schmitt, 'Computer Network and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37 Colum. J. Transnat'l L. 885, at 914.

63 UNSG 'Letter dated 16 July 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General' (17 July 2020) UN Doc. A/74/956-S/2020/719, at 2; UNSG 'Letter dated 22 July 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General' (23 July 2020) UN Doc. A/74/963-S/2020/732, at 3.

64 'Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation' (10 November 2020), available at http://en.kremlin.ru/events/president/news/64384 (accessed 31 March 2021).

65 For detailed analysis, see T. Ruys and F.R. Silvestre, 'The Nagorno-Karabakh Conflict and the Exercise of "Self-Defence" to Recover Occupied Land', Just Security (10 November 2020), available at https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/ (accessed 31 March 2021).

territorial disputes and problems concerning frontiers of States'.[66] This obligation even extends to respect for international lines of demarcation, such as armistice lines.[67] The prohibition of the use or threat of force thus operates irrespective of the validity of the territorial claim and self-defence cannot be invoked to settle territorial disputes.[68] Forcible revision events like this, without any international condemnation, have the potential to encourage other States to follow suit by making self-serving claims, which will create a dangerous hole in the *jus ad bellum* regime at the fundamental level.

Modern technological advances, in areas such as information technology, space technology and artificial intelligence, could also contribute to the destabilisation of the *jus ad bellum* regime, by enabling States to engage in hostile operations without employing the traditional means of physical force. For example, the upsurge of cyber-attacks, aided by their plausible deniability due to technical difficulties in identifying and proving the authors of those attacks, has created uncertainty as to whether and the circumstances in which cyber operations might qualify as the use of force prohibited under international law.[69] Given the limited role played by the Security Council in this area,[70] multiple States have developed and expressed their legal position that hostile activities by non-traditional means, such as cyber operations, can constitute a use of force when the scale and effects of such activities are comparable to those of

66 UNGA Res 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970) Principle 1, para. 4.

67 Ibid., Principle 1 para. 5.

68 See *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*) [2015] ICJ Rep 665, at para. 97; Eritrea-Ethiopia Claims Commission *Partial Award – Jus Ad Bellum – Ethiopia's Claims 1–8* (*Ethiopia v. Eritrea*) (19 December 2005) [2005] XXVI RIAA 457, at 465, para. 10. See also P. Klein and V. Koutroulis, 'Territorial Disputes and the Use of Force' in M.G. Kohen and M. Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Elgar 2018) 235.

69 See M.N. Schmitt, 'The Use of Cyber Force and International Law' in M. Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1110; M.C. Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 Yale J. Int'l L. 421; M. Roscini, 'World Wide Warfare – *Jus ad Bellum* and the Use of Cyber Force' (2010) 14 Max Planck Yearbook of United Nations Law 85.

70 See C. Henderson, 'The United Nations and the Regulation of Cyber-Security' in R. Buchan and N. Tsagourias (eds), *Research Handbook on International Law and Cyberspace* (2nd ed Elgar 2021) forthcoming; E. Tikk and N.N. Schia, 'The Role of the UN Security Council in Cybersecurity' in E. Tikk and M. Kerttunen (eds), *Routledge Handbook of International Cybersecurity* (Routledge 2020) 354.

a conventional act of violence covered by the prohibition.[71] Such clarification could facilitate the convergence of normative standards and legitimate expectations regarding how existing obligations apply to non-conventional means, even without an effective operation of the collective security system.

3.2 *Regional Institutions*

Under the UN collective security system, the decision-making authority is centralised in the Security Council for the exercise of collective enforcement powers. Nevertheless, the role of regional security institutions for the maintenance of international peace and security is not precluded under the Charter.[72] Indeed, regional security institutions have been encouraged to play complementary roles in facing the challenges to peace and security over the last few decades.[73] However, Article 53 of the Charter prohibits regional security institutions from taking enforcement action without Security Council authorisation.[74] The receding institutional capacity of the Security Council for authorising collective enforcement action raises questions regarding the efficacy of this restriction upon the authority of regional security institutions.

