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MAPPING THE CONCEPTS BEHIND THE CONTEMPORARY LIBERALIZATION OF THE USE OF FORCE IN INTERNATIONAL LAW

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It is hardly groundbreaking to suggest that the international legal order is enduring the corrosion of one of its most fundamental pillars: the prohibition on the use of force. Each controversial use of force by a State has sparked predictions from international legal scholars envisaging the demise of this prohibition.[1] While it would be inaccurate to conclude that the prohibition has been completely undermined, recent practice provides alarming indications that this is precisely the direction in which the prohibition is heading.

The claim that Article 2(4) of the U.N. Charter is on the brink of clinical death has already been heard—principally from *legal realists*.[2] These grim accounts have also been endorsed by some

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[1] For an earlier controversy, see the famous debate between Thomas M. Franck and Louis Henkin. *See* Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970) [hereinafter Franck, *Who Killed Article 2(4)?*] (arguing that the prohibition against the use of force has been eroded beyond recognition). *But see* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544 (1971) (arguing that while Article 2(4) is under assault, it is not dead). Franck has grown even more pessimistic in recent years. *See* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 607–08 (2003) [hereinafter Franck, *What Happens Now?*] (discussing the relevance of the conclusion offered in his 1970 article in the context of the war on Iraq, where American leaders "boldly proclaim a new policy that openly repudiates the Article 2(4) obligation.").

[2] *See generally* ANTHONY C. AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 75 (1999) (critiquing positivism by stating that it tends to place too much stock in the sanctity of treaties and illustrating that critique by citing states' indifference toward Article 2(4) of the U.N. Charter); Michael J. Glennon, *The Collapse of Consent: Is a Legalist Use-of-Force Regime Possible?, in* INTERNATIONAL LAW 220 (Beth A. Simmons ed., 2008); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 198 (2005) (explaining that an action in contravention of the

liberal scholars.[3] Such a bleak outlook has usually been resisted by those scholars who emphasize the overarching importance of *opinio juris* – the belief of States that international law prohibits the use of force irrespective of any corresponding conventional obligation[4] – and interpret the deficiencies of the collective security system as grave but temporary. These scholars believe that, although Article 2(4) is, at worst, in intensive care, the situation is not life threatening for the system of collective security.[5]

Whether on the brink of clinical death or in intensive care,[6] Article 2(4) is recognized unanimously as being in a state of grave weakness. The analysis provided by this Article seeks to assess the precise extent of the frailty of the prohibition on the use force. While recognizing that this is not the first time that the demise of the collective security system has been foreshadowed, this Article seeks to examine the *manner* in and the *concepts* through which the contemporary enfeeblement of the prohibition on the use force is

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U.N. Charter is explained away as the first step in its revision); Anthony C. Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 99–101 (2003) (conceding that there exist customary prohibitions on the use of force, but asserting that such prohibitions fail to espouse the strong language of Article 2(4)); Michael J. Glennon, *The Rise and Fall of the U.N. Charter's Use of Force Rules*, 27 HASTINGS INT'L & COMP. L. REV. 497, 508 (2004) (explaining that though nations have not explicitly renounced Article 2(4), they have violated the U.N. Charter).

3 *See* Franck, *Who Killed Article 2(4)?*, *supra* note 1, at 809 (illustrating the viewpoint that Article 2(4) rests on its deathbed); Henkin, *supra* note 1 (discussing the same proposition). For a pessimistic account from non-liberal scholars, see Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 32 (Antonio Cassese ed., 1986) (concluding that the guarantee to refrain from the use of force, embodied in Article 2(4), does not work).

4 *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99–100 (June 27) (finding that both parties agree that the principles regarding use of force in Article 2(4) of the U.N. Charter correspond with principles of customary international law); *see also* Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 622 (2003) (discussing that ideas of how states ought to behave can survive both "massive deviance" and an "almost total failure of application").

5 *See* Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 631–33 (2008) (reflecting on how the Charter's norms regarding permissible use of force have created a default rule of nonintervention, which has helped support global stability).

6 *See* Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. 292, 313–14 (2006) (noting that cultural differences in the way in which the French and the Americans establish rules of customary international law are reflected within debates on the use of force).

unfolding and the *potential impact* of that phenomenon on the international legal order as a whole.

Although this Article does not openly and purportedly embrace any particular vision of law, it is important to emphasize at this preliminary stage that each international legal scholar's understanding of the state of the law on the use of force—including the conception spelled out in this Article—remains deeply affected by each scholar's respective conception of the rules regulating the use of force and the aspirations that each has vested in the collective security system.[7] In particular, it could be argued that the looming enfeeblement of the prohibition on the use of force that is enunciated in this Article can, to a large extent, be explained as the outcome of the immoderate expectations vested in it by many scholars. In this way, it may be that the contemporary dilution of the prohibition on the use of force is nothing more than what it naturally ought to be.[8] It could simply be the end of the illusion conveyed by the optimism that followed the end of the Cold War.[9] Accordingly, this Article acknowledges the relativity of its findings and comes to terms with their utter dependence on each scholar's conception of the law and the collective security system. As a result, this Article has the modest aim of shedding some light on the state of law ushered in by contemporary developments with a view to anticipating the consequences of a complete demise of the prohibition on the use of force for the international legal order as a whole.

To achieve that goal, this Article follows a two-stage analysis. The Article starts by investigating the *manner* in which the

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[7] On this question see generally Andrea Bianchi, *The International Regulation of the Use of Force: The Politics of Interpretive Method*, 22 LEIDEN J. INT'L L. 651 (2009) for a discussion on why "the method by which the discourse on the use of force is formed" must be reconsidered in light of diverging interpretative techniques currently employed by scholars.

[8] *See* Prosper Weil, *Le Droit International en Quête de son Identité*, 237 RECUEIL DES COURS 9, 64–65 (1996) (stating that not all problems can be resolved by the law and suggesting that perhaps the reason why we are often disappointed by international law is that we expect too much of it). A similar argument occasionally permeates realist accounts of the collective security system. *See, e.g.*, Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 990–91 (2005) (stating the realist perspective that international law, by overstating claims of its success and hiding when it fails, has diminished its own progress).

[9] *See* Franck, *What Happens Now?*, *supra* note 1, at 609 (describing Article 2(4) as "miraculously reborn in a post-Cold War order").

prohibition to use force is being incrementally corroded. In particular, it argues that the evanescence of the rule expressed in Article 2(4) of the U.N. Charter does not stem from a conscious disregard for the prohibition on the use force since most States still feel constrained by it. Instead, it is submitted that the disintegration of the prohibition on the use force results from a general striving for looser limitations on that prohibition. This phenomenon is construed here as a *liberalization* of the use of force. Once it has been established how the prohibition on the use of force is being liberalized, this Article engages in a study of its consequences for the international legal order.

It is important to stress at this point that, having the modest aim of formulating some thoughts on the forms and impact of a dilution of the prohibition on the use of force on the international legal order as a whole, this Article does not strive to contemplate the *reasons* why the prohibition on the use of force is vacillating. The study of the causes of the enfeeblement of that rule has already been undertaken elsewhere, especially in the *realist* international legal scholarship. Yet, such studies have failed to focus on the question at hand; instead, they have been characterized by a conflation of the question as to why States obey the law with that of the existence or obligatory character of the law. Indeed, many legal realists condition the existence or the obligatory character of the rule upon the reasons why States abide by its commands. According to these scholars, should a State no longer have any reason to abide by a rule, this means that the rule is either inexistent or no longer obligatory.[10] By contrast, this Article rests on the assumption that the reasons why States abide by legal rules, their existence and the foundation of their obligatory character are three different questions, none of which have any direct bearing upon the subject central to this study. As a result, they are not examined here. In the same vein, this Article does not seek to evaluate whether the dilution of the rule enshrined in Article 2(4) of the U.N. Charter should be, as a matter of fact, bemoaned nor does it examine the reasons justifying whether such a rule ought to

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[10] *See, e.g.*, Glennon, *supra* note 8, at 940 (suggesting that excessive violation of a rule of international law causes the rule to be replaced); *see also* Michael J. Glennon, Force and the Settlement of Political Disputes: Debate with Alain Pellet at the Colloquium of Topicality of the 1907 Hague Conference (Sept. 7, 2007), *available at* http://ssrn.com/abstract=1092212 (discussing how repeated violations of international law have affected States' legal obligations to obey these laws).

be preserved. Such questions do not fall squarely within the ambit of legal expertise and are duly set aside for the purposes of this Article.

Because this Article aims at appraising the forms and the consequences of the dilution of the prohibition on the use of force for the international legal order as a whole, Part 1 starts by spelling out the interconnections between the prohibition on the use of force, the collective security system, and the international legal order. The Article then tries to demonstrate that the dilution of the prohibition on the use of force does not stem from any attempt to unravel the prohibition itself, but from a general endeavor for looser limitations to that prohibition. Part 2 accordingly embarks on an examination of the enduring character of the prohibition on the use of force. Part 3 then sheds some light on how the use of force is being dismantled through a severe loosening of its limitations. Part 4 offers a general appraisal of the extent of the dilution of the prohibition. In Part 5, the Article eventually provides some thoughts on the consequences of the vanishing of the prohibition on the use of force for the international legal order as a whole.

1. INTRODUCTORY REMARKS: THE INTERNATIONAL LEGAL ORDER, THE COLLECTIVE SECURITY SYSTEM, AND THE PROHIBITION ON THE USE OF FORCE

The international legal order has preceded the emergence of a collective security system, which itself has preceded the advent of a prohibition on the use of force. Therefore, these notions are all autonomous in the sense that none of them is a constitutive element of the other. In particular, an international legal order rests neither on the existence of a collective security system, nor of a prohibition on the use of force. This is well illustrated by the existence of international legal relations among states long before the creation of the League of Nations, which is widely considered the first rudimentary collective security system,[11] although its

[11] *See* ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918–1935, 2 (Atheneum Publishers, 2d ed. 1969) (explaining that the common purpose of all nations associated with the establishment of the League of Nations was to construct a security machinery to prevent the recurrence of another World War); *see also* C.K. WEBSTER & SYDNEY HERBERT, THE LEAGUE OF NATIONS IN THEORY AND PRACTICE 301 (1933) (contending that the League of Nations was primarily conceived as a "compact to maintain peace"); F.P. WALTERS, A HISTORY OF THE

systemic dimension has sometimes been portrayed as an illusion.[12] The League of Nations also demonstrated that a collective security system can be set up without a prohibition on the use of force.[13]

Although independent from one another, these notions are intertwined and act to reinforce each other. The most obvious interconnection among them is the finding that the existence of a collective security system fosters the viability of the international legal order as a whole. In essence, the collective security system can tame and *elevate the use of force to an enforcement mechanism of the international legal order*. Indeed, it is not contested that the collective security system can transform war into a coercive mechanism that can be used for the enforcement of law. For Kelsen, this enforcement mechanism even constitutes one of the constitutive elements of the international legal order.[14] There are, of course, various degrees in which a collective security system can instrumentalize war with a view to making it a law-enforcement tool. For instance, the pre-League of Nations collective security system, founded on the predominance, alliance, and congresses of the Great Powers, did little to provide an effective law-enforcement mechanism, for it was crippled by an overly fickle balance of powers.[15] Under the League of Nations, war became a law-

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LEAGUE OF NATIONS 3 (1952) (stating that the League of Nations is the "embodiment in constitutional form of mankind's aspirations towards peace and towards a rationally organized world").

[12] *See* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 842, 988 (1987) (illustrating the critical legal school's belief that the League of Nations system existed as an illusion to alleviate the frustration of a war fought in vain).

[13] *See* League of Nations Covenant arts. 10–16 (laying out the ways in which members of the League can deal with acts of aggression or threats of such acts by other Member States without specifically prohibiting the use of force in international disputes).

[14] *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 58 (1952) (explaining that if there were a total prohibition on the use of force without the possibility of forcible actions as sanctions, international law would cease to be a legal order); Jörg Kammerhofer, *Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law*, 22 LEIDEN J. INT'L L. 225, 230–31 (2009) (discussing Kelsen's interpretation that war exists as either "delict or sanction within positive international law").

[15] *See* F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES 301 (1963) (stating that the displacement of the older power structure by impersonal forces created instability and tension between the Great Powers in the years prior to the League of Nations); George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 335–36 (1998) (noting that

enforcement tool only to a limited extent; the League being mostly devoted to proceduralizing violence rather than instrumentalizing it.[16] By contrast, the U.N. collective security system—although it was put on hold during the Cold War and was not able to function properly as a means of enforcement until the fall of the Berlin Wall[17]—offers the possibility to use war as an enforcement procedure.[18] To a significant extent, the U.N. system is a structure devoted to maintaining the international legal order.[19] In that sense, the U.N. mechanism contradicts any Austinian type of objection that international law is not law because it lacks a coercive enforcement mechanism.[20] While the U.N. collective

the fragmented agreements made by the Great Powers could not have prevented the Great War).

16 *See* FÉODOR KORÉNITCH, L'ARTICLE 10 DU PACTE DE LA SOCIÉTÉ DES NATIONS (1931) (discussing Article 10 of the Covenant of the League of Nations). *See generally* U.N. LIBRARY AT GENEVA, THE LEAGUE OF NATIONS 1920–1946—ORGANIZATION AND ACCOMPLISHMENTS: A RETROSPECTIVE OF THE FIRST INTERNATIONAL ORGANIZATION FOR THE ESTABLISHMENT OF WORLD PEACE, U.N. Doc. LIB/96/6, U.N. Sales No. GV.E.96.0.25 (1996) (detailing the historical foundations and developments of the League of Nations).

17 *But cf.* S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950) (illustrating the operation of the Security Council, an integral part of the U.N. collective security system, in the face of armed attacks on the Republic of Korea by North Korean forces). *See* Nico J. Schrijver, *The Future of the Charter of the United Nations,* 10 MAX PLANCK Y.B. U.N. L. 1, 11 (2006) (discussing how the end of the Cold War signified a turning point for the U.N.).

