

# Great Power Security

Robert J. Delahunty\*

John Yoo\*\*

## I. INTRODUCTION

The change of administration in the US may have encouraged the belief that collective security will finally have its day.<sup>1</sup> Critics of the Bush administration argued that the US intervention in Iraq was illegal because it had not received the authorization of the UN Security Council. Implicit in this argument was the idea that relying on collective security methods, rather than great power politics and the use of force, would have produced better outcomes for the US and for global welfare. The Afghanistan War, by contrast, did receive the UN Security Council's implicit consent and has been blessed by the Obama administration as a "good" war. On other difficult international problems as well, such as Iran's nuclear weapons program, the US has turned to international institutions such as the International Atomic Energy Agency and the Security Council to achieve its foreign policy goals.

A conventional wisdom also seems to be emerging among many, if not most, academics in international law that the strengthening of the UN security system would advance international peace and security. Although the twenty-first century has brought radically different security threats from those that existed when the UN Charter was first written, many seem to believe that

---

\* Associate Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota.

\*\* Fletcher Jones Distinguished Visiting Professor of Law, Chapman University School of Law (2008–09); Professor of Law, University of California, Berkeley School of Law; Visiting Scholar, American Enterprise Institute.

<sup>1</sup> In that spirit, Susan Rice, the US Ambassador to the UN, testified at her Senate hearing that the new Administration "has affirmed America's commitment to the United Nations as an indispensable, if imperfect, institution for advancing our security and well-being in the 21st century." *Statement of US Permanent Representative-Designate Susan E. Rice Before the Senate Foreign Relations Committee: January 15, 2009*, 2 (US Senate Committee on Foreign Relations 2009), available online at <<http://foreign.senate.gov/testimony/2009/RiceTestimony090115a.pdf>> (visited Apr 16, 2009).

concentrating authority in the Security Council remains the most effective international legal process for the use of force. Some academics who think this share the views of Kofi Annan, who launched a proposal near the end of his time as Secretary-General to expand the legitimate purposes for the use of force, but to retain a strict process for authorizing those uses. In his 2005 report, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, Annan allowed that nations may use force more broadly to confront new threats to international peace and security, such as terrorism, rogue nations, and human rights catastrophes, but refused to change the Security Council's monopoly on the authorization of the use of force beyond that required for self-defense.<sup>2</sup> The only real issue left for debate was whether to expand the permanent members of the Security Council to include countries such as Japan, India, and Brazil. It is also worth discussing, though Annan's report did not address the matter, whether to give any new permanent members of the Council a veto.

Resurrecting the formal UN Charter rules on the use of force, however, or even modifying them in the way suggested by the former Secretary-General, would have the perverse effect of making international peace and security more difficult to achieve. Instead of bringing collective security, the UN Charter system only exacerbates the collective action problems inherent in solving the security challenges of the twenty-first century. The UN Charter system has never really worked; from the beginning, it represented a quixotic effort to end the great power system that had governed international politics since the mid-seventeenth century. A continued reliance on, if not a return to, cooperation and coordination by the great powers remains the better hope—imperfect though it may be—for managing problems of international security in this century.

Section II of this Article sets the context by describing the great power system and the effort to replace it with collective security. Section III describes the rules and operation of the UN Charter system, today's formal version of collective security. Section IV explains why the current threats facing nations will not be solved through the UN Charter, but more likely through a reinvigoration of the great powers and their right to set the rules for the use of force.

## II. INTERNATIONAL ANARCHY AND COLLECTIVE SECURITY

The rise of great power politics is traditionally traced to the Peace of Westphalia of 1648. That great settlement, as is commonly thought, recognized nation-states as the basic actors of the international system, replacing the universalist claims of multiethnic entities like the Holy Roman Empire. Realist

---

<sup>2</sup> See United Nations, Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 at 33, ¶¶ 124–26 (2005).

theories of international relations, expounded in the postwar works of John Mearsheimer and Kenneth Waltz, characterize the primary goal of nation-states in such a system as the maximization of their security.<sup>3</sup> The main threat to security is posed by the growth in relative power of other nation-states, primarily through size and effectiveness of their military forces, but also through their economic development (which creates the potential for building military strength).

The system dominated by the great powers was generally anarchic. Although a few customary rules prevailed, such as the immunity for diplomatic officials or the prohibition on piracy, the international system was generally not governed by legal rules. International law placed few restrictions on the use of force by nation-states.<sup>4</sup> It was not illegal for a nation to expand its borders through conquest. To unify Germany, for example, Prussia waged wars against a variety of other states, including the Austrian Empire, Denmark, and France. The US expanded its borders by conquest in wars with Mexico and Spain. Great Britain and France fought for decades in conflicts in which Canada and India changed hands. Russia, Austria, and Prussia together eliminated Poland. Each great power sought to maximize its security by expanding its population and territory, maintaining significant armed forces, and at times waging war against its competitors. As one early twentieth-century legal writer summed things up:

International Law, as such, is indifferent to causes. It does not consider the justice or injustice of a war. From the purely legal standpoint, all wars are equally just or unjust; or, properly speaking, they are neither just nor unjust. International Law merely takes cognizance of the existence of war as a fact, and prescribes certain rules and regulations which affect the rights and duties of neutrals and belligerents during its continuance.<sup>5</sup>

The great power rivalries created by an anarchic system did not of course eliminate all international cooperation. Nations formed alliances when one of their number seemed to rise so much in power that it threatened the security of the others. Thus, England and other nations joined an alliance to stop the expansion of France under Louis XIV, and another coalition of Great Britain, Prussia, Russia, and Austria eventually defeated Napoleonic France. Similarly,

---

<sup>3</sup> See John J. Mearsheimer, *The Tragedy of Great Power Politics* 2–4 (Norton 2001); Kenneth N. Waltz, *Theory of International Politics* 117–18 (McGraw-Hill 1979). For a summary of Mearsheimer's and Waltz's forms of "realism" and an analysis of their main differences, see Richard Little, *The Balance of Power in International Relations: Metaphors, Myths and Models* 167–248 (Cambridge 2007).