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71 See e.g. Government of Australia, 'Australia's Position on the Application of International Law to State Conduct in Cyberspace' (2017) s 1; Government of the Kingdom of the Netherlands, 'Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the International Legal Order in Cyberspace' (2019) Appendix, 3; *Ministère des Armées*, '*Droit international appliqué aux opérations dans le cyberespace*' (2019) s 1.1.2; J. Wright, 'Cyber and International Law in the 21st Century' (23 May 2018), available at https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century (accessed 31 March 2021); P.C. Ney Jr, 'DoD General Counsel Remarks at the U.S. Cyber Command Legal Conference' (2 March 2020), available at https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/ (accessed 31 March 2021); H.H. Koh, 'International Law in Cyberspace' (2012) 54 Harvard Int'l L.J. 1, at 3–4.

72 UN Charter, art. 52(1). Note that not every regional institution qualifies as a regional arrangement or agency within the meaning of this clause: *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*) (*Preliminary Objections*) [1998] ICJ Rep 275, at 306–307, paras 66–67.

73 See UNGA, 'Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc. A/59/2005, at 52; UNSG, 'A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change' in UNGA 'Note by the Secretary-General' (2 December 2004) UN Doc. A/59/565, at 85; UNGA 'Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (17 June 1992) UN Doc. A/47/277-S/24111, at paras 62–65.

74 UN Charter, art. 53(1).

In practice, the hierarchical collective security structure of the UN vis-à-vis regional security institutions has weakened to a certain degree because of the ambiguity as to what amounts to enforcement action and what constitutes an authorisation in the sense of Article 53 of the Charter.[75] There are indeed situations where regional institutions purported to take enforcement action without Security Council authorisation: for example, the Organisation of American States deployed the Inter-American Force for restoration of normal conditions in the Dominican Republic in 1965;[76] the Economic Community of West African States ('ECOWAS') established the ECOWAS Ceasefire Monitoring Group in 1990 to halt an armed rebellion against Liberia's President, Samuel Doe;[77] ECOWAS also deployed Senegalese troops in 2017 to uphold the results of the 2016 presidential elections in The Gambia;[78] and the Southern African Development Community launched military intervention in the Democratic Republic of the Congo in 1998 and in Lesotho in 1999.[79] Moreover, ECOWAS has been granted the authority to deploy military forces for humanitarian intervention and the enforcement of sanctions,[80] whereas the African Union has the right to intervene in a Member State to address grave circumstances such as war crimes, genocide, and crimes against humanity without Security Council authorisation.[81]

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75 See e.g. J. Bröhmer, G. Ress and C. Walter, 'Article 53' in B. Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn OUP 2012) 1478, at 1482–1496, 1500–1505.

76 OAS Resolution of 6 May 1965, reproduced in UN Doc. S/6333/Rev.1 (7 May 1965). See also M. Akehurst, 'Enforcement Action by Regional Agencies, with special reference to the Organization of American States' (1967) 42 BYBIL 175.

77 See M. Weller (ed), *Regional Peace-Keeping and International Enforcement: The Liberian Crisis* (CUP 1994), at 60–61. For details, see G. Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 ZaöRV 603; K.O. Kufor, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States' (1993) 5 African J. Int'l and Comp. L. 525.

78 For details, see M.S. Helal, 'The ECOWAS Intervention in The Gambia – 2016' in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 912; C. Kreß and B. Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017' (2017) 4 J. Use of Force & Int'l L. 239.

79 For details, see K.P. Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (CUP 2007), at 116–93; E.G. Berman and K.E. Sams, *Peacekeeping in Africa: Capabilities and Culpabilities* (UN Institute for Disarmament Research 2000), at 175–190.

80 ECOWAS, 'Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security' (signed 10 December 1999, entered into force 1 January 2000) ECOWAS Doc. A/P10/12/99, art. 22(c) and (d).

81 Constitutive Act of the African Union (done 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art. 4(h).

Although different views have been expressed about the extent to which these practices have undermined the Charter-based hierarchical system,[82] the demise of collective security is likely to facilitate a move further towards a decentralised collective security system, where regional institutions may develop autonomous authority to make collective security decisions without waiting for Security Council authorisation. Regional institutions may also be utilised to perform a regulatory function, as the Security Council has done,[83] by conferring a degree of legitimacy for military action in a specific situation, especially where the legal basis for it is precarious. However, various flaws associated with the authorisation method discussed in Section 2 above could cause regional institutions to hesitate over authorising military enforcement action as a means of implementing collective security. Despite their regional composition, these institutions are not immune from global power politics and may well face the same impasse that has undermined the Security Council's ability to form a collective response to international security crises. Indeed, the African Union's decision to authorise the deployment of the African Prevention and Protection Mission in Burundi was not carried through due to political division.[84] In addition, there are practical constraints that impede regional action,[85] such as resource capacity, financial feasibility, and operational and logistical difficulties.[86]