18 *See* David A. Westbrook, *Law Through War*, 48 BUFF. L. REV. 299, 317 (2000) (noting, for example, how the U.S. military took actions tantamount to acts of war against Iraq during the Gulf War as a means of supporting the "inspection and sanctions regime" imposed by the U.N. Security Council); *see also* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 736 (1950) (discussing the ability of the Security Council to direct its action against a state responsible for a threat to peace and is free to determine what constitutes a threat and then issue a legally binding "order" demanding that the state take a certain course of action); Kammerhofer, *supra* note 14, at 245 (explaining that coercive actions taken by the Security Council under Chapter VII are not necessarily responses to wrongs by Member States and are therefore not inconsistent with the Preamble of the Charter).

19 *See* Martti Koskenniemi, *The Police in the Temple – Order, Justice and the U.N.: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995) (detailing the tension between the goal of maintaining order and that of maintaining justice at the U.N.).

20 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 201 (Hackett Publishing Co., 1998) (positing that international law is improperly called law because it is set by general opinion, whereas positive law is set by a sovereign). *But see* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 3–43, 93–120 (2d

security system clearly instrumentalizes war and allows it to be used as a law-enforcement tool, it must be noted that this is only true as long as the rule that one seeks to enforce through the U.N. enforcement procedure dovetails with the objective of peace and security of the U.N., and more particularly, that the violation of the rule whose enforcement is sought may potentially constitute a threat to international peace and security.[21] In other words, it is only as early as the infringement of a given rule simultaneously constitutes a threat to the international peace and security that one can contemplate resorting to the U.N. collective security system to enforce international law.[22]

The requirement that the enforcement of a rule through the U.N. system must simultaneously contribute to the maintenance of international peace and security in order for the U.N. collective security to be deemed a law-enforcement system, should not be exaggerated.

Recent practice has shown that the qualification of Security Council resolutions have been loosely applied and have encapsulated situations where clear violations of international law have been committed. This is generally the case when the Security Council seeks to sanction what it qualifies an "aggressive act," "act of aggression," or "aggression."[23] This is also true in the case of a

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ed., 1980) (criticizing Austin's views on legal systems and comparing it with Kelsen's theory of legal systems).

[21] *See* U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

[22] *See id.*; *see also* Pierre d'Argent et al., *Article 39*, *in* LA CHARTE DES NATIONS UNIES: COMMENTAIRES ARTICLE PAR ARTICLE 1133–70 (Jean-Pierre Cot et al. eds., 3d ed. 2005) (discussing the competence of the Security Council to determine threats against peace, breach of peace, and acts of agression).

[23] *See* S.C. Res. 326, U.N. Doc. S/RES/326 (Feb. 2, 1973) (addressing what the Security Council deemed to be "provocative and aggressive acts" committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique, and Zambia); S.C. Res. 387, U.N. Doc. S/RES/387 (Mar. 31, 1976) (regarding the acts of aggression committed by South Africa against other countries in southern Africa); S.C. Res. 405, U.N. Doc. S/RES/405 (Apr. 14, 1977) (regarding the acts of armed aggression committed by mercenaries against Benin); S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985) (regarding the acts of aggression committed by Israel against Tunisia); S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988) (condemning the acts of aggression committed by Israel against Tunisia); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990) (regarding the acts of

humanitarian disaster that qualifies as a threat to international peace and security, or in situations concerning numerous violations of both humanitarian as well as human rights law.[24] It must be conceded that, in these situations, violations of international law have never been per se equated by the Security Council to threats to international peace and security. However, the Security Council, whose mandate is not to determine whether international law has been breached, has nonetheless considered that situations where there have been blatant violations of international law constitute threats to international peace.[25] This is also clearly the case when sanctions are applied by the Council to States or entities which have failed to comply with the Council's own compulsory injunctions.[26] While one can still dispute *the extent* to which the U.N. Security Council serves as a coercive enforcement mechanisms of international law as a whole, it seems indisputable that the U.N. collective security system can potentially provide a new avenue for the enforcement of international law as a whole.

The relationship between the prohibition on the use of force and the international legal order is probably more difficult to fathom. Indeed, as was previously stated, a prohibition on the use of force does not constitute a constitutive element of a legal order. One can easily conceive of an international legal order that is devoid of any prohibition on the use of force, as illustrated by the indisputable existence in international relations of orders that can reasonably be deemed legal before the advent of any prohibition

aggression committed by Iraq against diplomatic premises and personnel in Kuwait).

[24] For examples of resolutions pertaining to the situation in Kosovo, see S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1239, U.N. Doc. S/RES/1239 (May 14, 1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). For the situation in Darfur, see S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

[25] For the situation in Rwanda, see S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994), or for the situation in Somalia, see S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

[26] *See* S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (imposing sanctions on Libya for failing to comply with S.C. Res. 731 (1992)). *See generally* S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006) (adopting sanctions against Iran for, *inter alia*, failing to comply with S.C. Res. 1696 (2006)).

on the use of force. This does not mean that the existence or the absence of a prohibition on the use of force is without consequences for the international legal order as a whole. This accords with H.L.A. Hart's famous assertion that the restriction of violence constitutes "the minimum content of natural law," that is, a rule of conduct that any social organization must contain to be "viable."[27] That a legal order must somehow limit the use of violence so as not to be beset by chaos and ineptitude does not mean that the use of force must necessarily be prohibited. It could even be argued that the total absence of any legal limitation on the use of force may be offset by some moral or political postulates and in fact helps the legal order in question to remain viable. In that sense, the "just war" moral limitations pre-existing the League of Nations, the 1928 General Treaty for the Renunciation of War, and the U.N. Charter limitations on the use of force, although falling short of reflecting legal standards, may have played, together with the complex pre-League alliances system, the role of limiting the use of violence and contributing to the viability of the international legal order as a whole.

A prohibition on the use of force not only helps bolster the viability of a legal order, it can also be instrumental in the preservation of some of the main tenets of that legal order. With respect to the international legal order in particular, it can be argued that, by forbidding violence among sovereign States, the prohibition on the use of force is aimed at the preservation of the Westphalian order. Indeed, what the prohibition is meant to preserve in this case is a given configuration of the international community and the legal order that corresponds with it. According to Article 2(4), States are prohibited from invading, occupying, annexing, and eliminating other sovereign States.[28]

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[27] H.L.A. HART, THE CONCEPT OF LAW 193–94 (1961). This statement has often been abused in order to reconcile Hart and Dworkin and defend the idea that Hart had eventually elevated some minimum standards of morality into a condition of validity or a condition of the obligatory character of law. Hart, however, never construed his "minimum content of morality" as a constitutive element of valid or obligatory law. For an example of this misinterpretation of Hart, see Kenneth E. Himma, *Hart and Austin Together Again for the First Time: Coercive Enforcement and the Theory of Legal Obligation* 17 (SSRN Working Papers, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727465.

[28] *But see* Pierre d'Argent, *Which Law Through Which War? Law Through War Revisited*, 52 BUFF. L. REV. 635 (2004) (arguing that although initially prohibiting war, international law, and most notably the U.N. Charter, has begun to legalize it).

Article 2(4) thus shelters the current State-based configuration of the world and the legal order that rests upon it. This is probably why the International Court of Justice has long been so prone to defend a very robust understanding of the prohibition on the use of force, both in its conventional[29] and customary[30] dimensions.

As has been contended, the prohibition on the use of force is not a necessary condition to the legal character of the international order. Nor is the prohibition on the use of force a constitutive element of any collective security system. A collective security system can be set up and prove viable without force being simultaneously prohibited. This is well-illustrated by the fact that the League of Nations did not rest on any sort of prohibition, the use of force only being subjected to some multilateral procedural requirements under the League System.[31] The foregoing means that a collective security system is entirely conceivable short of any prohibition on the use of force and the relationship between the prohibition and the collective security system is not one of mutual reinforcement. The opposite could even be reasonably defended. It can be argued that the prohibition on the use of force can actually hinder the efficacy of a collective security system. Indeed, if utterly unqualified—that is if the prohibition does not allow any multilateral use of force—the prohibition on the use force can even demote the collective security system to a mere political forum where questions of peace and security are discussed but no police measures can be taken. It is well known that the current prohibition on the use of force enshrined in Article 2(4) of the U.N. Charter, which mirrors customary international law,[32] only *limits* the use of force and does not prohibit it completely, for the rule contains an exception both outside and inside the U.N. collective

[29] *See* Corfu Channel (Gr. Brit., N. Ir. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9) (stating that the alleged "right of intervention" is a "manifestation of a policy of force" which "cannot . . . find a place in international law").

[30] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97–101, paras. 184–90 (June 27) (holding that customary international law requires the non-use of force).

[31] *See* League of Nations Covenant arts. 10–16 (offering only an advisory role in responding to military activity).

[32] *See Military and Paramilitary Activities*, 1986 I.C.J. at 92–98, paras. 172–85 (holding that the United States' argument that the U.N. Charter is the sole basis upon which claims of international law may be made is incorrect).

system.[33] In that sense, it is only as long as the prohibition on the use of force leaves room for exceptions in the form of multilateral uses of force that it allows an efficacious collective security system to exist.

The prohibition on the use of force, although neither a constitutive element of any legal order nor of any collective security system, nonetheless has the ability to impact the viability, efficacy and configuration of both the international legal order and the collective security system. Accordingly, the last part of this Article appraises the impact of the dilution of the prohibition on the use force on each of these notions. First, however, such an appraisal requires a preliminary assessment of both the extent of the actual enfeeblement of the prohibition on the use of force and of its impact on the collective security system.

2. AN ENDURING PROHIBITION

Recent practice, especially that pertaining to the so-called fight against terrorism,[34] has provided some worrisome examples of situations in which the use force by a State short of any authorization by the Security Council has remained unchallenged. If the blatant trumping of international law in Kosovo[35] and Iraq[36] constituted the only exceptions, one could still live with the illusion of an international legal order where force remains strictly prohibited despite occasional patent violations. However, the violations of the prohibition of the use of force in Kosovo and Iraq have been corroborated ever since.

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[33] *See infra* note 65 (detailing those circumstances when the use of force is permitted).

[34] *See* P. Klein, *Le droit international à l'épreuve du terrorisme*, 321 RECUEIL DES COURS 203 (2006) (assessing the legal problems pertaining to the use of force in the context of the fight against terrorism).

[35] *See generally* KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT (Christian Tomuschat ed., 2002) (examining the future of Kosovo in light of the Security Council resolution 1244 of 1999 and the Stability Pact adopted to ensure economic recovery of the entire region).

[36] *See generally* Richard A. Falk, *What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT'L L. 590 (2003) (describing the United States' circumvention of the U.N.'s prohibition of force in Iraq); Franck, *What Happens Now?*, *supra* note 1 (describing the self-interest of super-powers winning out over international obligations, post-Iraq). *See also* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003) (reconciling the war in Iraq with the principles of international law).

Recently, in an attack first attributed to the United States,[37] Israel used force in Sudan without stirring much debate or condemnation and without clearly falling within the classical rules of self-defense.[38] Likewise, since Israel bombed alleged nuclear sites in Syria in September 2007, there has hardly been any response questioning the legality of the Israeli bombardment.[39] The possible covert development of nuclear weapons on the site has not even been invoked as a possible justification.[40] In the same vein, when Turkish troops swept into Iraqi Kurdistan, there were very few States challenging the legality of the Turkish intervention.[41] By the same token, recent military operations by foreign troops in Somalia have stirred no concern as to their accordance with international law.[42] These few particular examples have been corroborated by some principled positions expressed by States. For instance, some powerful nations have unwaveringly professed that they do not feel bound by any sort of constraints when their security is at stake.[43] It is also noteworthy that the U.S. National Security Strategy of September 2002 famously provides enormous leeway for the President to use force to prevent acts of terrorism on the exclusive basis of a self-assessment of the threat without any reference to the classical

[37] *See* Jeffrey Gettleman, *Sudan Says U.S. Airstrike Killed Dozens in Convoy*, INT'L HERALD TRIB., Mar. 27, 2009, at 5 (describing the confusion of whether the attacks on Sudan were undertaken by the United States or Israel).

[38] *See Israel Hit Convoy in Sudan, US Officials Say*, INT'L HERALD TRIB., Mar. 28–29, 2009.

[39] *See* David E. Sanger & Mark Mazzetti, *Analysts Find Israel Struck a Syrian Nuclear Project*, N.Y. TIMES, Oct. 14, 2007, at A1 (questioning Israel's justifications for attacking Sudan).

[40] *See U.N. Detects Processed Uranium at Syrian Site*, INT'L HERALD TRIB., Feb. 20, 2009 (reporting that recent samples taken by the International Atomic Energy Agency have shown signs of processed uranium on the site).

[41] *See* Sebnem Arsu & Stephen Farrell, *Turkey Says Its Raids in Iraq Have Killed More Than 150 Kurdish Rebels*, N.Y. TIMES, Dec. 26, 2007, at A8 (debating the grounds for the airstrike).

[42] *Somali Rebels Slam U.S. Killing of al Qaeda Suspect*, REUTERS, Sept. 15, 2009, at 1, *available at* http://www.reuters.com/article/idUSLF424326.

[43] *See* Press Release, The White House, President George Bush Discusses Iraq in National Press Conference (Mar. 6, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306-8.html ("I am confident the American people understand that when it comes to our security, if we need to act, we will act, and we really don't need United Nations approval to do so. . . . When it comes to our security, we really don't need anybody's permission.").

conditions of self-defense.[44] Under this view, modern threats and the development of tactical weapons seemingly conveyed the illusion of so-called "chirurgical" strikes with few causalities,[45] had liberated States from the burden of international law and convinced them that their imperative political motives can more easily outweigh their obligation not to use force under the U.N. Charter.