<sup>4</sup> We refer here to what is usually called "jus ad bellum." By the late nineteenth century, there was, however, a developed body of international rules regulating the means and methods of warfare, or "jus in bello."

<sup>5</sup> Amos S. Hershey, *The International Law and Diplomacy of The Russo-Japanese War* 67 (Macmillan 1906).

the United Kingdom, France, and Russia joined forces in World War I to contain the rise of Germany. But nations concerned with their own survival in the conditions of international anarchy do not fully trust each other, thus sharply limiting the possibilities of cooperation between them and indeed giving rise to rivalries even between powers that harbor no aggressive designs on each other.<sup>6</sup> The temptation to free-ride off the efforts of other countries, to bandwagon only after it is clear which side has the preponderance of forces, and other problems inherent in an anarchic, security-driven system will mean that alliances will tend to be temporary and opportunistic. Thus, Italy fought on the side of the Allies in World War I; then, after hesitating for over nine months after Hitler's invasion of Poland, fought on the side of the Axis for much of World War II.

Yet even though it is beset by competition and conflict, a system governed by great power politics is not necessarily less stable than one supposedly regulated by international law. International relations scholars debate to this day whether a system that is hegemonic (one dominant power, such as the US after 1991), bipolar (such as the US and the USSR during the Cold War), or multipolar (the period roughly from 1648 to 1945) is more stable.<sup>7</sup> After the Napoleonic Wars, for example, the great powers created the "Concert of Europe" in which they coordinated their policies to prevent any significant outbreak of war on the continent. Aside from the wars of national unification for Germany and Italy, the mid-century Crimean War, and smaller early twentieth-century Balkan wars, the Concert understanding helped to maintain a rough peace in Europe for a century.<sup>8</sup>

The Great War, of course, changed all that. Its sheer destructiveness is difficult to comprehend even today. The overall death toll from the War amounted to between nine and ten million. France lost nearly one in every five men mobilized, some 10.5 percent of the nation's active male population (about 1.4 million killed, 1.1 million seriously injured).<sup>9</sup> German, Austro-Hungarian, and British war losses, though less, were commensurable. Despite the appalling level of casualties on both sides at the great battles of Verdun and the Somme, neither

---

<sup>6</sup> See Mearsheimer, *Tragedy of Great Power Politics* at 3 (cited in note 3).

<sup>7</sup> See id at 336; see also Edward Vose Gulick, *Europe's Classical Balance of Power: A Case History of the Theory and Practice of One of the Great Concepts of European Statecraft* 9 (1955).

<sup>8</sup> For a survey of the writing by international relations scholars on the Concert of Europe and an independent evaluation of its effectiveness, see Dan Lindley, *Promoting Peace with Information: Transparency As a Tool of Security Regimes* 55–85 (Princeton 2007).

<sup>9</sup> Eugen Weber, *The Hollow Years: France in the 1930s* 11 (Norton 1994).

battle proved to be decisive; indeed, after the battles, positions at the front hardly changed.<sup>10</sup>

Collective security rejected the system of great power politics that had apparently visited the horrifying destruction of World War I on the peoples of Europe. The postwar legal regime was largely the outgrowth of three seminal documents—Woodrow Wilson’s “Fourteen Points,”<sup>11</sup> the Versailles Treaty,<sup>12</sup> and the Covenant of the League of Nations.<sup>13</sup> These documents embodied the American rejection of the European “balance of power” system as inherently unstable and prone to war in favor of a form of “collective security” designed to prevent or punish offensive war.<sup>14</sup> Instead of war, the international system would use permanent judicial and arbitral institutions intended to settle disputes. Collective security and judicial resolution would be supplemented by disarmament, such as the Washington Conference of 1922, which fixed the ratio of naval forces for the US, Great Britain, Japan, France, and Italy.<sup>15</sup> Altogether the interwar disarmament process yielded six major naval treaties embracing five great powers that sought to demilitarize much of the world’s oceans, limit the naval powers’ fleets to defensive purposes, and reduce the risk of war by preventing naval alliances between those powers.<sup>16</sup>

Collective security in the interwar period, of course, failed. The norms of international politics did not change, even in the wake of the horrors of World War I. Nations continued to use force or its threat to resolve disagreements and to rely on alliances, such as the British-French alliance, for their security.

---

<sup>10</sup> Although generally not exposed to the hazards of the front, civilians as well as combatants suffered fearfully from the war. One of the main causes of such suffering was the (questionably legal) British naval blockade of Germany. One calculation finds that the British blockade was responsible for 726,766 deaths in Germany between 1915 and 1918. Michael Glover, *The Velvet Glove: The Decline and Fall of Moderation in War* 125 (Hodder & Stoughton 1982).

<sup>11</sup> Address of the President, H Doc No 765, 65th Cong, 2d Sess (January 8, 1918), in 56 Cong Rec H 690–91 (Jan 8, 1918).

<sup>12</sup> Treaty of Versailles (Jun 28, 1919), 225 Consol TS 188 (1981) (treaty ending World War I between Allied Powers and Germany).

<sup>13</sup> League of Nations Covenant (1919).

<sup>14</sup> For a searching account of the Wilsonian vision and its aversion to the use of a “balance of power” to maintain peace, see Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* 359–60 (Knopf 2002). Bobbitt argues that the concepts of “collective security” and “balance of power” are not inherently incompatible, but that the underlying predicates of the Wilsonian vision—the nationality principle and democratic self-governance—create a contradiction between the two.