Regional institutions may also pursue alternative forms of collective security. Indeed, free from traditional conceptions of collective security, some regional institutions have followed their own development path by building regional norms and frameworks that are better suited for their security concerns. These regional norms address an increasing variety of non-traditional

82 See E. de Wet, 'The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?' (2014) 27 Leiden J. Int'l L. 353; M. Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11 JCSL 483; A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart 2004), at 153–182.

83 See Hakimi, 'The *Jus ad Bellum*'s Regulatory Form', at 169–175.

84 See E. de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020), at 172–174; N. Wilén and P.D. Williams, 'The African Union and Coercive Diplomacy: The Case of Burundi' (2018) 4 J. Modern African Studies 673, at 684–687.

85 See e.g. I.A. Badmus, *The African Union's Role in Peacekeeping: Building Lessons Learned from Security Operations* (Palgrave Macmillan 2015), chs 4–6.

86 As was the case with the delayed and limited deployment of ECOWAS forces to combat non-State armed groups in Mali in 2013: K. Bannelier and T. Christakis, 'The Intervention of France and African Countries in Mali – 2013' in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 812, at 813.

security threats, taking account of the relevant geopolitical considerations prevailing in each region. For example, the Organisation for Security and Cooperation in Europe (OSCE), established during the Cold War to facilitate political dialogue, has adopted a cooperative approach to security and has engaged in various support activities for conflict prevention and post-conflict rehabilitation.[87] The Association of Southeast Asian Nations (ASEAN) has also emerged as an alternative model for collective security, exercising its authority to develop and internalise regional norms or localise international norms as a collective response to all forms of threats and transnational security concerns shared among Member States.[88] Even though these regional institutions may not be well equipped to deal with armed violence, there is a potential to fill a security gap resulting from the failure of the UN collective security system by facilitating peaceful dispute management through cooperation on shared security concerns.

3.3 *The Law of Neutrality*

The UN collective security system is based not only on the centralised decision-making authority for the maintenance of international peace and security but also the commitment by UN Member States to accept and carry out Security Council decisions in accordance with the Charter.[89] This means that, in theory, there would have been no place for the traditional law of neutrality if the UN collective security mechanisms were implemented according to the letter and in the spirit of the Charter.[90] In practice, however, the law of neutrality has survived the fundamental normative change that was brought into force by the establishment of the UN collective security system,[91] with the rights

87 For details, see OSCE 'The OSCE Concept of Comprehensive and Co-operative Security: An Overview of Major Milestones' (17 June 2009) OSCE Doc. SEC.GAL/100/09. However, translating this approach into political reality is challenging: W. Zellner, 'Cooperative Security – Principle and Reality' (2010) 1 Security and Human Rights 64.

88 For details, see H. Nasu *et al, The Legal Authority of ASEAN as a Security Institution* (CUP 2019), at 31–35, 211–216.

89 UN Charter, art. 25.

90 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*) (*Advisory Opinion*) (*Separate Opinion of Vice-President Ammoun*) [1971] ICJ Rep 67, at 92.

91 *Legality of the Use or Threat of Nuclear Weapons* (*Advisory Opinion*) [1996] ICJ Rep 226, at 260–261, paras 88–89; International Law Commission, 'Draft Articles on the Effects of Armed Conflict on Treaties, with Commentaries' [2011] II(2) Yearbook of the International Law Commission 108, at 119. For analysis of State practice in the UN era, see especially W. Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' in M.N. Schmitt

and obligations of neutral States remaining relevant considerations for the exercise of belligerent rights in situations of international armed conflict. Due to increased tensions between great powers, we are more likely to see the Security Council reaching an impasse and States having no choice but to consider how they should position themselves in their relationship with belligerents involved in international armed conflict in the coming decades.[92]