However ominous this practice may appear, it is argued that the silence of the international community in these cases does not suffice to demonstrate a complete disintegration of the prohibition on the use of force.[46] First, the violations of the prohibition constitute the only tangible practice available. The extent to which States consciously refrain from using force is imperceptible, impalpable, and hence, immeasurable.[47] Moreover, States still seem to manifest a significant attachment to the principle of the prohibition on the use of force. Despite some notable recent exceptions,[48] States using force in ambiguous circumstances still

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[44] *See* Press Release, The White House, National Security Strategy of the United States of America (Sept. 17, 2002), *available at* http://www.state.gov/documents/organization/15538.pdf (providing an overview of America's international strategy); Falk, *supra* note 36, at 593 (describing the leaning of powerful nations to feel exonerated from the prohibition to use force); *see also* Franck, *What Happens Now?*, *supra* note 1, at 619 (finding that the U.S.'s National Security Strategy redefined the concept of self-defense to take into account the exigencies of modern terrorism).

[45] *See* Anthony D'Amato, *Megatrends in the Use of Force*, *in* 71 INT'L L. STUDIES, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 1–16 (Michael N. Schmitt & Leslie C. Green eds., Naval War College) (1998) (describing these developments).

[46] *See* Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L 621, 622-27 (2003) (describing the impact of violations on the state of the law and indicating that use of force does not suggest and erosion of international law).

[47] *See* ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 180 (Routledge 1993) ("While it is easy to count the times that a particular norm is violated, it is quite difficult to identify the times when a norm exerted a controlling influence, when states refrained from forcible action because of Article 2(4)'s proscription.").

[48] *See generally* Franck, *What Happens Now?*, *supra* note 1, at 608 (arguing that nowadays, states do not even bother to use a "fig leaf of legal justification"). Also note the particular example provided by the Special Commission of Investigation about the decision of the Netherlands to support the war against Iraq which concluded that the Netherlands deemed it unnecessary to seek a mandate from the Security Council. Gilbert Kreijger, *Iraq Invasion Had No Legal Backing: Dutch Report*, REUTERS, Jan. 12, 2010, at 1, http://www.reuters.com/assets/print?aid

strive to justify their deeds by referring to the rules of international law pertaining to the use of force.[49] Recent and authoritative scholarly work further underpins that conclusion.[50] This continuous attachment to the prohibition on the use of force, however, does not mean that the aforementioned examples are negligible and marginal. Indeed, it is argued here that the utilizations of force referred to above betray the deep ailment of the collective security system, which is being undermined by a fading prohibition on the use of force.

Legal scholars are divided regarding the normative status of a prohibition on the use of force, that is, whether the prohibition constitutes a peremptory norm of international law. Indeed, there is no scholarly consensus on whether the prohibition on the use of force enshrined in Article 2(4) of the U.N. Charter constitutes a peremptory norm of international law.[51] There is also disagreement as to the normative character of the rule regulating self-defense.[52] Such a controversy seems to have pervaded the work of the International Law Commission ("ILC"). Indeed, the

=USTRE60B3A620100112 (reporting on the Dutch government's support of a United States led invasion of Iraq that had no legal backing).

[49] *See* Military and Paramilitary Activities (Nicar, v. U.S.), 1986 I.C.J. 14, para. 186 (June 27) (noting that a state's use of rules and exceptions to rules to defend its use of force confirms rather than weakens the rule); U.K. Foreign Secretary, *Iraq: Legal Basis for the Use of Force*, 2003 BRIT. Y.B. INT'L L. 793, 793–96 (describing the use of force following the liberation of Iraq).

[50] *See generally* OLIVIER CORTEN, LE DROIT CONTRE LA GUERRE: L'INTERDICTION DU RECOURS À LA FORCE EN DROIT INTERNATIONAL CONTEMPORAIN (Pedone 2008) (claiming that the rule prohibiting the use of force has undergone significant change since September 11, 2001).

[51] *See* U.N. Int'l L. Comm'n, *Articles on State Responsibility*, U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part 2) (1996) *available at* http://www.lcil.cam.ac.uk /projects/state_responsibility_document_collection.php#4 [hereinafter *Articles on State Responsibility*] (containing the former Article 19 of the ILC which seems to indicate that only the prohibition of aggression is *ius cogens*); *see also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/56/589 (Jan. 28, 2002) (containing Article 27 of the Articles on State Responsibility, which excludes the invocation of circumstances precluding wrongfulness in case of violation of peremptory norms, if read in conjunction with Article 22, Article 27 seems to limit the peremptory character to the prohibition of aggression).

[52] *See* Antonio Cassese, *Article 51*, *in* LA CHARTE DES NATIONS UNIES, COMMENTAIRE ARTICLE PAR ARTICLE 1357 (Jean-Pierre Cot et al. eds.) (2005). *Cf.* Raphaël van Steenberghe, *Le Pacte de non-agression et de défense commune de l'Union africaine: entre unilatéralisme et responsabilité collective*, 113 REVUE GÉNÉRALE DE DROIT INT'L PUB. 125 (2009).

ILC itself has been alternating between asserting that it is endowed with a *ius cogens* character,[53] that the status is to be reserved to the prohibition of aggression,[54] or that it did not need to take a position on the issue.[55] Article 50 of the Articles on State Responsibility seems to consider the prohibition on the use of force as one of the peremptory obligations of international law.[56] It would be of no avail to take on that debate here.[57]

For the sake of this Article, it suffices to underscore that, at first glance, it may seem odd, if not paradoxical, that scholars are quibbling over the peremptory character of the prohibition at a time when the collective security system is deeply damaged. Largely, the attribution of a peremptory character to the prohibition on the use of force reflects the whims of a legal scholarship that is deluded by the constitutionalist character of the U.N. Charter[58] and which sees in the prohibition on the use of force the overarching principle of an emerging international constitutional order.[59]

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[53] *See Report of the International Law Commission on the Work of its Thirty-second Session*, 2 Y.B. INT'L L. COMM'N 169, 270 (1980) (stating that the Commission was unsure as to whether communications were made and whether they were operative).

[54] *See Articles on State Responsibility*, *supra* note 51 (containing the former Article 19 which prohibits force except in the most serious of circumstances).

[55] *Report of the International Law Commission on the work of its thirty-second session*, 35 GAOR Supp. (No. 10) at 27–28, U.N. Doc. A/35/10 (1980), *reprinted in* 2 Y.B. INT'L L. COMM'N 26 U.N. Doc A/CN.4/SER.A/1980/Add.l (Part 2) (discussing the ILC's work of codifying the rules governing State responsibility).

[56] *See* Articles on State Responsibility, *supra* note 51, art. 50 ("Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting reprisals; (d) Other obligations under peremptory norms of general international law.").

[57] For an extensive discussion of the question, see CORTEN, *supra* note 50, at 293–385 (discussing the use of force in contemporary international law).

[58] S*ee, e.g.*, BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS CONSTITUTION OF THE INTERNATIONAL COMMUNITY 1 (2009) (addressing the legal consequences of viewing the U.N. charter as a constitution for the international community).

[59] *See generally* Jean d'Aspremont, *International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines*, 13 ASIAN Y.B. INT'L L., 89 (2008) (criticizing the constitutionalist understanding of international law); Jean d'Aspremont, *The Foundations of the International Legal Order*, 12 FINNISH Y.B. INT'L L. 1, 7 (2007) (challenging the idea of a constitutionalist legal order); Wouter Werner, *The Never Ending Closure: Constitutionalism and International Law*, *in* NIKOLAUS K. TSAGOURIAS, TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL

This squabbling over the peremptory character of the prohibition on the use of force is not deemed futile here because of the very modest consequences of *ius cogens* in international law. It is true that *ius cogens* only invalidates subsequent conflicting conventions,[60] terminates prior conflicting conventions,[61] obliges States not to recognize its serious breach and to cooperate to put an end to it,[62] and bars the invocation of circumstances precluding wrongfulness in case of a breach.[63] However limited and modest, the effects of *ius cogens* may prove to be fundamentally important to the limitations to the prohibition on the use of force. The determination of the normative character of the prohibition on the use of force is of fundamental avail in other respects. Indeed, the question whether circumstances precluding wrongfulness—especially the state of necessity[64]—may be invoked to exclude the wrongfulness of an illegal use of force creates a new possibility for States to illegally use force without incurring responsibility. We shall briefly revert to this issue in the next section.

The reason why the debate about the peremptory status of the prohibition on the use of force seems somewhat overblown pertains to the assumption made here that the peremptory character of the prohibition to use force does not constitute a rampart against the current challenges of the collective security system. In other words, even if the prohibition on the use of force, on which the collective security system rests, were to be a norm of *ius cogens*, its peremptory character would not shield it against the perils brought about by attempts to enlarge its limitations. It is precisely because of the irrelevance of the *ius cogens* character of

AND EUROPEAN MODELS 329 (Cambridge University Press 2007) (using constitutionalist language to explain existing developments in international law).

60 *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law.").

61 *See id.* art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

62 *See* Responsibility of States, *supra* note 51, art. 41 ("A State whose conduct constitutes an internationally wrongful act having a continuing character is under die obligation to cease that conduct, without consequences of invoking prejudice to the responsibility it has already incurred.").

63 *See id.* art. 27 (discussing a circumstance precluding wrongfulness).

64 *See id.* art. 25 (explaining that breach of an international obligation starts at the moment that act begins).

the prohibition in relation to the possibility of stretching its limitations that it is fundamental to gauge the extent to which States have resorted to abusive understandings of these limitations. It is the aim of the following section to describe the debilitation of the collective security system that originates in attempts to broaden the limitations under which a resort to force is allowed.

3. SUBVERTING THE LIMITATIONS TO THE PROHIBITION TO USE FORCE

This section sketches out the concepts through which the current liberalization of the use of force is being carried out. It does not seek to offer comprehensive analysis of each one, for this has already been done in the literature. However, general mappings of the various conceptual manners in which the prohibition to use force is being liberalized in contemporary international law are scarce. The following paragraphs intend to fill that gap.

A preliminary remark must be formulated about terminology. This Article construes the situations where force can legally be used under current international law as "limitations." The term "limitation" seems better suited than the term "exception" or "qualification" in the sense that the situations where the use of force is allowed do not, strictly speaking, derogate from the prohibition. They simply *limit* its ambit. Likewise, the situations where force can lawfully be used, although being enshrined in provisions scattered throughout the entire U.N. Charter, can be seen as constitutive parts of a single rule. Envisaging the prohibition on the use of force as one single legal rule embracing the multilateral use of force authorized by the Security Council as well as the concept of self-defense enshrined in both Article 51 and customary international law also underpins the use of the term limitation instead of exception. Such terminology is also reflected in the case law of the International Court of Justice, which, in its decision in the *Oil Platforms* case, ceased to consider self-defense an exception to the prohibition to use force and qualified it a "limitation."[65]

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[65] *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 183 (Nov. 6) ("[i]f a measure is to be qualified as self-defence . . . the criteria of necessity and proportionality must be observed."). It is interesting to note that prior to that judgment, the Court considered self-defense an "exception" to the prohibition on the use of force. *See* Pierre d'Argent, *Du Commerce à l'Emploi de la Force: L'Affaire des Plates-Formes*

The attempt by States to justify their use of force (or their intention to do so) through a resort to the limitations to the prohibition has manifested itself in two ways. First, States have invoked new limitations to justify their resort to military force. In particular, they have referred to the concept of humanitarian intervention as well as that of pro-democratic intervention to support the legality of their military action. At the same time, they have been prone to broadening the scope of the existing limitations, namely the right to use force in self-defense or upon prior authorization by the Security Council. Besides invoking new limitations or expanding existing limitations, States have also tried to argue that their use of force is not prohibited by Article 2(4) of the U.N. Charter and the corresponding customary rule because they have been invited by the State's government onto the territory on which force is actually used. Finally, even when their actions are undoubtedly at odds with the prohibition on the use of force and do not fit into one of its exceptions, States have tried to evade the correlative responsibility for their illegal conduct by invoking circumstances precluding wrongfulness, and particularly the state of necessity. Each of these arguments has gained much credence among States as well as legal scholars, which explains why each of them must now be examined briefly.

It is important to point out, preliminarily, that resorting to the aforementioned arguments is not an entirely new phenomenon. On the contrary, contemporary endeavors to float new limitations on the prohibition on the use of force, to stretch the ambit of the current limitations, to deem oneself duly invited by the government, or to evade responsibility by invoking a state of necessity, convey a strong sense of "déjà vu." Indeed, as was demonstrated by the practice during the Cold War, these arguments were always heard when the Security Council was structurally paralyzed. This is not to say that the Security Council is now utterly passive and incapable of authorizing the use of force. When it comes to ordering economic sanctions against States,[66] groups of individuals,[67] lone individuals,[68] or to policing

Pétrolières (Arrêt sur le Fond) [Trade in the Use of Force: The Oil Platforms Case (Decision on the Merits)] 49 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 266 (2003) (discussing the Oil Platforms Case and its implications on international trade).

[66] *See, e.g.*, S.C. Res. 986, ¶ 11, U.N. Doc. S/RES/986 (Apr. 14, 1995) (setting forth the Oil-for-Food program in Iraq).

the seas,[69] recent practice has shown that the Council is extremely, if not overly, active,[70] being sometimes oblivious to the elementary requirement of the rule of law.[71] The resemblance between today's practice and the immobility of the Council during the Cold War nonetheless lies in its lasting reluctance to yield to the request for authorizations from its most bellicose members. After a short interlude in the immediate aftermath of the fall of the Berlin Wall, the Council has quickly reverted to evincing great prudence and is now very loathe to rubber-stamp the plans of its warmongering members. It is the latter which, when confronted with the Council's great tepidity to authorize the use of force, have been most prone to subvert the limitations to the prohibition on the use of force in order to justify their resort to armed force. At a time when the Security Council was constantly idle, the harm caused by these arguments was limited. However, since the end of the Cold

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[67] *See, e.g.*, S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (addressing international terrorism); *see also* S.C. Res. 1698, ¶ 1, U.N. Doc. S/RES/1698 (July 31, 2006) (explaining that the situation in the Congo is a threat to international security and peace in the region); S.C. Res. 1804, ¶ 1, U.N. Doc. S/RES/1804 (Mar. 21, 2008) (demanding that armed groups in Congo lay down their arms); S.C. Res. 1807, ¶ 1, U.N. Doc. S/RES/1807 (Mar. 31, 2008) (describing the situation in the Congo).