<sup>15</sup> See A Treaty Between the United States of America, the British Empire, France, Italy, and Japan, Limiting Naval Armament (Feb 6, 1922), reprinted in Emily O. Goldman, *Sunken Treaties: Naval Arms Control Between the Wars* 274–93 (Pennsylvania State 1994).

<sup>16</sup> See Goldman, *Sunken Treaties* at 8–17 (cited in note 15).

International institutions failed to affect state decisions in the security area. In the early 1920s, Greece and Turkey, as well as Russia and Poland, fought wars without the League of Nations' intervention. Japan's invasions of Manchuria and China, Italy's invasion of Ethiopia, and Germany's aggression under Hitler demonstrated the hollow hope of collective security.

Some believe that the fault lay in the design of the League, rather than in the idea of collective security itself. One chief problem with the League was the absence of the US, the most powerful nation in the world. The League also lacked any real mechanism to enforce declarations to end fighting. But blaming the structure of the League obscures the root cause of its failure: changes in norms needed for collective security were not feasible. Conventional wisdom claims that the harsh peace of Versailles, particularly the large reparations payments owed by Germany to France, was responsible for the renewal of conflict in Europe in 1939. Marc Trachtenberg, however, convincingly argues that the deeper structural problem was the problem of Germany's unification, which had created a powerful nation in the middle of Europe.<sup>17</sup> The "German Question" was solved by the superpowers only by dividing the nation for the period of the Cold War.

Indeed, faith in collective security and the League of Nations diverted attention from sounder and more realistic measures that could well have averted World War II. As Trachtenberg suggests, the strategy that could have preserved the peace would have involved an alliance between the US, France, and Britain. An American military presence in Europe, which eventually came about during the Cold War, would have balanced Germany's rise, reassured the French, and might have encouraged accommodation between Germany and the nations around her.<sup>18</sup> But such measures would have contradicted the theory underlying collective security: that great power politics and the balance of power were responsible for war.

One might have thought that World War II would have proven that great power politics remained the fundamental mechanism in international relations. International law had appeared to do little to affect the decisions of the nations to go to war. Neither the League of Nations nor the variety of peace treaties of the interwar period prevented Hitler's Germany from rearming and then invading its neighbors. Nations at war pursued alliances and fought out conflicts regardless of shared values—Nazi Germany and the communist Soviet Union agreed to divide Poland, Germany then attacked the communist Soviet Union,

---

<sup>17</sup> See Marc Trachtenberg, *Versailles Revisited*, 9 *Sec Studies* 191, 198–99, 201 (Spring 2000), reviewing Manfred Boemeke, Gerald Feldman, and Elisabeth Glaser, *The Treaty of Versailles: A Reassessment after 75 Years* (Cambridge 1998).

<sup>18</sup> See *id.* at 197–98.

and democratic, capitalist Great Britain and the US allied with the communist Soviet Union. Even the apparent compliance with international treaties, such as the non-use of chemical weapons in combat, can be explained by mutual deterrence and fear of retaliation rather than by regard for international law.

In the wake of even greater destruction than in World War I, the US and its allies constructed yet another system of collective security. It resurrected the same basic idea that had motivated the League of Nations: that law could bring peace by “outlawing” the use of force to settle disputes between nations. It created a UN with a General Assembly, which like the League of Nations did not have any serious powers to address threats to international peace and security, but also added a Security Council. The Council has the power under Chapter VII to deploy force, either through its own standing forces (envisioned as coming from the contribution of national militaries) or by commanding or authorizing action by member states.<sup>19</sup> In a nod to the realities of great power politics, the Roosevelt administration gave a veto over Council action to five permanent members—the US, the Soviet Union, China, the UK, and France—whom Roosevelt believed would together dictate world events. Roosevelt was committed to the rhetoric, perhaps even the norm, of collective security, but when it came to institutional design he created a system that would allow each of the great powers, circa 1945, to block any international action contrary to their vital interests. Spreading the veto out among five nations, however, also made it difficult for nations to cooperate even when only one great power disapproved. The UN Charter created the possibility of a more effective enforcement mechanism than that of the League of Nations, though the Cold War would render it stillborn with the US and the Soviet Union vetoing each other’s proposals. The formation of the North Atlantic Treaty Organization (“NATO”) for the mutual defense of the US and its Western European allies in 1949—only four years after the UN Charter was signed—demonstrates how swiftly the faith in the Security Council’s ability to provide collective security collapsed. To take a more recent example, proposals to define and criminalize “aggression” under the Rome Statute for the International Criminal Court amount to an admission that the UN Charter’s methods for constraining aggression have signally failed. International criminal law is being enlisted in an effort to make good for the Charter’s defects—although the likelihood of success with that approach is no greater than it was under the Charter’s.

---

<sup>19</sup> See United Nations Charter, arts 39, 42–49.

### III. FAILURE OF THE UN CHARTER SYSTEM

In this section, we ask whether the UN's formal rejection of great power politics has made any difference in making war less frequent and in promoting peace. Here, we focus on the norm of collective security, rather than the institutional design of enforcement mechanisms. The UN Charter protects state sovereignty with a strict rule restricting the use of force by nations. Article 2(4) of the UN Charter requires member states to refrain "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>20</sup> There are only two exceptions. The first is when the Security Council approves the use of force "as may be necessary to maintain or restore international peace and security."<sup>21</sup> The second is when a nation acts to defend itself:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>22</sup>

The UN Charter system thus puts into place rules with strong parallels to a criminal law enforcement system. It imposes an absolute prohibition on the use of force. Nations give up their right to use force and delegate it to the UN, just as individual citizens give a monopoly over the legitimate use of violence to domestic government. Force may be used without the permission of international government only in self-defense, just as private citizens can use force to defend themselves from attack when law enforcement is unavailable.