Under the Charter, there is a general obligation on the part of UN Member States to provide the UN with every assistance in any action it takes and to refrain from giving assistance to any State against which the UN is taking preventive or enforcement action.[93] However, the extent of obligations imposed upon them in specific situations varies, as the Security Council has the authority to determine how its decisions are to be implemented.[94] Even in cases where the Security Council has authorised collective enforcement action, the extent to which and the manner in which each Member State is required to implement it has often been obscure, with a variety of hortatory expressions such as 'request', 'authorise', 'urge', and 'call upon' leaving room for neutrality.[95] Indeed, Iran and Jordan proclaimed neutrality when the Security Council authorised military action against Iraq in 1990, although their rights and obligations as neutral States were modified to the extent of any inconsistency with their obligations under the relevant Security Council resolutions.[96]

As Robert Tucker observed, the normative impact of collective security on the operation of the law of neutrality is contingent upon the extent of obligations imposed on UN Member States, the powers of a centralised decision-making body (such as the Security Council), and the effectiveness of the machinery provided for ensuring that those obligations are so fulfilled.[97] In the absence of a Security Council resolution activating Charter obligations for collective security, States are likely to find themselves having to assert neutral rights and fulfil neutral obligations, as many did for example during the

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and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Nijhoff 2007) 543, at 548–551 and the literature cited therein.

92 The status of belligerency extends to non-State entities that are recognised as such by other States. For details, see R. McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict* (OUP 2020).

93 UN Charter, arts 2(5) and 49.

94 UN Charter, art. 48.

95 Z.P. Augustine, 'Cyber Neutrality: A Textual Analysis of Traditional Jus in Bello Neutrality Rules Through a Purpose-Based Lens' (2014) 71 Air Force L. Rev. 69, at 78.

96 See US Department of Defense, 'Final Report to Congress: Conduct of the Persian Gulf War, Appendix O – The Role of the Law of War' (1992) 31 ILM 615, at 637–640.

97 R.W. Tucker, 'Law of War and Neutrality at Sea' (1957) 50 Int'l L. Stud. 3, at 171–175, 181.

Iran-Iraq War in the 1980s,[98] in order to protect their interests from the conduct of hostilities engaged between other States. During the 2003 Iraq War, Austria and Switzerland denied coalition forces permission to fly over their territories, whereas numerous other States offered a limited range of support with implications for their obligations under the law of neutrality.[99] With the prospect of great power rivalry paralysing the function of the Security Council, the law of neutrality is expected to be increasingly relied upon as a residual system of international law that regulates the relationship between belligerents and neutral States during an international armed conflict. This means that States do not enjoy complete freedom in providing military or other logistical support to a belligerent party due to restrictions imposed under the law of neutrality.

The extent to which the law of neutrality becomes relevant to the conduct of hostilities depends on various factors, such as the duration of hostilities, geographical proximity to the locus of hostilities, and the political affiliation and trade relationship with belligerent parties.[100] To illustrate this, the law of neutrality is of limited significance when an international armed conflict takes place only for a short duration, as it prevents hostilities from reaching the degree of interference with the interests of third parties that triggers consideration of neutrality. This does not mean that the law of neutrality becomes relevant only when the level of hostilities reaches a certain threshold of duration and intensity.[101] Rather, the range of relevant rights and obligations of neutral States, and corresponding rights and obligations on the part of belligerent parties, increases as a matter of practical necessity with the escalation and spread of hostilities. Likewise, as was the case with the Falklands/Malvinas conflict in 1982,[102] those geographically proximate to or in a close political or trading

98 See G.C. Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 Vanderbilt J. Transnat'l L. 575, at 593–595. Note, however, that the Security Council called upon non-belligerent States 'to exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict': UNSC Res 479 (1980) 'Iraq-Islamic Republic of Iran' (28 September 1980) para. 3; UNSC Res 582 (1986) 'Iraq-Islamic Republic of Iran' (24 February 1986) para. 7.

99 For details, see L. Ferro and N. Verlinden, 'Neutrality During Armed Conflicts: A Coherent Approach to Third-State Support for Warring Parties' (2018) 17 Chinese JIL 15, at 17–20.

100 See W.L. Williams Jr, 'Neutrality in Modern Armed Conflicts: A Survey of the Developing Law' (1980) 90 Mil. L.R. 9, at 13–14.

101 See e.g. J. Upcher, *Neutrality in Contemporary International Law* (OUP 2020), at 46–54; Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts', at 565–567. Cf M. Bothe, 'The Law of Neutrality' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (4th edn OUP 2021) 602, at 608.