[68] *See, e.g.* S.C. Res. 1572, ¶ 1, U.N. Doc. S/RES/1572 (Nov. 15, 2004) (discussing the situation in Cote d'Ivoire); S.C. Res. 1591, ¶ 1, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (discussing the situation in Darfur); S.C. Res. 1706, ¶ 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (deciding to support implementation of the Darfur peace agreement).

[69] *See, e.g.*, S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (deciding to cooperate with the TFG to fight armed robbery and piracy off the Somalian coast).

[70] *See* Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902 (2002) (describing how the Security Council departed from its previous practice in responding to September 11, 2001); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 177 (2005) (explaining that only generic resolutions should be described as international legislation).

[71] On the debate over the infringement of human rights by the U.N. Security Council and its effect in the regional legal orders, see Larissa van den Herik, *The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual*, 20 LEIDEN J. INT'L L. 797, 797 (2007) (discussing regional legal orders and the infringement of human rights); Michael Bothe, *Security Council's Targeted Sanctions Against Presumed Terrorists: The Need to Comply with Human Rights Standards*, 6 J. INT'L CRIM. JUST. 541, 541 (2008) (arguing for due process procedures for listing decisions and remedies against listing decisions). On the specific problems caused by the implementation of these measures, see Jean d'Aspremont & Frederic Dopagne, *Kadi*: *The ECJ's Reminder of the Elementary Divide Between Legal Orders*, 5 INT'L ORG. L. REV. 371, 371–79 (2008) (describing the problems caused by implementation of U.N. Security Council resolutions).

War, the Security Council has no longer been paralyzed and has proved itself to be a fully workable machine. In this context, the impact of the subversion of the limitations to the prohibition on the use of force is disastrous for the collective security system as a whole. It is precisely for this reason that the contemporary practice described below, while not entirely unprecedented, carries far more dramatic consequences.

3.1. New Limitations?

Practice shows that States have not balked at resorting to two new limitations to the prohibition on the use of force alien to the U.N. collective security system: humanitarian intervention and pro-democratic intervention. In addition, albeit in veiled terms, the International Court of Justice as well as the *Institut de Droit international* have both alluded to an additional limitation to the prohibition contained in the U.N. Charter, namely the possibility of measures involving the use of force in reaction to an initial use of force which falls below the threshold of an armed attack. Since most of these limitations have already received extensive attention in the existing literature, these three limitations to the prohibition to use force are only outlined briefly.

3.1.1. Humanitarian Intervention

The most common non-U.N. limitation to the prohibition on the use of force on which States have relied to justify their unauthorized military actions is humanitarian intervention.[72] Although it has been expressly invoked by some States[73] and supported by some scholars,[74] it seems uncontested that positive

[72] *See generally* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 45 (OUP, 2001) (discussing humanitarian intervention and the U.N. Charter).

[73] *See* KREIGER, THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 25 (Cambridge University Press, 2001) (discussing the U.N. commission on Human Rights).

[74] *See* THOMAS M. FRANCK, RECOURSE TO FORCE, STATE ACTION AGAINST THREATS AND ARMED ATTACKS, 135–69 (Cambridge University Press, 2002) (addressing humanitarian intervention). *Compare* Bruno Simma, *NATO, the U.N., and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 14–21 (1999) (discussing a change in the relationship between the U.N. and NATO to competition and away from reinforcement), *with* Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 23 (1999) ("[W]here a number of stringent

international law does not enshrine anything close to an entitlement to use force in the case of a humanitarian disaster on the territory of another State.[75] Even the vague political concept of the responsibility to protect falls short of recognizing any entitlement to use force in the absence of a Security Council authorization.[76]

3.1.2. Pro-Democratic Intervention

Another limitation that has been expressly or impliedly resorted to in practice is the concept of pro-democratic intervention. According to this idea, States would be entitled to use force against another State in order to oust a non-democratic government. The argument was invoked on the occasion of the American intervention in Grenada.[77] Additionally, it was not totally absent from the political discourse in the aftermath of the war in Iraq in 2003 when the argument pertaining to preventive self-defense began to unravel.[78] However, pro-democratic intervention rarely constitutes an autonomous justification for the use of force that would otherwise be illegal. Practice shows that it is usually invoked to complement other arguments when circumstances leave great doubts as to the legality of the impugned action. Be that as it may, similar to humanitarian intervention, it is hardly debatable that the concept has failed to garner enough

conditions are met, a customary rule may emerge which would legitimize the use of force by a group of states in the absence of prior authorization by the Security Council.").

[75] *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 51 (3d ed., 2008) (discussing civil wars and the use of force); CORTEN, *supra* note 50, at 792 (discussing the use of force in contemporary international law).

[76] *See* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 102 (2007) (clarifying legal norms surrounding the responsibility to protect).

[77] *See* Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 816 (1993) (observing that legal norms were not altogether ignored in the decision to invade Grenada); RUSSELL CRANDALL, GUNBOAT DEMOCRACY: U.S. INTERVENTIONS IN THE DOMINICAN REPUBLIC, GRENADA, AND PANAMA 105–62 (2006) (discussing the invasion of Grenada).

[78] *See, e.g.*, *Statement of the UK Foreign and Commonwealth Office*, 74 BRIT. Y.B. INT'L L. 793–96 (2003).

support to constitute a new customary limitation to the prohibition on the use of force.[79]

Even though they do not presently reflect customary international law, the concepts of humanitarian and pro-democratic interventions are very symptomatic of just how unabashed some States may be when it comes to justifying a conduct whose illegality is so evident. Moreover, despite their dramatic potential for abuse, it certainly cannot be excluded that these limitations to the prohibition on the use of force may someday gain enough currency to constitute positive law, thereby further unraveling the prohibition on the use of force.

3.1.3. Military Counter-Measures

States injured by a violation of their rights are entitled to react by infringing some obligations that they owe to the author of the wrongdoing. This is what is commonly called, under the Law of State Responsibility, a "counter-measure."[80] It is well known that Article 50 of the Articles on State Responsibility prohibits military counter-measures, that is, reactions of injured States that could involve a violation of the prohibition on the use of force. By carefully carving the substantive limits of the types of counter-measures that may be utilized by injured States, the International Law Commission aimed to reflect the classical limits of the prohibition on the use of force.[81]

Despite this clear legal framework, it is startling that the International Court of Justice as well as the *Institut de Droit*

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[79] *See* JEAN D'ASPREMONT, L'ETAT NON DÉMOCRATIQUE EN DROIT INTERNATIONAL 316–26 (Pedone 2008) (discussing non-democratic states in international law). On the absence of a right to use force to restore democratic governance in the framework of the African Union Non-Aggression and Common Defence Pact, see Marco Roscini, *Neighbourhood Watch? The African Great Lakes Pact and ius ad bellum*, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 931, 955-58 (2009).

[80] *See* Articles on State Responsibility, *supra* note 51, art. 22 (addressing exhaustion of local remedies). The term "counter-measures" was first coined by the International Arbitral Tribunal in the case of Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 1978 R.I.A.A. XVIII, 417, 417 (Dec. 9).

[81] *See Articles on State Responsibility*, *supra* note 51, art. 50 (discussing prohibited countermeasures); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 288–89 (2002) (addressing Article 50 and obligations that are not affected by counter-measures).

international have both hinted at the possibility of taking counter-measures involving the use of force even though they restrict their comments to narrowly defined situations. For instance, in the *Nicaragua* case, the Court contended that "[i]t might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defense, one which might be resorted to in a case of intervention short of armed attack."[82] Later, the Court stated that:

> [t]he acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[83]

It is acknowledged that the hints the Court made at the possibility of resorting to forceful counter-measures are beset with ambiguity, and it would be an exaggeration to infer from them any clear conclusion. However, the interpretation giving rise to the right to take military counter-measures in case of attacks of lesser intensity has also been endorsed by Judge Simma in his separate opinion to the decision of the Court in the *Oil Platforms* case, an opinion which is worth reproducing here:

> I am less satisfied with the argumentation used in the Judgment by which the Court arrives at the—correct—conclusion that, since the Iranian mine, gunboat or helicopter attacks on United States shipping did not amount to an "armed attack" within the meaning of Article 51 of the Charter, the United States actions cannot be justified as recourse to self-defense under that provision. The text of paragraph 51 of the Judgment might create the impression that, if offensive military actions remain below the—considerably high—threshold of Article 51 of the

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[82] Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14, 110 (June 27).

[83] *Id.* at 127.

> Charter, the victim of such actions does not have the right to resort to—strictly proportionate—defensive measures equally of a military nature. What the present Judgment follows at this point are some of the less fortunate statements in the Court's *Nicaragua* Judgment of 1986. In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the *Sea Isle City* or the *Samuel B. Roberts* cannot be denied. What we see in such instances is an unlawful use of force "short of' an armed attack ("agression armée") within the meaning of Article 51, as indeed "the most grave form of the use of force[."] Against such smaller-scale use of force, defensive action—by force also "short of' Article 51—is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. Here I see a certain analogy with the *Nicaragua* case, where the Court denied that the hostile activities undertaken by Nicaragua against El Salvador amounted to an "armed attack" within the meaning of Article 51, that would have given the United States a right to engage in collective self-defence, and instead qualified these activities as illegal military intervention. What the Court did consider permissible against such unlawful acts were "proportionate counter-measures[,"] but only those resorted to by the immediate victim.[84]

The *Institut de Droit international* alluded to that possibility as well. Indeed, in its 2007 Santiago Resolution on Present Problems of the Use of Armed Force in International Law, it indicated that:

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[84] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 331–32 (Nov. 6) (separate opinion of Judge Simma).

> An armed attack triggering the right of self-defense must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack.[85]

Here is not the place to discuss whether resorting to defensive military measures would be an appropriate response for States which are victims of attacks not amounting to armed attacks. It is more interesting to note that this veiled support for a new limitation to the prohibition on the use of force has not emanated from States but from judges and scholars. Indeed, States have generally stuck to the discourse of self-defense, even when their action was not following the logic of self-defense.[86]

It should be noted that the idea of military counter-measures certainly gives rise to fewer possibilities of abuse than humanitarian intervention and pro-democratic intervention. It could also be argued that it is because of the lack of entitlement to take defensive military counter-measures that States have tried to disguise their defensive military measures as humanitarian intervention or pro-democratic intervention. Nevertheless, the only relevance for this Article of these weighty pronouncements of the International Court of Justice ("I.C.J.") and the *Institut de Droit international* in favor of military counter-measures lies in their potential, despite their ambiguity, to further dilute the prohibition on the use of force.

3.2. Loosening Existing Limitations?

Under current international law, force is permitted if it has been authorized by the Security Council under Chapter VII after a finding of the existence of a threat to the peace, a breach to the

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[85] Institut de Droit International, Present Problems of the Use of Armed Force in International Law, Res. 10A (Oct. 27, 2007), *available at* http://www.idi-iil.org/idiE/resolutionsE/2007_san_02_en.pdf.

[86] *See* TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 203–04 (2005) (distinguishing between armed reprisals and pre-emptive self-defense); GRAY, *supra* note 75, at 197–98 (stating that the self-defense attacks by the U.S. and Israel may have been more than defensive); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 382 (2009) (noting that offensive military attacks have been justified using self-defense).

peace, or an act of aggression. It is also allowed without prior authorization of the Council if a State has been the victim of an armed attack and it is necessary to repel the attack. When they do not propose new limitations, States try to fit their behavior within the ambit of these two existing hypotheses by audaciously stretching their limits.

3.2.1. Abusing Past Security Council Authorizations

As was alluded to earlier, the Security Council, while clearly coming back to life after the end of the Cold War, has quickly returned to acting with great prudence and now proves reluctant to authorize the use of force preferring instead to authorize non-forceful measures. The Council's aversion to the authorization to use force is not solely the result of the classical reluctance of veto-wielding powers like the People's Republic of China or the Russian Republic to give permission for multilateral uses of force. The misgivings of these countries vis-à-vis the requests for authorization submitted by other member States can, in large part, be traced to the fallout caused by a few States' abuse of authorizations of force granted by the Security Council in the early 1990s.[87] In particular, the multiple attempts—especially by the United States[88] and the United Kingdom[89]—between 1991 and 2003

[87] *See, e.g.*, Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 727–28 (1998) (maintaining that such a practice is consistent with international law); Yoo, *supra* note 36, at 571–74 (discussing the justifications under international law for the use of force in Iraq). *Contra* Franck, *What Happens Now?*, *supra* note 1, at 612–14 (arguing that international law does not provide justification for the U.S. and U.K. actions in Iraq); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 150–52 (1999) (finding a lack of justification for the actions of the United States and United Kingdom in Iraq, and pointing to the Security Council's rebuffs of those efforts); Stromseth, *supra* note 5, at 629–31 (discussing disagreements in the international community about the use of force in Iraq both in the 1990s and in 2003).

[88] *See* Franck, *What Happens Now?*, *supra* note 1, at 611–12 (1970) (citing William H. Taft, Remarks Before National Association of Attorneys General (Mar. 20, 2003)) (discussing the Department of State's position on the presidential invocation of self-defense to justify the use of force); *see also* Letter from the Permanent Representative of the United States of America, Address to the President of the Security Council, U.N. Doc S/2003/351 (Mar. 21, 2003):

> It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the

to "revive" the authorization to use force contained in Resolution 678 (1991) have convinced other States that future authorizations should be made more carefully. Their hesitance also stems from the overly generous and unlimited authorizations issued by an overactive Security Council in the immediate aftermath of the Cold War.

These abusive justifications, based on past authorizations, have ignited a vicious circle, which, in turn, has paved the way for a greater disentanglement of the collective security system. Indeed, having witnessed abusive uses of its authorizations, the Council and its members have grown disinclined to authorize force. As a result, States, confronted with a (self-inflicted) recurrent dismissal of their bellicose plans by the Security Council, have been prodded to take advantage of extinct authorizations already granted by the Security Council. Simultaneously, these States have been emboldened to make abusive interpretations of the other exception under which the use of force is admitted, i.e. self-defense.

3.2.2. Expanding Self-Defense

It is mostly through a perversion of the self-defense limitation[90] that States have undermined the prohibition on the use of force.

> authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).