Some scholars believe that the right to use force internationally is even narrower than it is for private citizens in domestic affairs. They believe that Article 51's condition on the right to use force only "if an armed attack occurs" allows self-defense only *after* an enemy attack has crossed a border or otherwise begun.<sup>23</sup> This rule is necessary, they argue, to prevent claims of self-defense

---

<sup>20</sup> United Nations Charter, art 2, ¶ 4.

<sup>21</sup> *Id.*, art 42.

<sup>22</sup> *Id.*, art 51.

<sup>23</sup> See, for example, Ian Brownlie, *International Law and the Use of Force by States* 275–80 (Oxford 1963) (observing that anticipatory self-defense may be available only in "very exceptional" circumstances, but deeming it wisest to proscribe this option in view of its risks). For a closely related view, see, for example, Antonio Cassese, *Return to Westphalia? Considerations on the Gradual*

meant to conceal actual wars of aggression. Others, however, hold the view that Article 51 did not limit the right of self-defense as it existed at the time of the Charter's adoption, which allows for self-defense in anticipation of an imminent cross-border attack.<sup>24</sup> Recognizing the right of anticipatory self-defense brings the international rules on the use of force roughly into line with those that apply in domestic law.<sup>25</sup>

The record of practice seems to be that the new UN rules of collective security were every bit as ineffective as those of the League of Nations. During the Cold War, for example, the Security Council authorized no uses of force aside from the Korean War (this was only authorized because the Soviet Union boycotted the vote), yet the great powers engaged in multiple wars—such as the US in Vietnam and the Soviet Union in Afghanistan. The envisioned contribution of nations to an international militia under UN command never came about. Once the Cold War ended, the UN did expressly authorize one significant conflict, the Persian Gulf War of 1991, and a variety of humanitarian interventions, such as those in Somalia and Haiti, but it failed to address other human rights crises in Rwanda, the Balkans, Darfur and elsewhere.

It does not appear that collective security, even in its new guise, reduced the absolute number of interstate wars. From 1945 to 1997, according to the Correlates of War project, nations engaged in twenty-three wars.<sup>26</sup> From 1816 to 1945, this project counts fifty-six interstate wars. This yields a rate of .43 wars per year before World War II ended, and .44 wars per year in the postwar period—basically no change. The real change occurs when one corrects for the number of states, which rose dramatically during the Cold War due to decolonization. From 1715 to 1814, the number of wars per year per state was .019, falling to .014 from 1815 to 1914, rising to .036 from 1918 to 1941, then falling again to .005 from 1945 to 1995.<sup>27</sup>

---

*Erosion of the Charter System*, in A. Cassese, ed, *The Current Legal Regulation of the Use of Force* 505, 515–16 (Martinus Nijhoff 1986).

<sup>24</sup> *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14, 94 (June 27, 1986). See, for example, Abraham D. Sofaer, *International Law and Kosovo*, 36 Stan J Intl L 1, 16 (2000) (advocating the abandonment of rigid and often dishonest rule-based evaluations of use of force decisions in favor of a more flexible standard that might elicit honest reason-giving by international actors); Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich L Rev 1620, 1634 (1984); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am J Intl L 597, 599–600 (1963); D. W. Bowett, *Self-Defence in International Law* 182–99 (Manchester 1958).

<sup>25</sup> For a discussion of anticipatory self-defense and its difference from preventive war, see Robert J. Delahunty and John C. Yoo, *The Bush Doctrine: Can Preventive War be Justified?*, 32 Harv J L & Pub Poly 843 (2009).

<sup>26</sup> See, for example, Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 Conflict Mgmt & Peace Sci 123, 134–35 (2000)

<sup>27</sup> See K.J. Holsti, *The State, war, and the state of war* 24 (Cambridge 1996).

While the rate of interstate wars has fallen, the types of war have changed dramatically. This is due mainly to the emergence of intrastate wars, generally civil wars, in undeveloped parts of the world. During the postwar period, no conflicts have occurred between the great powers, nor have any interstate wars taken place in Western Europe or North America.<sup>28</sup> Since World War II, 75 to 80 percent of all armed conflicts, and 80 percent of all casualties, have been from internal civil wars.<sup>29</sup> Rather than territorial expansion of the state, these wars represent the aim of one group within a nation to seize control of a regime or a territory at the expense of other groups within the same nation.

These data prompt two observations. First, it might be argued by supporters of collective security, such as the advisors to Secretary-General Annan,<sup>30</sup> that the UN Charter system is responsible for the sharp fall in wars per year per state. It would be difficult to test whether this is empirically true, but scholars of American foreign relations attribute the relative peace of international relations to an altogether different cause. They trace the cause to the balance of power between the US and the Soviet Union, and some argue more specifically that their large nuclear arsenals rendered the costs of war so prohibitive that the two superpowers cooperated to prevent any great power conflicts.<sup>31</sup> It would be difficult to attribute any influence over this state of affairs to the UN Charter system, which operated during the postwar period not as a limitation on international conflict, but rather—due to the permanent veto—as a brake on the ability of the institution to take any action at all. It was the operation of great power politics, modified by the presence of nuclear weapons, that produced the peace, not collective security.