102 See Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality', at 599–601.

relationship with belligerent parties are more likely to be prompted to express their neutral position early on, even in relation to an international armed conflict of a short duration.

Under the traditional law of neutrality,[103] belligerent parties are prohibited from engaging in war-fighting or war-sustaining efforts in and across the territory of a neutral State (i.e., the inviolability of neutral territory),[104] with the exception for access to pre-existing communication facilities open for public use.[105] Neutral States, on the other hand, have corresponding obligations to abstain from supporting belligerents directly or indirectly with the provision of military supplies or services.[106] And when neutral States apply restrictive measures in exercising their neutral rights or fulfilling their neutral obligations, they must do so in an impartial and non-discriminatory manner towards all the belligerents.[107] However, the application of these traditional rules must be considered and adjusted in light of the modern development of international law that has been achieved under the influence of the Charter. Under the traditional law of neutrality, there are circumstances in which the use of force is permitted or even required, which need to be reconciled with the contemporary *jus ad bellum* regime that centers upon the prohibition of the use or threat of force. This process of reconciliation creates uncertainty and associated legal debates about how the law of neutrality might apply in the context of contemporary and future warfare.[108]

As discussed earlier, the principle of non-use of force as a rule of customary international law is likely to retain its normative status, although its ambit is

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103 See generally Bothe, 'The Law of Neutrality', at 612–633; Upcher, *Neutrality in Contemporary International Law*, at ch. 3; R. Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Elgar 2018) ch. 10; Y. Dinstein, 'The Laws of Neutrality' (1984) 14 Israel Yearbook on Human Rights 80, 91–98; Tucker, 'Law of War and Neutrality at Sea', at 202–258.

104 Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1908) 2 AJIL Supp 117 [hereinafter Hague Convention V], arts 1–4; Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War (signed 18 October 1907, entered into force 26 January 1910) (1908) 2 AJIL Supp 202 [hereinafter Hague Convention XIII], arts 1–5.

105 Hague Convention V, arts 3(b), 8. This exception arguably extends to cyber communication systems: *Tallinn Manual 2.0*, r. 151 para. 4.

106 Hague Convention V, art. 5; Hague Convention XIII, art. 6.

107 Hague Convention V, art. 9; Hague Convention XIII, art. 9.

108 For the author's analysis as to how the law of neutrality might develop with the change of geopolitical situations and technological advances, see H. Nasu, 'The Laws of Neutrality in the Inter-Connected World: Mapping the Future Scenarios' in M.C. Waxman and T.W. Oakley (eds), *The Future Law of Armed Conflict* (OUP 2021) forthcoming.

subject to the dynamic development of State practice and *opinio juris* as States interact with specific cases in a decentralised and disorganised manner. This means that the prohibition of the use or threat of force continues to govern the legal relationship between belligerents and neutral States. However, under the traditional law of neutrality, neutral States are under an obligation to defend their neutrality, even by force, and the use of force by a neutral State to resist attempts to violate its neutrality cannot be regarded as a hostile act.[109] One may deny such forcible action falling foul of the prohibition of the use or threat of force,[110] or justify it as an exercise of the right of self-defence when the violation of neutrality amounts to an armed attack in the sense of Article 51 of the UN Charter.[111]

Likewise, views are divided over the legal basis upon which a belligerent may take forcible action to terminate violations of neutrality by the adversary after it has afforded the neutral State a reasonable opportunity to remedy the situation. Traditionally, such a belligerent right has been recognised as a measure of 'self-help' to the extent necessary and proportionate to counter the threat posed by the activities of enemy forces in neutral territory.[112] However, this does not bode well for the prohibition of the use or threat of force under contemporary international law. A competing view therefore restricts the circumstances in which the aggrieved belligerent may take forcible action only in the exercise of the right of self-defence when the violation of neutrality constitutes an armed attack.[113]

The application of the traditional law of neutrality in the context of contemporary international law also enables neutral States to invoke the right of

109 Hague Convention V, art. 10.

110 Bothe, 'The Law of Neutrality', at 614.

111 See M. Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2014), at 274–275.

112 See Office of the General Counsel, US Department of Defense, *Law of War Manual* (rev. edn, Dec. 2016) §15.4.2 [hereinafter US DoD Law of War Manual]; *Tallinn Manual 2.0*, r. 153; *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) r. 22. See also M.N. Schmitt, 'Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law' (2013) 52 Colum. J. Transnat'l L. 77, at 81–82; M.S. McDougal and F.P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (New Heaven Press 1994), at 406–407; M. Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 538; E. Castrén, *The Present Law of War and Neutrality* (Academia Scientiarum Fennica 1954), at 462–463, 487.