Id.; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 419, 427 (2003) (detailing Iraq's failure to comply with disarmament resolutions); Yoo, *supra* note 36, at 570 ("Thus, because Iraq refused to fully comply with Resolution 687, such as by destroying fully its [weapons of mass destruction] and their delivery systems, it was in 'serious violation' of the cease-fire and the United States was justified in resuming use of force under Resolution 678.").

[89] *See* Lord Goldsmith, Address to Parliamentary Question, Attorney General Clarifies Legal Basis for Use of Force Against Iraq (18 March 2008) *available at* http://fco.gov.uk/resources/en/news/2003/03/fco_not_180303_legaladvice (referencing the Attorney General of the U.K.'s position on the use of force in Iraq); *see also UK Materials on International Law*, 64 BRITISH Y.B. INT'L L., 736–40 (1993).

[90] As was explained *supra* note 66, the I.C.J. abandoned its classical qualification of self-defense as an "exception" to the prohibition on the use of force in favor of regarding it as a "limitation." *See generally* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6) (discussing the court's self-defense jurisprudence); d'Argent, *supra* note 66 (highlighting this transition).

Indeed, contemporary practice—especially practice pertaining to the fight against "terrorism"[91]—has caused far-ranging and sweeping abuses of the concept of self-defense as it is enshrined in Article 51 of the Charter. The perversion of the self-defense limitation has manifested itself in various ways. It has impinged on the notion of armed attack, the requirement that the aggression or the threat of aggression originates from a State and the requirement of a prior aggression. A few words must be said about each of these emerging loopholes in the right of self-defense since they reflect a general widening of the limitation of the concept and, thus, an acceleration of the collective security system's disintegration.

3.2.2.1. The Threshold of Violence Required for an Armed Attack

The definition of what constitutes an armed attack has long fueled controversy. As is well-known, this debate has been partly kindled by the discrepancies existing between the English and French versions of the U.N. Charter.[92] The definition provided by the General Assembly's Resolution 3314 (XXIX)[93] has not fully alleviated this concern—some authors even went as far as claiming that it consciously codifies all the judicial "loopholes and pretexts" to unleash aggression.[94] While there is probably no controversy in cases of all-out invasion by regular armed forces of one State into the territory of another State, it remains uncertain whether an attack by precise modern airborne weapons or a series of low-scale attacks constitute armed attacks giving rise to the right to use force

[91] *See* The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 91, U.N. Doc. A/59/2005 (Mar. 21, 2005) (explaining that terrorism is understood as an activity "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act").

[92] Charte des Nations Unies [U.N. Charter] art. 51 (suggesting a higher threshold of violence for an "agression armée").

[93] *See* Bengt Broms, *The Definition of Aggression*, 154 RECUEIL DES COURS 299, 307–12 (1977) (providing a historical account of the elaboration of the definition of aggression).

[94] Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 239 (1977) (arguing that states which joined in the consensus showed ample awareness of persisting conflicts).

in self-defense. In recent years, the question of whether a cyber-attack can be considered an armed attack has also been debated.[95]

Mindful of the risk inherent in a loose understanding of the concept of armed attack, the position of the I.C.J. has been twofold. On the one hand, the court has always carefully avoided the most controversial of the abovementioned difficulties. In the *Oil Platforms* case, for instance, the I.C.J. was confronted with the question of whether a series of minor attacks cumulatively amounted to an armed attack[96]—an argument, often called the *accumulation doctrine*, that has long been advocated by some States[97]—but failed to provide an answer.[98] On the other hand, in the context of a foreign State's support of insurgents, the court has provided a very restrictive interpretation of how the concept of armed attack must be understood. In its 1998 decision, *Military and Paramilitary Activities in Nicaragua*, for example, the court referred to the definition of "aggression" enshrined in the abovementioned resolution 3314 of the General Assembly and argued that it required a very high level of State involvement in an attack by irregular forces.[99] In the *Oil Platforms* case, the court, by referring to the reference made by the court in the *Nicaragua* case to the gravity of the attack in the context of collective self-defense,[100] required the attack by regular forces to be of a certain *gravity* to amount to an armed attack triggering the right to self-defense.[101]

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[95] *See* Mark Landler & John Markoff, *In Estonia, What May Be the First War in Cyberspace*, N.Y. TIMES, May 28, 2007, *available at* http://www.nytimes.com/2007/05/28/business/worldbusiness/28iht-cyberwar.4.5901141.html (discussing "the first war in cyberspace").

[96] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 190–91 (Nov. 6) ("[T]he burden of proof of the existence of an armed attack by Iran on the United States, in the form of a missile attack on the *Sea Isle City*, has not been discharged.").

[97] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 230–31 (Cambridge Univ. Press 2005) (explaining the accumulation doctrine advanced by Israel).

[98] *See Oil Platforms*, 2003 I.C.J. at 331–32 (separate opinion of Judge Simma) (noting that the majority opinion did not address the issue of cumulative attacks which do not individually constitute armed attacks).

[99] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103–04 (June 27) ("There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation"); *see also id.* at 341–47 (Schwebel, J., dissenting) (criticizing the narrow understanding of aggression adopted by the court).

[100] *Id*. at 103.

[101] *Oil Platforms*, 2003 I.C.J. at 186–91 (stating that an exercise of self-defense requires verification that a state was responsible for the attack, and that the attack

This very strict understanding of what constitutes an armed attack was challenged by Uganda in its pleading in *Armed Activities on the Territory of the Congo* but the court did not yield.[102] The conservatism of the court has been widely criticized.[103] It was, however, followed by other international judges, including the Eritrea/Ethiopia Claims Commission Award in *Ethiopia's Ius ad Bellum Claims 1-8,*[104] as well as the *Institut de Droit international*.[105]

The conservatism of the court has probably not been useless. It seems that in practice States still believe that self-defense can only be used as long as the original attack is of sufficient gravity. Gravity can nonetheless be understood in various ways as it can stem from either the *scale* of the attack or its *effects*; the I.C.J. itself resorted to both yardsticks in the *Nicaragua* case.[106] This means that a lot of uncertainty remains as to how the gravity of the attack must be appraised. Be that as it may, it is regrettable that the Court has not seized upon the opportunity to resolve the controversies pertaining to a series of low-intensity attacks or the use of specific

fits into the definition of "armed attack" as specified in Article 51 of the U.N. Charter).

[102] *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, paras. 146–47 (Dec. 19) (holding that Uganda had no right to self-defense); *see also Armed Activities*, 2005 I.C.J. paras. 4–15 (separate opinion of Judge Simma) (suggesting that the narrow interpretation needs to be reevaluated); *Armed Activities*, 2005 I.C.J. paras. 16–31 (separate opinion of Judge Kooijmans) (criticizing the court for not seizing upon the opportunity to clarify that point).

[103] *See generally* Thomas M. Franck, *Some Observations on the I.C.J.'s Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116 (1987) (arguing that recent I.C.J. decisions resulted in substantive and procedural disadvantages in dispute resolution).

[104] *See* Eth. v. Eri., Partial Award, 45 I.L.M. 430 (2006) (exhibiting a strict understanding of what an armed attack constitutes). *See generally* Pierre d'Argent & Jean d'Aspremont, *La Commission des réclamations Erythrée – Ethiopie: un premier bilan*, 53 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 347 (2007) (supporting this stance further).

[105] *See* Institut de Droit international, Substitution and Equivalence in Private International Law, Res. 10A, art. 5 (Oct. 27, 2007) ("To an act requiring the intervention of an authority such as a judge, notary, or registrar, an equivalent act by the authority of another State is substituted if the respective authorities exercise the same or similar functions."); Institut de Droit international, Present Problems of the Use of Armed Force in International Law, Res. 10A, para. 5 (Oct. 27, 2007) ("An armed attack triggering the right of self-defence must be of a certain degree of gravity.").

[106] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 195 (June 27).

weapons, because these ambiguities could pave the way for large abuses of the concept of self-defense. It must be acknowledged that these debates have remained limited in scope. The expansion of self-defense to situations involving attacks by non-State actors—while corresponding to a contemporary need—has been much more instrumental in the enfeeblement of the collective security system and therefore will be briefly addressed.

3.2.2.2. Armed Attacks by Non-State Actors

It is probably the threats posed by non-State actors—those that are seen as belonging to terrorist organizations or secessionist movements—at the global, regional, or local level that have prodded States to incrementally feel less constrained by the legal requirements of the self-defense exception. This is not entirely surprising. In the absence of an authorization by the Security Council, the current collective security system does not provide an explicit right to use force in the case of an armed attack by non-State actors,[107] unless it can be attributed to a State—for instance, because it has been committed under the effective control of another State[108]—or simply because it follows "[t]he sending by or on behalf of [another] State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force . . . of such gravity as to amount to [an act of aggression]."[109] As a result, States, confronted with the rising threats from non-State actors, have tried to justify the use of armed force on the basis of self-

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[107] On the desire of some states during the negotiations on the U.N. General Assembly Definition of Aggression to construe mere support, assistance or encouragement to armed bands abroad as aggression, see Stone, *supra* note 94, at 238 (describing how states such as Indonesia and Guyana wanted to expand the range of activities constituting aggression).

[108] *See Military and Paramilitary Activities*, 1986 I.C.J. para. 115 ("United States participation . . . in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, [was] still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua"); *Armed Activities*, 2005 I.C.J. para. 160 (concluding "the MLC was not that of 'an organ' of Uganda"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, para. 396 (Feb. 26) (determining whether the massacres at Srebrenica were committed by persons under control of the state).

[109] G.A. Res. 3314 (XXIX), art. 3(g), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974). *See also* CORTEN, *supra* note 50, at 672 (discussing the use of force in contemporary international law).

defense even if the armed attack cannot be attributed to a State but only to a terrorist organization. It is particularly noteworthy that, while unilateral uses of force against non-state actors in the 1980s were systematically condemned,[110] this is no longer the case. Attention now focuses not on the question of whether the use of force is permitted, but instead on whether the use of force is proportionate.[111] This is well-illustrated by the war in Afghanistan in 2001[112] and the war in Lebanon in 2006.[113] Overall, claims that force can be used as a measure of self-defense are no longer the exception and are closer to becoming the rule.[114]

If the concept of armed attack is understood as being necessarily committed by a State, one can liken the rule of self-defense to a rule that only yields its legal effects if the behavior that it regulates can be ascribed to a person endowed with an official status.[115] This means that self-defense is a rule whereby the impugned conduct,[116] or the fact which triggers the legal effects defined by the rule, must be the act of an actor or an entity which

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110 *See* S.C. Res. 573, para. 1, U.N. Doc. S/RES/573 (Oct. 4, 1985) (condemning the 1985 raid by Israel on the PLO Headquarters outside Tunis); G.A. Res. 41/38, para. 1, U.N. Doc. A/RES/41/38 (Nov. 20, 1986) (condemning the raid of the United States against Libya).

111 Tams, *supra* note 86, at 379.

112 *See generally* GREGOR WETTBERG, THE INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS: STATE PRACTICE FROM THE U.N. CHARTER TO THE PRESENT 152–63 (2007) (discussing the conflict in Afghanistan). *See also* Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183, 206–08 (2010) (discussing the application of the self-defense limitation to the Afghanistan conflict).

113 *See generally* Andreas Zimmermann, *The Second Lebanon War:* Jus ad bellum, jus in bello *and the Issue of Proportionality*, 11 MAX PLANCK Y.B. U.N. L. 99 (2007) (discussing the Second Lebanon War in relation to the use of force under international law and to international humanitarian law).

114 *Cf.* Franck, *What Happens Now?*, *supra* note 1, at 608 (explaining that, while in the 1970s states tried to justify use of force with self-defense, today states rarely put much effort into a self-defense justification).

115 Note, for instance, the obligations pertaining to the right to life, which requires that a state agent commit an infringement of the right to life. *See generally* SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 155 (2nd ed., 2004) (arguing that the state must control and limit circumstances in which individuals may be deprived of life by the state).

116 On the discussion of whether self-defense enshrines a right or a prohibition, see Kammerhofer, *supra* note 14, at 229 (discussing the use of force within Kelsen's theoretical framework).

has the official status of a State. It cannot be ascertained whether this was the original meaning of the concept of armed attack when it was first set out in the U.N. Charter. Indeed, the question of what constitutes an armed attack was not really deemed important during the negotiations of the Charter, as Article 51 was originally devised to ensure compatibility between regional self-defense pacts and the U.N. collective security system.[117] At that time, violence in the international arena was still mostly construed in a classical inter-State format. Even if we believe that the concept of self-defense was originally restricted to situations of armed attacks by States, it is still conceivable that the rule has evolved to waive the requirement pertaining to the official status of the original attacker and now encapsulates situations of *attack by non-State actors.*

Since there is no clear answer in the Charter, one might have expected the I.C.J., in its role as "principal judicial organ" of the U.N.,[118] to alleviate this pressing need for clarification. Such a move would, after all, be in line with its previous crucial contributions to the clarification of the U.N. system.[119] Overall, the I.C.J. in its *Nicaragua,*[120] *Wall*,[121] and *Armed Activities*[122] decisions promoted a very orthodox understanding of the classical rule of self-defense and has tended to shy away from clearly affirming a right to resort to self-defense in cases of armed attack by non-State actors. In the *Nicaragua* and *Armed Activities* cases, the court did not expressly rule out the application of self-defense in cases of armed attack by non-State actors, for it was not necessary to

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[117] Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention, and Immediacy*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES—ESSAYS IN HONOUR OF YORAM DINSTEIN, 113, 116–17, 121 (Michael Schmitt & Jelena Pejic eds., 2007).

[118] U.N. Charter art. 92.

[119] One of the most crucial clarifications to the U.N. system was formulated by the I.C.J.. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 65 (June 21) (determining that since South Africa's mandate in South West Africa was terminated, its presence there was illegal).

[120] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 195 (June 27).

[121] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 139 (July 9).