Our second observation is that the UN Charter's collective security system seems ill-suited to meet the changing nature of warfare. Even if one believed that nations complied with the formal rules of the UN Charter most of the time, those rules were designed with cross-border attacks by nation-states in mind. The UN Charter makes no express provision for intervention in civil wars or humanitarian crises, although the Security Council, over time, has interpreted its authority to secure international peace and security so as to cover these problems. Recently, the Security Council enacted SC Res 1674, which asserts

---

<sup>28</sup> Even when Central and Eastern Europe are included, there have been very few interstate wars in that period—NATO's 1999 intervention in Kosovo being one case, Armenia's conflict with Azerbaijan a second, and Russia's brief armed intervention in 2008 in Georgia arguably a third.

<sup>29</sup> See John Yoo, *Using Force*, 71 U Chi L Rev 729, 748 (2004).

<sup>30</sup> See United Nations, Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 at 18, ¶ 11 (2004).

<sup>31</sup> See generally, for example, Kenneth N. Waltz, *The Spread of Nuclear Weapons: More May Be Better*, Adelphi Papers no 171 (Intl Inst Strategic Studies 1981).

that all nations have a responsibility to protect their populations, and claiming that the Security Council could order intervention in the case of genocide, war crimes, crimes against humanity, and ethnic cleansing. Nonetheless, there is no textual authority in the Charter to override the sanctity of territorial sovereignty in the interests of preventing deaths from internal war or harm to human rights. Moreover, many UN member states—including the veto-wielding China and Russia—can often be counted on to object to interventions for such purposes, arguing that they would constitute improper interference with the essentially domestic jurisdiction of the affected state.

Current problems run beyond interstate warfare, though that possibility remains ever-present despite the low rate of interstate armed conflict since 1945. The primary threat to international peace and security today comes from rogue states, failed states, terrorist organizations, humanitarian catastrophes, and the proliferation of weapons of mass destruction (“WMD”) technology. The 9/11 attacks and continuing operations by the al Qaeda terrorist organization and its allies show that non-state entities can wield violence for political ends in ways that used to lie only in the hands of nation-states. Their acquisition of WMD technologies would only exacerbate their threat to the security of nations such as the US and its allies.<sup>32</sup>

Armed intervention into the internal affairs of nations may prevent these threats from materializing, even though they do not involve an imminent cross-border attack. This may be even truer of human rights disasters. The US and its allies have already used force in Somalia, Haiti, and Bosnia to prevent humanitarian disasters, even though those nations posed no security threat to their neighbors. Recently, there have been calls by scholars and international organizations for the recognition of a new “duty to protect” that would permit intervention when a nation systematically fails to observe the human rights of its citizens.<sup>33</sup>

Rogue nations compound these problems. Typically, these regimes combine disregard for the basic human rights of their own peoples with grave

---

<sup>32</sup> See Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 Chi J Int'l L 597, 600 (2006):

Soon after the Charter came into effect . . . [state-to-state] military action ceased to be the principal mode in which threats to the peace tended to arise. The shift to endemic and brutal civil wars, egregious violations of a growing canon of human rights, and clandestine terrorism directed at civilians has threatened with obsolescence those systemic norms meant to address threats to the peace. These new kinds of “threats to the peace” and “acts of aggression” are not those the Charter’s drafters had in mind . . . .

<sup>33</sup> See generally, for example, W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case W Res J Int'l L 57 (2008). For a recent survey of various views, see Conor Foley, *The Thin Blue Line: How Humanitarianism Went to War* 150–59 (Verso 2008).

threats to the civilian populations of their neighbors. Thus, North Korea and Iraq under the regime of Saddam Hussein both oppressed their citizens and posed a severe threat to their neighbors, not just with conventional arms, but with their efforts to acquire WMD technologies. Armed intervention could forestall the problems posed by such nations before they metastasize into more serious threats to the international system.

Failed states have the opposite characteristic—too little rather than too much governmental authority—but may contribute to these problems. The collapse of governmental authority in a state allows human rights catastrophes to occur because of the failure of basic governmental services or the rise of private warlords. An ungoverned territory can also become a safe haven for terrorists, who can freely organize, train, and operate from a failed state, such as for al Qaeda in Afghanistan before the 9/11 attacks. A failed state could destabilize surrounding nations, which would receive refugee movements or suffer attacks from terrorist groups.

These examples illustrate that the UN Charter's system of collective security suffers at the level of both legal norm and institutional design. At the level of formal rule, the Charter's restrictive rule regarding self-defense chooses a suboptimal level for the use of force in the international system. Like the legal constraints on self-defense in domestic affairs, the international legal rule seeks to drive the level of force in interstate relations close to zero. Prohibiting all uses of force except those in self-defense against another state's actual or imminent attacks precludes intervention to prevent the harms to the international system presented by threats outside the state-versus-state framework. Harms caused by non-state actors, by rogue states, by failed or failing states, or by the spread of dangerous technologies or human rights oppression, cannot truly be cured under a non-use-of-force regime. This problem is exacerbated by the specific features of the collective security system now in place. The Security Council is designed to discourage the use of force, and gives the five permanent members a veto over any intervention beyond that necessary for self-defense. The permanent members of the Council will use their veto to block intervention in areas of the world where they have an interest (such as the Balkans or now Sudan), or where none of them has an interest (such as Rwanda), even though human rights catastrophes may loom.

#### IV. GREAT POWER SECURITY AND USE OF FORCE RULES

This section discusses the appropriate legal rule for the use of force in international affairs, and what mechanism would best enforce it. The goal must go beyond the traditional aim of collective security, which we take to be the prevention or reduction of interstate armed conflict. The purpose of the optimal legal rule must instead be the more comprehensive one of maintaining

international peace and security. Section III argued that this broader goal is threatened by conditions other than wars between nation-states, and encompasses the prevention or reduction of violence caused by terrorist groups' attacks on civilians, by civil wars, and by states' oppression of their own populations. We also argued that the UN Charter system exacerbated the collective action problem inherent in international security. We turn next to the question of what institutional arrangement would better allow for the enforcement of the optimal legal rule. A system of great power politics, we shall now argue, would do equally well and probably better at maintaining international peace and security than the current approach.