113 See e.g. Bothe, 'The Law of Neutrality', at 611; D. Schindler, 'Transformations in the Law of Neutrality Since 1945' in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (Nijhoff 1991) 367, at 381–383.

collective self-defence as a justification for violations of neutral obligations by supporting one of the belligerent parties upon request or in accordance with a pre-existing agreement. Under Article 51 of the UN Charter, States may assist the victim of an armed attack in the exercise of the right of collective self-defence, but not for the State that has been identified by the Security Council as an aggressor.[114] However, in the absence of a Council determination regarding the legitimacy of self-defence action, both parties are likely to regard themselves as the victim of an armed attack and call upon their respective allies for support in the exercise of the right of collective self-defence.

In such cases, one may wonder whether supporting States lose, or are deprived of, neutral status by virtue of the fact that they are bound by the collective defence agreement or by participating in hostilities in the exercise of the right of collective self-defence. However, a breach of neutral obligations must not be confused with the loss of neutral status.[115] The latter is an issue of conflict classification governed by the law of armed conflict, not under the law of neutrality.[116] The belligerent relationship between States is established when there is an international armed conflict. Therefore, neutral status may be lost only when the supporting State is involved in a conflict in a manner that is integral to the act of hostility undertaken by the belligerent party. Such assistance does not merely contribute to the capacity of a belligerent force or the ease with which the belligerent can conduct hostilities, but rather forms an essential part of the act of hostility, without which the attack cannot be launched.

As such, the mere breach of a neutral obligation does not necessarily lead to a loss of neutral status. This means that the neutral State does not automatically become a belligerent party in the conflict by taking forcible action to defend its neutrality, providing unneutral support or being obliged to do so under a collective defence agreement. Indeed, collective defence agreements tend to leave room for individual members to exercise a degree of discretion in deciding the way in which they assist with the conduct of hostilities in the implementation of their treaty obligations.[117] The determination as to whether

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114 *Oil Platforms* (*Islamic Republic of Iran v. United States of America*) [2003] ICJ Rep 161, at 186–187, para. 51; *Nicaragua* judgment, at 105, para. 199. See also Bothe, 'The Law of Neutrality', at 607.

115 *Dubsky v The Government of Ireland* [2005] IEHC 442, para. 89 (High Court of Ireland). See also Upcher, *Neutrality in Contemproary International Law*, at 54–63; C. Chinkin, *Third Parties in International Law* (OUP 1993), at 308.

116 See International Committee of the Red Cross, *Updated Commentary on the Third Geneva Convention of 1949* (CUP 2020) para. 1083 fn 253.

117 See e.g. North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, art. 5 ('by taking… such action as it deems necessary'); Treaty of

a neutral State has acted or failed to act in a manner that would lead to a loss of its neutral status is dependent upon the factual assessment, taking into account various factors such as the domestic policies of the State, the materiality of a breach, and the nature of the assistance relative to the act of hostility.[118] Thus, States will have to tread a tightrope in managing their peaceful relations with belligerent parties without becoming a party to the armed conflict.

4 Conclusion

Speaking in his capacity as the Whewell Professor of International Law in the University of Cambridge, the late Lord McNair gave a sober warning about the future of collective security by reminding his audience that 'a system which collectivises the use of force and provides no machinery for the collective revision of the *status quo* is certain to fail'.[119] Under the UN collective security system, many successes over seventy-five years of its history are due to the flexible adaptation of the global governance architecture to enable the collective revision of the status quo, such as decolonisation, the advancement of human rights as an international agenda, and the peaceful settlement of international disputes. However, with the dynamic shift in global power balance and the rapid pace of technological advances, the UN stands at a critical juncture, where its ability to prevent individual States from unilaterally making opportunistic moves to force revision of the status quo is being tested.