[122] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 148 (Dec. 19).

envisage self-defense from that angle.[123] Its advisory opinion in *Wall* is more intricate in this respect. Although the court did not expressly say that the right to self-defense exists only in the case of an armed attack by one State against another,[124] the decision can reasonably be interpreted as an implicit rejection of the right to use force against the territory of another State (or quasi-State entity) in response to acts of non-State actors emanating from the territory but not attributable to that (quasi-)State entity. The separate opinions of the judges joined to the advisory opinion seem to confirm this interpretation.[125] The implicit rejection[126] of the application of self-defense in cases of attacks of great gravity by non-State actors has been significantly criticized by scholars for being overly conservative and oblivious to contemporary realities.[127]

It is beyond doubt that the court is well aware of the current controversies riddling the concept of self-defense and the ambiguity of its decisions is not a pure fortuity. Although the court's decisions are predominantly conservative, the uncertainty shrouding the pronouncements prevent us from inferring firm

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123 *See* Kimberley Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, 144 (2007) ("As in *Nicaragua*, the court did not explicitly rule out that a lesser degree of State involvement (such as acquiescence) could form the basis for attributing the armed activities of irregular forces to the State").

124 *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. para. 139.

125 This seems to be confirmed by the separate opinion of Judges Higgins, *Legal Consequences of the Construction of a Wall*, 2005 I.C.J. para. 35, as well as by the separate opinion of Judge Buergenthal, *Legal Consequences of the Construction of a Wall*, 2005 I.C.J. para. 6.

126 For an interpretation of the decision as not excluding self-defense in case of attacks by non-state actors, see Iris Canor, *When* Jus ad Bellum *meets* Jus in Bello*: The Occupier's Right of Self-Defence Against Terrorism Stemming from Occupied Territories*, 19 LEIDEN J. INT'L L. 129, 132 (2006) (arguing that, although the I.C.J. gives "thin treatment" to self-defense, the concept is related to the legal personality of the state and state responsibility and effective control).

127 See Christian Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the* Wall *Case*, 16 EUR. J. INT'L L. 963 (2005) for the argument that in interpreting self-defense that way, it would become a "vehicle that hardly ever leaves the garage." He borrows this expression from Ian Brownlie, *Comment*, *in* CHANGE AND STABILITY IN INTERNATIONAL LAW–MAKING 110 (Joseph H. H. Weiler & Antonio Cassese eds., 1988) (referring to jus cogens); *see also* Sean D. Murphy, *Self-Defense and the Israeli* Wall *Advisory Opinion: An* Ipse Dixit *from the I.C.J.?*, 99 AM. J. INT'L L. 62 (2005) (criticizing the I.C.J.'s "institutional capabilities" to adjudicate cases of armed conflict).

conclusions regarding the application of the concept of self-defense, particularly since the court did not entirely rule out the application of self-defense in the case of an armed attack by non-State actors.

So long as the Charter and the court's case law do not clearly exclude the application of self-defense in cases of attack by non-State actors and seemingly leaves room for further development of the rule, the conceptual routes by which the concept of self-defense can accommodate the contemporary State practice of armed force used against non-State entities remains unclear. Recent scholarship seems to have envisaged the extension of self-defense to situations of attack by non-State actors in two different ways. First, some authors have suggested that the rules of attribution ought to be either different or loosely interpreted in cases of attack by non-State actors (*special rules of attribution*). Second, some authors have argued that the concept of armed attack no longer requires that the attack be attributed to any State. Those defending the latter option have either discarded any requirement of state involvement (*privatization of the concept of armed attack*) or have posited that the original attack, although not attributable to a State, still requires some State involvement (*indirect attack*). These different conceptual options deserve some attention.

3.2.2.2.1. Special Rules of Attribution

This is the idea—already articulated in Judge Jennings' dissenting opinion in the *Nicaragua* case[128]—that there exists a radically different, special rule (*lex specialis*) of conduct attribution that departs from the traditional rules of attribution enshrined in the Articles of the International Law Commission on State Responsibility in cases of armed attacks by terrorist groups.[129] The

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[128] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 533 (June 27), Jennings, J., dissenting.

[129] *See* Articles on State Responsibility, *supra* note 51 arts. 4–11 (defining state acts). This has barely been discussed in the international legal scholarship. *But see* André Nollkaemper, *Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility*, *in* THE SECURITY COUNCIL AND THE USE OF FORCE 133, 162 (Niels Blokker & Nico Schrijver eds., 2005) ("Responsibility of a state based on knowledge, foreseeability, intent, and causation may come close to attribution for purposes of state responsibility."). *See also* Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?*, *supra* note 112 at 194–97 (discussing "state attribution rules").

possibility of special rules of attribution that depart from the general rules laid out by the ILC has also been recognized by the I.C.J. itself in the *Genocide* case; though the Court required that these rules be "clearly expressed."[130] Adapting the rules of attribution to cases of armed attacks by terrorists groups could also take the form, not of a *lex specialis*, but of a very flexible and loose interpretation of the principles of attribution enshrined in Articles 4–11 of the Articles on State Responsibility.[131]

It is important to note that adapting the rules of attribution to some special hypotheses—whether through new special rules or *ad hoc* interpretation—dovetails with a classical "inter-state" interpretation of the concept of armed attack, and more generally an inter-state reading of *ius ad bellum*.[132] It is also a conceptual construction that preserves the fulfillments of the other conditions of the exercise of self-defense, and especially the condition of necessity. Indeed, in the mainstream interpretation of the conditions for the exercise of self-defense, the condition of necessity includes a requirement of state involvement.[133] This means that the involvement of a state is required to ensure that the military response fulfills the condition of necessity. In other words, if the defensive attack is directed at a state, the original attack must have been committed by a state due to strict necessity. In light of this requirement, it is only if the armed attack by non-State actors can be formally attributed to a state that the condition

130 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, para. 401 (Feb. 26) ("The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.").

131 *See, e.g.*, Tams, *supra* note 86, at 385–87 (discussing the various ways to construct attribution and state responsibility); *see also* Nollkaemper, *supra* note 129, at 156–157 (discussing the attribution of acts of force to the state).

132 This is also the opinion of Tams, *supra* note 86, at 369.

133 *See* DINSTEIN, *supra* note 97, at 209–10 (discussing that the predicate requirements for self-defense include necessity, proportionality, and immediacy); Carsten Stahn, *Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51 (1/2) of the UN Charter and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 42, 47–48 (2003) (evaluating when a state can use self-defense against terrorist aggression); Trapp, *supra* note 123, at 145–46 ("decisions [of the International Court] should be understood as requiring that armed attacks be attributable to a State if the State *itself* is to be the subject of defensive uses of force.") (emphasis in original); *see also* Raphaël van Steenberghe, *supra* note 112, at 199 (discussing the use of force against private armed attacks).

of necessity can be fulfilled. However, it should be noted that while severing the concept of armed attack from attribution to a state may help extend situations of armed attack to violence by irregular forces, it would nonetheless prove of little value with respect to the requirement of necessity.

While the adaptation of the rules of attribution may seem more attuned to the inter-state character of the international legal order and the condition of necessity, it may be more problematic as a matter of policy and pragmatism. As has been argued by Milanovic, there is a strong policy argument in favor of an amendment of the primary rules pertaining to the use of force instead of the secondary rules of attribution.[134] According to that view, contemporary problems are better dealt with if primary rules are changed without affecting the general systemic rules. This Article does not intend to address this debate. The following paragraphs simply present the two manners in which the primary rules pertaining to the use of force, rather than the secondary rules of attribution, can be modified to accommodate a use of force against non-State actors without affecting the secondary rules of attribution.

3.2.2.2.2. Privatization of the Concept of Armed Attack

Although the conditions for the exercise of self-defense seem to require that the armed attack be committed by a state entity, some authors have defended another conceptual construction to justify the extension of self-defense to situations of armed attack by non-state entities. According to them, the concept of armed attack does not require the attack to emanate from a state; instead, the determination of what constitutes an armed attack is strictly a question of the intensity of the attack.[135] Such an interpretation—

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[134] *See* Marko Milanovic, *State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken*, 22 LEIDEN J. INT'L L. 307, 323 (2009) (discussing the adoption of permanent rules).

[135] *See* Yoram Dinstein, *The International Legal Response to Terrorism*, *in* 2 INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERT AGO, 139, 146 (P. L. Zanardi et al eds., 1987) (explaining that even if a state is too weak to evict terrorists from its borders, the victim state need not sit by and allow the attacks solely out of respect for a sovereign's borders); DINSTEIN, *supra* note 97, at 206–08; Daniel Janse, *International Terrorism and Self-Defence*, 36 ISRAEL Y.B. HUM. RTS. 149, 170–71 (2006) (arguing that the self-defense justification could seemingly be used against a state supporting terrorists); Murphy, *supra* note 127, at 63 (discussing the scope of Article 51 of the U.N. Charter); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43

which completely privatizes the concept of armed attack—has also been echoed in some I.C.J. Judges' opinions.[136] It is not impossible that an additional underpinning for this construction may be found in the position advocated by the Court in the *Oil Platforms* case where the Court severed the question of attribution of the attack to a state from the determination of the armed attack itself.[137]

Should the concept of armed attack be entirely stripped of its inter-state features, this re-reading of Article 51 would probably go hand-in-hand with an acceptance of the so-called 'accumulation doctrine' whereby a string of small-scale attacks by non-state actors amount to an armed attack falling under Article 51. The I.C.J. has shown that it is not ready to accept this concept.[138] It is uncertain whether this would still be its position if the idea of a private armed attack were to be widely accepted.

3.2.2.2.3. Indirect Attack

Among those who have advocated a concept of armed attack stripped of any requirement of attribution to the state, some have nonetheless continued to require a certain level of state involvement in the original attack committed by non-state actors.

HARV. INT'L L.J. 41, 45 (2002) (explaining the scale of activities that might rise to the level of an armed attack); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 16–18 (2003) (discussing the use of anticipatory self-defense in the context of threats from terrorists after the September 11, 2001 terrorist attacks).

136 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 35 (July 9) (separate opinion of Judge Kooijmans); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 11 (Dec. 19) (separate opinion of Judge Simma).

137 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, para. 51 (Nov. 6). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States had to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the U.N. Charter and as understood in customary law on the use of force. For an understanding of this decision as allowing an application of self-defense even if the armed attack is not attributable to a State, see Trapp, *supra* note 123, at 156 ("In the meantime, State practice strongly suggests that the international community has recognized a right to use force in self-defence targeting non-State actors in foreign territory to the extent that the foreign State cannot be relied on to prevent or suppress terrorist activities.").

138 *Oil Platforms*, 2003 I.C.J. paras. 62–64.

Such state involvement, although of a lesser degree than that leading to attribution of the act or the state, could amount to toleration, acquiescence, logistical support, or assistance to the non-state entities carrying out the attack.[139] This means that the armed attack is carried out by a non-state entity that was tolerated, harbored or supported by the state against which the defensive attack will subsequently be carried out. This mild privatization of the concept of armed attack seems sufficient to live up to the condition of exercise of self-defense pertaining to necessity. The extension of self-defense to situations of indirect attacks—namely cases of harboring terrorists or supporting them—has received an implied espousal in the 2005 African Union Non-Aggression and Common Defence Pact.[140]

The exact conceptual foundation of the extension of the concept of self-defense to situations of armed attacks by non-state actors is still a matter of much debate. Whether one amends or loosens the classical rules on attribution or whether one uses a strict severance between attribution to a state and the concept of armed attack so as to require no state involvement at all or only a limited state connection, the legal scholarship seems to be moving towards an acceptance of self-defense even if the armed attack cannot be

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[139] *See* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 565–67 (1999) (discussing the involvement of Afghanistan and Sudan in providing "safe havens" for terrorist groups); Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 J. CONFLICT & SEC. L. 289, 312 (2005) (arguing that the need for state involvement in private attacks is supported by both legal scholarship and state practice).

[140] Art. 1(c)(xi) states:

> The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity: . . . the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State.

African Union, Non-Aggression and Common Defence Pact art. 1(c)(xi), Jan. 31, 2005, http://www.africa-union.org/root/AU/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf. On the relationship between the African Union Defence Pact and the U.N. Charter, see van Steenberghe, *supra* note 52, at 125. On the specificities of the African Union Non-Aggression and Common Defense Pact, see Marco Roscini, *Neighbourhood Watch? The African Great Lakes Pact and* ius ad bellum, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 931 (2009).

attributed to the state against which the defensive action is carried out.[141]

3.2.2.3. Pre-Emptive Self-Defense

Another manifestation of the expansion of self-defense is the growing adoption among states of the concept of pre-emptive self-defense. While clearly prohibited by the U.N. Charter,[142] pre-emptive self-defense—in the case of an imminent threat of an armed attack[143]—has been gradually accepted by states. The High Level Panel has also endorsed it, though in somewhat ambiguous terms.[144] In addition, the Secretary-General espoused the idea that Article 51 of the U.N. Charter covers imminent threats.[145] Such a position is also defended by the *Institut de Droit International*.[146]

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[141] This is also the opinion expressed in GRAY, *supra* note 75, at 130. See the ambiguous resolution of paragraph 10 of the Institut de Droit International's October 27, 2007 resolution, which recognizes the application of Article 51 of the U.N. Charter to this situation but seems to restrict it to very limited and classical situations. Problèmes actuels du recours à la force en droit international, Institut de Droit International, Res. 10A, para. 10 (Oct. 27, 2007).

[142] *See* CORTEN, *supra* note 50, at 619 (discussing the requirement in Article 51 of the U.N. Charter that self-defense measures be preceded by an armed attack, such that pre-emptive self-defense is prohibited); Theodore Christakis, *Vers une Reconnaissance de la Notion de Guerre Préventive?*, *in* L'INTERVENTION EN IRAK ET LE DROIT INTERNATIONAL 19 (Karrine Bannelier et al. eds., 2004) (arguing that Article 51 of the U.N. Charter prohibits pre-emptive self-defense in its requirement of an armed attack).

[143] On preemptive self-defense, see generally W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006) (discussing the development of the use of pre-emptive self-defense, where States react to the possibility of a future attack); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005) (discussing the notion of pre-emptive self-defense in terms of international legal norms and legal theory); Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227 (2003) (evaluating the potential expansion of the legal definition of "armed attack" to include threats that prompt pre-emptive self-defense).