The current international legal rule draws the wrong analogy. Rather than borrowing the view of criminal law as it applies to the individual right to self-defense, the international legal system ought to adopt a global welfare approach, which seeks to maximize the welfare of the largest number of human beings. Even theories of international law that focus on institutions must rely on a utilitarian basis.

An important function of government action in a welfare maximization approach is to promote the production of public goods. Public goods are those that, unlike private goods, are non-rivalrous and non-exclusive. An individual can consume a public good without reducing the supply available for others, and it is impossible to prevent others from consuming the good without paying. In domestic affairs, national defense or law and order are the paradigmatic public goods—one citizen's benefit from added security of the country does not take away from any other citizen's, regardless of whether they pay for it. The market will not supply the optimal amount of these goods, because providers will be unable to fully internalize the cost and benefits. In such cases, government intervention can cure the market failure.

Government intervention can also address the related problem of externalities. Some types of activity produce positive externalities, in that they produce benefits to others that are not fully internalized by the buyer or seller of the good. Conversely, negative externalities are produced by conduct whose harms fall on third parties. The cost of these harms is also not fully internalized by the producer or consumer. Activity that tends to produce positive externalities will tend to be undersupplied by the market, while activity with negative externalities will tend to be oversupplied, or in other words, produced in greater quantities than is socially optimal. Government action should encourage the former and restrict the latter by forcing producers and consumers to internalize the costs.

The challenges presented by the changing nature of international relations can be usefully understood in this light. The provision of international peace and security can be seen as an international public good. To some degree, all nations and their peoples benefit from the reduction of armed conflict, human rights

catastrophes, or WMD proliferation, and it is impossible to exclude any state from the benefits to the international system. International peace and security provide the foundations for the conduct of international trade and commerce, travel and communication, and cooperation in the solving of other collective action problems.

Similarly, the international system encounters negative externalities that may also benefit from cooperation. A failed state, for example, can be understood as creating negative externalities. The collapse of governmental authority in a state may lead to the outflow of refugees to neighboring countries. A terrorist group's operation in a failed state may threaten security and order along the borders. Government action could usefully prevent these spillovers from affecting nations near failed states. Another example would be environmental harm caused by individual nations that pollute global commons. If global warming is caused by excessive carbon emissions, the harm to the environment can be seen as a spillover from the industrial production of individual nations. International cooperation should seek to force the polluting nations in this case to internalize the costs of their activities.

From this perspective, the international legal system creates incentives that act in the wrong direction to that which would be best for overall global welfare. The theory of public goods predicts that activity necessary to secure international peace and security will be less than optimal. Nations, or an alliance of nations, might act to prevent threats to international peace and security, but only up to the point where those benefits equal the costs of the action. The US and its allies, for example, may intervene to prevent the failure of a state on the borders of Europe. They will stop when the costs of sending troops and administering the state exceed the benefits, to them, of stopping refugee flows and ending the humanitarian crises—regardless of whether other nations, both those near and far, benefit as well. From a global welfare maximization perspective, however, intervention should continue until the costs of intervention equal the benefits to the international system. All nations will benefit to some degree in the enhanced stability and peace produced by intervening in such situations, but many will free-ride on the efforts of the nations that actually undertake the use of force.

International legal rules, in attempting to produce zero violence in international affairs, actually exacerbate the collective action problem. If force can be used only in self-defense or upon the authorization of the UN Security Council, and nations follow these formal rules, then there will be an even greater undersupply of interventions to cure threats to international peace and stability. Humanitarian crises display the problem. The UN Security Council authorized the use of force in Somalia and Haiti, but it failed to do so in Rwanda and Bosnia. Western nations failed to stop the genocide in Rwanda, but then sought

to halt ethnic cleansing in Kosovo, only to face claims that they had acted in violation of UN Charter law.

Proposed changes in the structure of the relevant international institutions will have the perverse effect of making the problem even worse. Reforms to the UN Charter, as suggested by the former Secretary-General and his task force, would recognize an exception to the principle of non-intervention for humanitarian intervention, but would still require the approval of the Security Council, whose permanent members would be expanded to include other nations such as Germany, Brazil, and Japan. Expanding the number of nations on the Council has two effects. It might improve the accuracy of the decision to intervene—the Condorcet Jury Theorem, roughly put, predicts that as the number of decisionmakers increases, the probability increases that the decision will be correct. This effect, however, is swamped by increasing the number of decisionmakers. Expanding the Security Council will increase the internal transaction costs of decision, making it even less likely that the Council will authorize any use of force.<sup>34</sup> The ability of a collective decisionmaking body to bargain and reach collective decisions becomes more difficult as its numbers increase.

Great power politics may lessen this problem. We should begin by recognizing that it is actually the great powers, rather than international institutions, that cooperate in maintaining international peace and security. At the level of interstate armed conflict, it seems highly unlikely that the UN Charter's rules on the use of force have produced the steep post-1945 drop in great power wars. The world certainly came close to such wars several times during the Cold War period. In the 1950s, the armed forces of the US and Communist China fought in Korea, and the US threatened its own allies, Britain and France, to withdraw from the Suez Canal. From 1948 to 1949, and again in the 1960s, the US and the Soviet Union directly confronted each other in Berlin. The two superpowers came within a hair's breadth of nuclear war over Cuba in 1962. Proxy wars throughout the 1960s, 1970s, and 1980s in places like Vietnam, the Middle East, Africa, and Afghanistan kept alive the possibility of a major conflict between the powers. But none of these crises erupted into a major conflagration at the level of World War I or II. Much of the explanation must come not just from nuclear weapons, which threatened extreme costs to escalating a conflict, but also from the balance of power between the US and the Soviet Union. Both superpowers had an interest in preventing their allies from causing a destabilization of the international system, which might have invited a broader conflict. Their rivalry kept the peace, rather than any international legal injunction against the use of force.