Through flexible adaption, the UN Security Council has developed the authorisation method as the collective decision-making mechanism for military enforcement action under Chapter VII of the Charter. The development

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Mutual Cooperation and Security between Japan and the United States of America (signed 19 January 1960, entered into force 19 May 1960) 11 U.S.T. 1632, art. V ('Each Party… would act to meet the common danger in accordance with its constitutional provisions and processes'); Mutual Defense Treaty between the United States and the Republic of Korea (signed 1 October 1953, entered into force 18 November 1954) 238 UNTS 199, art. III; Mutual Defense Treaty between the United States and the Republic of the Philippines (signed 30 August 1951, entered into force 27 August 1952) 177 UNTS 133, art. IV.

118 See Australian Defence Headquarters, *Law of Armed Conflict* (2006), at para. 11.35; Chief of the General Staff (Canada), *Law of Armed Conflict at the Operational and Tactical Levels* (2001), at para. 1303; Danish Ministry of Defence and Defence Command, *Denmark Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), at 62; New Zealand Defence Force, *Manual of Armed Forces Law: Vol. 4 Law of Armed Conflict* (2017), at para. 16.2.4; US DoD, *Law of War Manual*, at para. 15.4.1.

119 A.D. McNair, 'Collective Security' (1936) 17 BYBIL 150, at 159 (with reference to Sir John Fischer Williams, *International Change and International Peace*, 1932).

of this practice without clear agreement on the implementation and interpretation of Council resolutions has caused the collective security system to fracture over time, undermining the UN's credibility as a global collective security institution. Even during the global outbreak of SARS-CoV-2, widely known as COVID-19, there was very little that the Security Council could do to stop belligerents from engaging in the conduct of hostilities, despite calls for a general and immediate ceasefire so as to focus on the fight against the spread of virus.[120] Nevertheless, as this article has shown, the legal implications of the demise of collective security are likely to be limited, with a gradual shift in State practice and an associated change in *opinio juris* as States interact with specific instances of security threats.

This finding is both reassuring and concerning. It is reassuring in that, even in the event that the UN collective security system has collapsed, the fundamental structure of international law will not completely revert to the pre-Charter era. Rather, the modern development of international law achieved under the influence of the Charter will set a course for normative restructuring, for example, with regard to how the existing regime of *jus ad bellum* applies to non-conventional means of warfare or may be reconciled with the traditional law of neutrality. Regional institutions may also provide resilience in the collective security system by developing regional norms and autonomous authority to make collective security decisions, or instead, by performing alternative security functions.

There are serious concerns arising from the demise of collective security as well. States may become less inclined to adhere to the strict rules of *jus ad bellum* when employing military forces to protect or advance their national interests. This is especially so when they expect concerted condemnation to be difficult or unlikely because of ambiguity in the law or associated academic debates. When such reckless practices are used to force unilateral revision of the status quo, there is a potential to encourage other States to follow suit, creating a dangerous hole in the *jus ad bellum* regime at the fundamental level. In situations of international armed conflict, the traditional law of neutrality provides a legal safeguard against the spread of hostilities in third States, with the prohibition of the use or threat of force governing the legal relationship between belligerents and neutral States. However, legal ambiguity created in the process of reconciling competing obligations under these two legal

120 UNSC Res 2565 (2021) 'Maintenance of International Peace and Security' (26 February 2021); UNSC Res 2532 (2020) 'Maintenance of International Peace and Security' (1 July 2020).

regimes leaves third States at the risk of being drawn into an armed conflict by providing military support for belligerent parties.

For now, the demise of collective security remains a hypothetical scenario that this article has examined as a thought experiment. Yet, these implications for international law are real in that they are drawn from existing practices and debates. One day, we might see a situation where the Security Council reactivates the authorisation practice to combine international efforts against a common threat or as a result of political changes resolving mutual distrust between Council members. Even in such optimistic scenarios, various issues identified in this article would remain as structural flaws of the collective security system that is currently put in place. It is time to remind ourselves that the UN is not an infinite ideal but inevitably suffers set-backs in the ebb and flow of progress,[121] as geopolitical conditions change for its operation. It is our shared responsibility to keep developing the collective security machinery that deters unilateral revision of the status quo, in search of the international legal order that best protects the future of humanity.

121 H. Lauterpacht, 'Neutrality and Collective Security' (1936) 2 Politica 133, at 151.