[144] U.N. SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGES, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY paras. 188–92, U.N. Doc. A/59/565, U.N. Sales. No. E.05.I.5 (2004).

[145] The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, paras. 122–25, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

[146] *See* Resolution of the Institut de Droit international Res. 10A, *supra* note 141, para. 3 ("The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack.").

It is important to highlight that this dismissal of the requirement that an armed attack has actually occurred does not go so far as permitting *preventive* self-defense, *i.e.* short of the imminent threat of an armed attack.[147] Only a few states support the legality of preventive self-defense without even claiming that such an interpretation would constitute *lex lata*.[148]

In any case, whether self-defense can be pre-emptive or even preventive, resorting to the conditions of exercise laid out in the famous *Caroline* incident[149]—which are frequent both in practice[150] and in the literature[151]—is hardly relevant. The *Caroline* incident cannot serve as a precedent for any of the contemporary developments, at least as long as the collective security system still rests on a prohibition on the use of force. The *Caroline* incident dates back to a time when the use of force was not prohibited. It is,

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[147] *See* U.N. SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGES, *supra* note 144, paras. 189–92 (clarifying that it is illegal for a State to use force in response to a non-imminent threat absent Security Council authorization). For comments from U.N. member states on the use of force, see the April 6–8, 2005 General Assembly debates. U.N. GAOR, 59th Sess., 85th plen. mtg., U.N. Doc. A/59/PV.85 (Apr. 6, 2006); U.N. GAOR, 59th Sess., 86th plen. mtg., U.N. Doc. A/59/PV.86 (Apr. 6, 2005); U.N. GAOR, 59th Sess., 87th plen. mtg., U.N. Doc. A/59/PV.87 (Apr. 7, 2005); U.N. GAOR, 59th Sess., 88th plen. mtg., U.N. Doc. A/59/PV.88 (Apr. 7, 2005); U.N. GAOR, 59th Sess., 89th plen. mtg., U.N. Doc. A/59/PV.89 (Apr. 8, 2005); U.N. GAOR, 59th Sess., 90th plen. mtg., U.N. Doc. A/59/PV.90 (Apr. 8, 2005). *See also* Institut de Droit International Res. 10A, *supra* note 141, para. 6 ("There is no basis in international law for the doctrine[] of 'preventive' self-defence . . .").

[148] *See* Press Release from The White House, *supra* note 44 (stating the United States' policy of taking action against emerging threats to its national security); Franck, *What Happens Now?*, *supra* note 1, at 619 (discussing the United States' National Security Strategy and suggesting that it appears to "be exponentially expanding . . . the range of permissible preemption."). On the ambiguous position of Australia, see Andrew Garwood-Gowers, *Pre-emptive Self-Defence: A Necessary Development or the Road to International Anarchy?*, 23 AUSTL. Y.B. INT'L L. 51 (2004) (referring to statements by members of the Australian government proposing that the international community redefine the right of self-defense). *See also* Nicole Abadee & Donald R. Rothwell, *The Howard Doctrine: Australia and Anticipatory Self-Defense against Terrorist Attacks*, 26 AUSTL. Y.B. INT'L L. 19 (2007).

[149] For a review of the Caroline incident, see R. Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82 (1938) (discussing the *Caroline* case and its significance in the early development of legal limits to the right of self-defense).

[150] *See* William H. Taft, *The Legal Basis for Preemption*, COUNCIL ON FOREIGN RELATIONS, Nov. 18, 2002, http://www.cfr.org/publication/5250/legal_basis_for_preemption.html (discussing the *Caroline* "necessity" justification as it applies to the threats posed by weapons of mass destruction).

[151] *See, e.g.*, Yoo, *supra* note 36, at 572 (discussing the requirements of anticipatory self-defense as formulated in *Caroline*).

therefore, of no avail to invoke the practice of an era where the use of force was not prohibited[152] in order to determine the ambit of a limitation to the prohibition to use force in the contemporary system.[153]

3.3. Intervention by Invitation: Consent by Governments Lacking "Effectivité"

Despite the stance defended by the *Institut de Droit International* opposing all interventions of third party states in civil war,[154] it is well-known that the I.C.J. has confirmed in the case of the *Military and Paramilitary Activities in Nicaragua* that a state can call upon another state to assist it and consent to the use of force by the latter on its territory.[155] The possibility of inviting another state to use force on one's own territory—which is often done in practice[156]—was again confirmed in the *Armed Activities* case.[157] This is not, strictly speaking, a limitation to the prohibition on the use of force in the same vein as self-defense, for the prohibition on the use of force only prohibits the use of force without consent.[158] Indeed,

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[152] On the existence of the prohibition to use force to the U.N. Charter, see Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 530 (June 27) (Jennings, J., dissenting) ("There is no doubt that there was, prior to the United Nations Charter, a customary law which restricted the lawful use of force, and which correspondingly provided also for a right to use force in self-defence.").

[153] *See* Tarcisio Gazzini, *A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?*, 13 J. CONFLICT & SEC. L. 25, 25–26 (2008) (arguing that the *Caroline* incident should today be better treated under the "rubric of state necessity").

[154] The Principle of Non-Intervention in Civil Wars, Institut de Droit international Res. (Aug. 14, 1975), *available at* http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf

[155] *Military and Paramilitary Activities*, 1986 I.C.J. para. 246.

[156] On the recent practice concerning the Saudi military intervention in Yemen in November 2009, see Robert F. Worth, *Yemeni Rebels and Saudis Clash at Border*, N.Y. TIMES, Nov. 7, 2009, at A8 (reporting on Saudi Arabia's involvement in the Yemeni government's conflict with the rebels); Robert F. Worth, *Saudis Claim to Beat Back Yemeni Rebels in Border Area*, N.Y. TIMES, Nov. 9, 2009, at A7 (describing the intervention as Saudi Arabia's first "unilateral" military campaign in decades); Robert F. Worth, *Yemen Rebels Routed, Saudi Arabia Says*, N.Y. TIMES, Nov. 10, 2009, at A14 (discussing Saudi military action against Yemeni rebels).

[157] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, paras. 42–54 & 92–105 (Dec. 19).

[158] Strangely enough, the International Law Commission has construed consent as a "circumstance precluding wrongfulness." *Articles on State Responsibility*, *supra* note 51, art. 20.

once the host state consents, the use of force is not at odds with the territorial integrity of the host State and accordingly does not infringe Article 2(4) of the Charter.

While this rule has not, at least as far as its principle is concerned, been subject to much controversy,[159] the determination of the conditions upon which a government can issue such an invitation has allowed an enlargement of the consent-based justifications for the use of force. Indeed, it has classically been contended that only an effective government could validly consent to the use of force by another State on its territory. The growing importance of criteria for democratic legitimacy in international law[160] has, however, diluted the requirement of *effectivité* of the government issuing the invitation. The democratic legitimacy of a government has typically offset its poor *effectivité*.[161] This indicates that the *effectivité* of the government issuing the invitation no longer constitutes the overarching condition of the validity of the consent to the intervention of another state. This conclusion seems implied by the I.C.J. in its decision in the *Armed Activities* case, which never questioned whether the Congolese government was effective enough to validly invite other States to use force on its territory.[162] The foregoing explains why *democratic* governments, which do not wield an effective control over the territory of the state, seem to be entitled to validly invite another state to forcefully intervene. However, as illustrated by the American intervention in Grenada[163] and in Panama,[164] democratic legitimacy can be subject to manipulations and abusive interpretation; the possession of

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159 *See* GRAY, *supra* note 75, at 81 (observing that the rule represents a "generally agreed position" that "normally if one state requested assistance from another, then clearly that intervention could not be dictatorial and therefore unlawful.").

160 *See* Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 913-16 (2006) (discussing the criteria for determining the legitimacy of democratic governments and proposing a formulation that addresses the case of the illiberal democracy).

161 *Id.*

162 *Armed Activities*, 2005 I.C.J. paras. 42–54 & 92–105.

163 *See generally* Crandall, *supra* note 77 (discussing the American intervention in Grenada).

164 *See* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Protection of Nationals*, 78 AM. J. INT'L L. 200, 200 (1984) (discussing U.S. rescue operations in Grenada); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Refugees*, 78 AM. J. INT'L L. 655, 661 (1984) (discussing the collective security action in Grenada).

certain democratic trappings sometimes seems to suffice to endow an ineffective government with the power to invite a foreign State to intervene. In this way, easing the requirements for validly consenting to the forceful intervention of another State further waters down the general prohibition on the use of force and weakens the collective security system.

3.4. Evading Responsibility by Using Force Out of Necessity

It is uncontested that, even though an action may constitute a violation of international law, its author will not incur responsibility if it can invoke any "circumstances precluding wrongfulness,"[165] especially if it can prove that it acted in a state of necessity.[166] This requires that the illegal conduct constituted the "only way for the state to safeguard an essential interest against a grave and imminent peril" and did not "seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole."[167] No one disputes, however, that circumstances precluding wrongfulness *cannot* be invoked to absolve a state that has committed a violation of a peremptory norm of international law.[168] This means that if the prohibition on the use force were to be considered a peremptory norm of international law, an illegal use of force

[165] It is interesting—although hardly understandable—that self-defense has been construed as a circumstance precluding wrongfulness by the International Law Commission in the framework of its work on the Responsibility of States. This seems to contradict the earlier position of the ILC, *Addendum to the Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318/Add.5 (1980), *reprinted in* 2 Y.B. Int'l L. Comm'n. 51, §83, U.N. Doc. A/CN.4/SER.A/1980/Add.1, as well as the understanding of the International Court of Justice, Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 38. The commentary to Article 21 is itself beset by ambiguity. *See* CRAWFORD, *supra* note 81, at 166–67 (qualifying the legality of self-defense by stating that a State is "'totally restrained' by an international obligation if that obligation is expressly or intended to apply as a definitive constraint," and also noting that "Article 21 leaves open all issues of the effect of action in self-defence vis-à-vis third States.").

[166] ILC Articles on State Responsibility, *supra* note 51, art. 25. On the status of article 25, see the remarks of Sarah Heathcote, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility – Necessity*, *in* THE LAW OF STATE RESPONSIBILITY, (J. Crawford et al. eds., 2010) (forthcoming) (on file with the author). *See also* S. Heathcote, *Est-ce que l'état de nécessité est un principe de droit international coutumier?*, 40 REVUE BELGE DE DROIT INTERNATIONAL 53 (2007).

[167] *Articles on State Responsibility*, *supra* note 51, art. 25.

[168] *Id.* art. 26.

would always engage the responsibility of its author. On the contrary, if the *ius cogens* character of the norm lies solely with the prohibition of aggression, states using force beneath the threshold of aggression can evade responsibility by invoking a state of necessity.

It must be acknowledged that this debate is rarely echoed in practice or in the discourse of states and has mostly been confined to academic circles. This should not cause any surprise. As has been stated, the main implications of this debate do not pertain to the legality of the impugned behavior but to its consequences in terms of responsibility to which states are less amenable. It is nonetheless interesting to note that the I.C.J. deemed it important to examine the invocation of the state of necessity in its advisory opinion on the *Wall Opinion.* It is of particular interest to note that the court examined the application of the state of necessity without preliminarily raising the question of the general applicability of such a rule in cases of violations that *could* include infringements of the prohibition on the use of force.[169] The court remained ambiguous and it cannot be firmly asserted that the court presupposed that the state of necessity could be invoked to deprive low-intensity illegal uses of force of their wrongful character.

For the sake of this study, there is no need to dwell upon that controversy and it suffices to note that, as some authors have argued,[170] the Charter itself seems to prohibit the invocation of the state of necessity to evade responsibility for breaches of the Charter. Although the U.N. Charter does not deal with issues of responsibility and is only concerned with questions of legality, it can reasonably be defended that the primary norms enshrined in the Charter have excluded the use of the secondary norm of necessity. In particular, by virtue of the concept of self-defense, the Charter seems to have intended to provide a self-contained regime as to how circumstances arising out of necessity could be used to evade compliance with the prohibition on the use force.

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[169] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 140 (July 9).

[170] *See, e.g.*, CORTEN, *supra* note 50, at 327 (arguing that the U.N. Charter does not provide for the invocation of a circumstance precluding wrongfulness, including a state of necessity); *see also* Maria Agius, *The Invocation of Necessity in International Law,* 56 NETH. INT'L L. REV. 95 (2009), at 111 (discussing the law of necessity under the U.N. Charter).

It must be acknowledged that this abovementioned restrictive interpretation of the Charter remains contentious, and it cannot be excluded that its silence on this matter, especially if conjugated with the idea that only the prohibition of aggression is endowed with *ius cogens* character, allows an interpretation of the concept of "state of necessity" that can potentially provide a new avenue for using force without bearing the consequences of responsibility. Should that be the case, not incurring responsibility would nonetheless continue to hinge on the respect for the strict conditions of the state of necessity, which may prove difficult in practice.[171]

4. APPRAISING THE DILUTION OF THE PROHIBITION ON THE USE OF FORCE

This Article has so far tried to shed some light on the attempts by States to subvert the limitations on the prohibition on the use of force. It has been argued here that this practice, although indicating some alarming instances of abuse, does not yet amount to a complete disappearance of the prohibition on the use of force. However, the dilution of the prohibition that has been evidenced by this practice may well usher in an era where force will no longer be prohibited. As has been stated, it is not that states are shedding the prohibition. It is, rather, that the prohibition is being diluted by the floating of new limitations and the expansion of the existing ones.

As a result, we are left with a prohibition that is subject to numerous ill-defined qualifications that make it very difficult to delineate the exact command or restriction that it contains. Indeed, the content of the rule has become extremely hazy since its scope has grown very uncertain. The dilution of the prohibition on the use of force is of such magnitude that the rule is almost non-normative. By non-normative, this Article means that the rule no longer enshrines a clear command and barely lays down any specific obligation. This is what I have called elsewhere a rule with a *soft instrumentum*,[172] or what others have called a rule with a *soft*

171 On the application of the conditions of the state of necessity to the use of force, see Christakis, *supra* note 142, at 29–45 (discussing the stringent application of the requirements for establishing a state of necessity).