---

<sup>34</sup> See, for example Robert D. Cooter, *The Strategic Constitution* 174–77 (Princeton 2000).

Great powers similarly will have be the central dynamic of any future system of international security. We confess that it is difficult to predict how the system will work in practice. From the end of the Cold War to the end of President George W. Bush's second term, the world faced something close to a unipolar system, thanks to the collapse of the Soviet Union. The US's share of the world's economic and military power allowed it, for a period, to wield an almost hegemonic influence over world events. The US was able to lead a coalition in 1991 that reversed Iraq's invasion of Kuwait. In the 1990s, it expanded NATO to the very borders of Russia. It led efforts to stop the proliferation of nuclear weapons to North Korea, Iran, and Libya. In 2003, it invaded and occupied Iraq despite the opposition of many of the world's major powers.

But the growth in the economic power of other nations, especially China but also including Russia, Brazil, and India, signals that this state of affairs is temporary. The difficult question is whether this change will result in less warfare, or more. The relative decline of US economic and military strength in the years ahead may suggest that the other great powers will combine to offset the power of the US. Or the US might itself play the role of an offshore balancer, preserving its dominance in the Western hemisphere while intervening to maintain an equilibrium among rival powers in Europe or Asia.<sup>35</sup> In either case, we might see international peace and stability maintained by something similar to the nineteenth century's Concert of Europe, in which the great powers attempted to manage conflict to maintain the status quo. (As we have seen, the Concert, and the balancing it expressed, was relatively successful in keeping a general European peace from the end of the Napoleonic Wars to the start of World War I.) Yet another possibility is that the US, like other assumedly "declining" powers before it, may be tempted to launch a preventive war to thwart the rise of competitors or to forestall shifts in the balance of power

---

<sup>35</sup> Thus, Walter Russell Mead suggests that "Asia seems to be moving toward a complex balance of power, something like the European system that emerged after the Congress of Vienna. In this system, an offshore balancing power—Britain in 1815, the United States today—can exercise great influence and protect its vital interests at low cost, even if other powers in the system have larger populations or economies, or even, by some measures, stronger military forces . . . . Even though the rise of India and China over the long term poses a threat to Japan's standing as Asia's preeminent economic and technological power, for the foreseeable future the three great Asian powers form a potentially stable triangle. Either India or China, *plus Japan*, is likely to be strong enough to make it unrealistic for the third power in the triangle to dominate the other two. With the United States as a second balancing power available to counter any aspiring hegemon, the path to Asian supremacy for India, China, or Japan seems difficult if not impossible to navigate—always assuming that the other powers, including the United States, recognize and act on their national interests." Walter Russell Mead, *God and Gold: Britain, America, and the Making of the Modern World* 355 (2007).

adverse to it. Germany and Japan in World War II, and Germany and Austria-Hungary in World War I, provide examples of this kind.<sup>36</sup>

Relying on great power politics to provide international peace and security, however, does not need much in the way of international law of the kind found in the UN Charter. The formal structure of the Security Council has some benefits by providing a forum for discussion of matters of concern to the member states. But the territorial integrity of the great powers themselves does not need legal protection; the spread of nuclear weapons to the major military nations can guarantee their sovereign integrity. Great power balancing may well protect middling powers from larger ones; if Russia were to threaten Turkey, for example, other powers would aid the latter to prevent the former from expanding the resources under its control. (For exactly those reasons, Britain provided the Turkish Empire with protection against Russian encroachments for much of the nineteenth century.<sup>37</sup>) Such support would be far more valuable than an international legal rule against aggression that lacked any reliable, institutionalized enforcement mechanism. The place for international law would not be to attempt to establish some type of non-intervention rule, but rather to regularize the means of coordination and cooperation among the great powers to prevent misunderstandings, repeated transaction costs, and the like.

The place where a real difference might appear, however, would be in the area that is most challenging to the international system today. Since the end of the Cold War, rogue nations, international terrorist groups, humanitarian crises, and WMD proliferation have been of the most concern to nations as the threat of interstate warfare has declined. Great power cooperation has several benefits over the UN Charter system. First, it relies on those nations with the resources to actually intervene in a meaningful way. The US's performance in 1990–91 provides a good example. Not only was it able to provide the military assets needed to reverse the invasion of Kuwait, but it was also able to cooperate with other nations which provided financial and other non-combat means of support to the mission. The great powers are also those that may benefit more than

---

<sup>36</sup> It would be a mistake to assume, however, that the emergence of a new dominant power must trigger a preventive war on the part of the power it is superseding. Witness the ability of the rising US and the declining British Empire to resolve their differences without conflict after the War of 1812. See generally Steven E. Lobell, *Britain's Paradox: Cooperation or Punishment prior to World War I*, 27 *Rev Intl Studies* 169 (2001) (analyzing Britain's readiness to accommodate US rise to global power in pre-World War I period); see also William R. Thompson, *The Evolution of Great Power Rivalry: The Anglo-American Case*, in William R. Thompson, ed, *Great Power Rivalries* 201, 208–16 (South Carolina 1999) (surveying possible causes of end of Anglo-American rivalry before World War I).

<sup>37</sup> See Michael Graham Fry, Erik Goldstein, and Richard Langhorne, eds, *Guide to International Relations and Diplomacy* 130–32 (Continuum 2002). See generally G. D. Clayton, *Britain and the Eastern Question: Missolonghi to Gallipoli* (London 1971).

others from the trade and commerce that are facilitated by international stability. The NATO nations had a strong interest in solving the humanitarian crises in the Balkans in the 1990s because those crises created instability in Europe. While these considerations do not cure the collective action problem, aligning the interests of the great powers with overall global welfare would move toward solving it.

A Concert of Europe–like system on a global scale could help ameliorate the collective action problems that beset the UN Charter system.<sup>38</sup> Under a great powers approach, no single nation would have an absolute veto over action. Rather, five or even ten nations might have a say over whether to intervene to stop a rogue nation, for example, from acquiring nuclear weapons. There would be no formal vote in an international institution, nor any requirement of a majority vote as such. Rather, intervention would effectively be a function of the relative power of each of the nations—perhaps more similar to the weighted voting systems that characterize the operation of corporations. This would be superior to the existing system because it would take away the right of an absolute veto. This does not mean that any single nation, or perhaps a small group of nations, would not have the power to block collective action. If the most powerful nation was opposed to an intervention, and was willing to use its resources to stop it, the nation very well might have its way, though the relative power of that nation would have to be something near 50 percent of the global economic and military power. Only if the current international legal rule against aggression, by its own force, has reduced the amount of interstate conflict (a proposition for which little or no evidence exists) would our proposed system reduce global welfare.

Even so, allowing the most powerful nation to block collective action would place the world in no worse position than the case where permanent

---

<sup>38</sup> We note that international relations scholars distinguish between certain forms of the “balance of power” between states and what is genuinely a “concert” system, the latter of which is said to presuppose “continuous coordination and collective decision making.” Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* 168 (Norton 1997). Thus, historian Paul Schroeder has theorized that the success of the Concert of Europe in maintaining a general continental peace was not so much because it created a balance of power as because it achieved “a general equilibrium in which all the members of the European family of states would share in certain balanced advantages and duties . . . a balance of rights.” Paul W. Schroeder, *Did the Vienna Settlement Rest on a Balance of Power?*, 97 *Am Hist Rev* 683, 698 (1992). See also *id.* at 699–702; Paul W. Schroeder, *The 19th-Century International System: Changes in the Structure*, 39 *World Pol* 1, 12–13 (1986). One critical issue—which we are unable to address within the scope of the present Article—concerns the difficulties of moving from the more predatory kind of “balance of power” system postulated by some American theorists of international relations to a genuine “concert” system. Consider Robert Jervis, *A Political Science Perspective on the Balance of Power and the Concert*, 97 *Am Hist Rev* 716, 720–22 (1992) (commenting on Schroeder).

members of the Security Council exercised an absolute veto. The real difference would arise where a group of nations representing more than 50 percent of the world's economic and military capabilities wanted to use force to intervene in a state. Under a great power system, they would be far more likely to prevail than under the Charter system, which allows a nation with a permanent seat such as France, which represents less than 3 percent of world GDP, to veto a proposed intervention. A decision on intervention will come far closer to the views of the median great power than the extreme nation closest to the status quo of inaction. Again, this does not solve the problem of supplying the optimal amount of intervention necessary to produce international peace and stability. It may even be the case that there might be a rise in undesirable interventions—that is, aggression for territorial conquest or influence—although we think the same restraints that exist now on such interventions would still be present with equal force under our system. But it will allow the great powers to cooperate on more interventions, such as Rwanda and Darfur, than are currently possible under the formal UN Charter system. It would therefore represent an advance for global welfare.

## V. CONCLUSIONS

The UN Charter system should be supplanted: its use-of-force rules are based on the assumption that the Security Council will provide collective security that will underpin a global peace. Not only has that system failed in practice, but it is not designed to deal with the changing nature of warfare. The Charter's use-of-force rules were addressed to the prevention or reduction of armed conflict between states. They are not adequate to deal with the more contemporary problems of civil war, mass violence against civilians at the hands of non-state terrorist groups, the protection of populations from genocide or other atrocities inflicted by their own governments, or the violence that is bred within failed or failing states.

What is needed is a new international legal regime for regulating the use of force by states against the threats of these varying kinds. The overarching goal of this regime should be the maintenance of international peace and stability through the pursuit of global welfare. Suppression of interstate conflict—which we take to be the main goal of the UN Charter system—is no longer sufficient in itself. Instead, the international legal system should be designed to produce international public goods, including the reduction of armed conflicts of whatever kind, the prevention of human rights catastrophes, the safety and security of civilian populations from both internal and external threats, and the nonproliferation of weapons of mass destruction. Unlike the UN Charter system, which is designed to drive the use of force by states close to zero, a reconstructed international legal system should seek to produce the optimal level

of force, thus allowing armed interventions for the purpose of preventing catastrophic harms.

The emergence of new great powers (China, the EU, and India, for example) and the re-emergence of older ones (such as Russia) have apparently begun to shift the post–Cold War world from unipolarity to multipolarity. Global peace and security in the future may no longer be underwritten by an (assumedly) “hegemonic” US. Instead, the world may experience a return to the kind of great power politics that was prevalent in Europe before World War I (and arguably, throughout recorded human history). Although the maintenance of peace and the possibilities of international cooperation are always problematic when rival great powers confront each other, the practice of the classical European “balance of power” suggests that even a long peace can be preserved in such circumstances. More specifically, the nineteenth century’s Concert of Europe might provide a useful analogy of how the Great Powers can identify common security interests leading them to cooperate in preserving peace and in securing other international public goods. While we would not attempt to forecast how an emerging multipolar world would work, an explicit great power system could well ameliorate the collective action problems that the current UN Charter system exacerbates, and thus could advance global welfare.