172 *See* Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075, 1081 (2008) ("The softness of the

formulation.[173] In this sense, it can be argued that the prohibition on the use of force is becoming qualified by so many limitations, which are themselves unclear, that the rule itself is incrementally reaching a state of softness. This does not mean that the prohibition on the use of force no longer constitutes a legal rule and has been demoted to a mere moral principle. Indeed, the formulation of clear obligations is not a constitutive element of any legal norm. Even if some scholars have argued to the contrary,[174] it is now commonly agreed that a legal act need not be normative to be legal.[175] A legal norm with a soft content also constitutes an entirely valid legal rule, for the formulation of a clear command is not a condition of its validity.[176] There are strong indications that

instrumentum pertains to the choice made by the legal subjects of an instrument which lies outside the realm of law."). Baxter is probably the first author to have interpreted soft law in this sense. *See* R.R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549, 549 (1980) ("[T]here are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as 'soft' law"); *see also* Georges M. Abi-Saab, *Eloge du "Droit Assourdi": Quelques Réflexions sur le Rôle de la Soft Law en Droit International Contemporain*, *in* NOUVEAUX ITINÉRAIRES EN DROIT: HOMAGE À FRANÇOIS RIGAUX 59, 61 (1993) (examining the critique that soft law, increases the uncertainty associated with law by blurring the distinction between what is law and what is not); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INTL & COMP. L.Q. 901, 901 (1999) (outlining the basic tenets of soft law); Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37, 39 (1984) (characterizing soft law as a collection of techniques designed to "achieve the goals of collective action and limited constraint"); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 500 (1999) (differentiating among non-treaty agreements). More recently, see ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 220 (Oxford Univ. Press 2007) (discussing contrast between rules and norms or principles). *But see* VAUGN LOWE, INTERNATIONAL LAW 96 (Oxford Univ. Press 2007) (rejecting the use of soft law to refer to legal acts with a soft content).

173 BOYLE & CHINKIN, *supra* note 172, at 220.

174 Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 34, 48 (July 6) (separate opinion of Judge Lauterpacht) ("An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose."); *see also* Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 116 (Mar. 21) (dissenting opinion of Judge Lauterpacht) (distinguishing the case at hand from *Certain Norwegian Loans*).

175 *See* Vienna Convention on the Law of Treaties, art. 2(1)(d) May 23, 1969, 1155 U.N.T.S. 331 (noting that, in lodging a reservation, States can "modify the legal effect of certain provisions of the treaty in their application to that State").

176 This is not in dispute, as the Vienna Convention on the Law of Treaties does not elevate the normative character of a conventional act into a condition of

the prohibition on the use of force is gradually experiencing a softening of its content, thereby bearing a closer resemblance to the prohibition on the threats of a use of force, which has always suffered from a clear lack of normativity.[177]

On one occasion, the I.C.J. has been called upon to grapple with a rule that was deemed non-normative in this sense because it was riddled with too large a limitation. In the *North Sea Continental Shelf* case, the court assessed the customary character of the equidistance principle enshrined in Article 6 of the 1958 Convention on the Continental Shelf. On this occasion, it asserted that the norm at stake had first to "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[178] The court built on the idea that any conventional rule must contain a directive for it to be able to someday crystallize into a customary international rule. Taking into account the profound indeterminacy of the concept of "special circumstances," which determines the qualification of the equidistance principle, the court concluded that the principle of equidistance enshrined in the 1958 Convention was non-normative. Since the principle of equidistance did not provide for a given behavior to be adopted by the parties, the court concluded that it could not crystallize or generate a rule of customary international law.[179]

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its validity. *See id.* pt. V, § 1 (1969) (discussing the criteria for impeaching the validity of treaties). It is surprising that those who had construed the formulation of clear obligations as a constitutive element of any legal act have simultaneously hinted at the idea that a legal act that is not normative is invalid. *See Certain Norwegian Loans*, 1957 I.C.J. at 48 (emphasizing the element of good faith in international law).

[177] On the loose content of the prohibition of threats of force, see generally Dino Kritsiotis, *Close Encounters of a Sovereign Kind*, 20 EUR. J. INT'L L. 299 (2009). On the prohibition of the treaty of force, see generally F. Dubuisson et A. Lagerwall, *Que signifie encore l´interdiction de recourir a la menace de la force*, *in* L'INTERVENTION EN IRAK ET LE DROIT INTERNATIONAL 83 (Bannelier et al. eds., 2004).

[178] North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20).

[179] *Id.* at 41-42, para. 72. For an analysis of this aspect of the case, see Jean d'Aspremont, *Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice*, BELGIAN REV. INT'L L. 496, 518 (2003). *See also* BOYLE & CHINKIN, *supra* note 172, at 220–21 (noting that "some treaty provisions are soft in the sense that they impose no real obligations on the parties").

Drawing on the expanding limitations on the prohibition on the use of force, the command that it enshrines is being diluted, thereby stripping the rule of its ability to voice a clear command to states. This practice accordingly makes it a rule with a soft content that recalls the indeterminacy of the rule of equidistance with which the I.C.J. previously grappled. As the recent abovementioned case law of the court pertaining to the use of force indicates, the court has never likened the prohibition on the use of force to the indeterminate principle of equidistance and has applied it as if the commands that it contains were of sufficient clarity. In doing so, the court has probably tried to stem the dilution of the rule and has entrusted itself with the role of guardian. It is not clear, however, whether the prohibition to use force would pass the test of normativity that was applied by the court in the *Continental Shelf* case.

While this Article has argued that the dilution of the prohibition on the use of force mostly amounts to a softening of its content through a multiplication and expansion of the limitations to that prohibition, it must be acknowledged that the lack of clear guidance in relation to the rules has been interpreted differently in the legal scholarship. Liberal scholars, like Thomas Franck, understand this kind of softness as a dent in the legitimacy of the rule, which in turn can impinge on its efficacy.[180] Realist scholars have seen the lack of clear guidance as a sign of the desuetude of the rule.[181] Others, especially scholars affiliated with critical legal studies, have seen the indeterminacy of the rule as manifesting a retreat to politics, thereby confirming the failure to depoliticize this area of inter-state relations.[182] While positivist scholars have classically endorsed the position advocated above and have not

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[180] *See generally* THOMAS N. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (Clarendon Press, 1995) (focusing on concepts of fairness to assess international law).

[181] Glennon, *supra* note 8, at 969 (noting that there is no guidance in international law as to where the tipping point occurs between breaking the law to desuetude).

[182] *See, e.g.*, Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566, 574 (1997) (finding that rules become political when they are over and under inclusive, as often is the case with international law). The argument is not only made by critical legal scholars. *See, e.g,* Jan Klabbers, *Off Limits? International Law and the Excessive Use of Force*, 7 THEORETICAL INQUIRIES IN LAW 59, 67 (2006), *available at* http://www.bepress.com/til/default/vol7/iss1/art4 (discussing the political dimension of warfare and the inevitability that politics will seep into the equation).

considered that the clarity of the command of a rule is without any impact on its legal quality,[183] some have nonetheless considered its normative quality instrumental in its legal character.[184]

There are thus diverging interpretations of the decomposition of the prohibition on the use of force. However one construes the inability of a rule to formulate clear guidance, most scholars will see the growing obscurity shrouding the prohibition on the use of force as evidence of its incremental dilution. Against this backdrop, it no longer seems far-fetched to contend that the current practice has ushered in the demise of the prohibition on the use of force, the consequences of which on the international legal order must now be appraised.

5. THE PROSPECT OF A LEGAL ORDER DEVOID OF A CLEAR PROHIBITION ON THE USE OF FORCE

The evaporation of the prohibition on the use of force, whether through softness, inefficacy, or desuetude, seems compelling. Even the I.C.J.—which has not stood idle[185] and sometimes taken very unorthodox positions to ensure that it is granted the opportunity to defend the rule[186]—has not managed to rein in this

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183 *See* Christakis, *supra* note 142.

184 *See* Robert Ago, *Science Juridique et Droit International*, 90 RECUEIL DES COURS 851, 912, 923–27 (1957) (discussing functional positivism). His positivist theory is further spelled out in Robert Ago, *Positive Law and International Law*, 51 AM. J. INT'L L. 691 (1957). Such a functionalist approach of positivism should not be conflated with the realist objection to positivism, which was also denoted as 'functional.' *See* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 274 (1940) (observing that "realist" jurisprudence is actually "functional" jurisprudence). For another author elevating normativity to a constitutive element of legality, see Hans Kelsen, *Théorie générale du droit international public, problèmes choisis*, 42 RECUEIL DES COURS 117, 138 (1932).

185 Some defendant states have relentlessly argued that cases involving the use of force are non-justiciable. For a discussion of this argument and its rejection by the court, see Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after* Nicaragua, 14 EUR. J. INT'L L. 867 (2003).

186 For instance, in a very inelegant manner, the court made suspect use of the principle of systemic integration enshrined in Article 31.3(c) of the Vienna Convention on the Law of Treaties in the *Oil Platforms* case in order to appraise the conduct of the United States in light of the principles pertaining to the use of force, whereas the treaty of commerce and navigation which constituted its sole ground for jurisdiction was alien to these rules. *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 199 para. 78 (Nov. 6) (holding that use of force here was unjustified); Campbell McLachlan, *The Principle of Systemic Integration and Article*

tendency. Although it is unclear whether it behooves international legal scholars to militate for the protection of the collective security system,[187] many authors have also vigorously reacted against the aforementioned practice.[188] As with attempts made by the I.C.J., the protestations of scholars have not sufficed to avert any further subversion of the limitations on the prohibition on the use of force. Since the corrosion of the prohibition on the use of force thus looks irresistible, it is of great interest to reflect, in the last part of this Article, on the possible outcome of its complete demise for the international legal order as a whole.

The exercise that is undertaken in this section would probably look odd for those who, like constitutional scholars, have placed the prohibition on the use of force and the collective security system at the center of the hierarchical and value-based understanding of the international legal order.[189] Drawing on the aforementioned practice, it is argued here that that the following undertaking does not constitute a fanciful reflection in any sense. The harbingers mentioned above are too serious not to be taken into account and we must ponder the possible disappearance of the prohibition on the use of force.

31(3)(c) of the Vienna Convention, 54 INT'L & COMP. L. Q. 279, 280 (2005) (explaining that Article 31(3)(c) of the Vienna Convention's application in *Oil Platforms* has strengthened international law at a critical time when international law was facing fragmentation). For a similar criticism of the court's judgment in *Oil Platforms*, see Jorg Kammerhofer, *Oil's Well that Ends Well? Critical Comments on the Merits Judgment in the* Oil Platforms *Case*, 17 LEIDEN J. INT'L L. 695, 696–700 (2004). For another judgment where the court forcefully dealt with issues pertaining to the use of force, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, paras. 121–39 (Feb. 26) (describing the court's resort to the *sui generis* character of the situation to which it applied the principle *res iudicata* in a manner that disregards the classical requirements of Article 35 of the Statute).

187 For some reflections on the role of scholars, see d'Aspremont, *supra* note 172.

188 *See* Matthew Craven et al., *We Are Teachers of International Law*, 17 LEIDEN J. INT'L L. 363, 363 (2004) (discussing the concept of collective security and self-defense within the context of the United States' most recent war in Iraq); *see also* Centre de droit international, *Appel de juristes de Droit international concernant le recors a la force contre l'Irak,* January 2003, *available at* http://www.humanrights.ch/home/upload/pdf/030513_aufruf_f.pdf.

189 On Constitutionalism in general see TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (Nicholas Tsagourias ed., Cambridge Univ. Press 2007); Richard Collins, *Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past*, 22 LEIDEN J. INT'L L. 251 (2009); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 223 (2006).

The potential consequences of a dilution of the prohibition on the use of force for the international legal order could be manifold. It could bear upon the legal order itself and on the collective security system. These two distinct dimensions of the fallout of the dilution of the prohibition on the use of force are examined below.

5.1. The International Legal Order

The prohibition on the use of force is commonly extolled, eulogized and, very often, elevated to the higher rank of the norms governing the international society to such an extent that its disintegration can only be understood by some scholars as a return to a pre-1928 Hobbesian state of nature. This Article argues that attempting to gauge the impact of the dilution of the prohibition on the use of force does not in any way amount to examining the unraveling of the international legal order itself. It is nonetheless true, as is well known, that Hobbes contends that bestowing the monopoly of the entitlement to use force upon one sovereign constitutes the foundational act of any society and, hence, makes the existence of a legal order possible.[190] Thus, from a Hobbesian vantage point, one may be tempted to believe that the elimination of any constraints on the use of force could lead to the demise of the legal order itself.

It is, however, argued here that such an understanding of the consequences of the demise of the collective security system would be overkill. First, because it is not at all certain that the vanishing of the prohibition to use force would necessarily pave the way for utter chaos. The possibility that States resort to force can be curtailed by many non-legal factors, including public opinion,[191] balance of power, or arguments of morality.[192] More importantly,

[190] Hobbes has been perceived as the precursor of so many radically opposite understandings of the international society. One classical view of Hobbes links him to the realist theories of international law. For a criticism of the neo-realist understandings of Hobbes, see Donald W. Hanson, *Thomas Hobbes's "Highway to Peace,"* 38 INT'L ORG. 329 (1984). For a neo-Hobbesian understanding of the international law-making processes, see d'Aspremont, *supra* note 58.

[191] *See generally* Charlotte Ku & Harol K. Jacobson, *Toward a Mixed System of Democratic Accountability*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 349 (Charlotte Ku & Harold K. Jacobson eds., Cambridge Univ. Press 2003) (suggesting that accountability is one way to moderate the use of force).

[192] Klabbers, *supra* note 182, at 67 ("international humanitarian law attempts to pay tribute to moral considerations").

the prohibition on the use of force is not at all a constitutive element of any legal order. A legal order can leave the freedom of its subjects to fight each other unfettered without putting its own existence into question. This is easily illustrated by the fact that nobody ever contested the legal character of the international order when the use of force was only loosely regulated in the framework of the League of Nations, before it came to be prohibited by the 1928 Kellog-Briand Treaty, by customary international law or later by the U.N. Charter.[193] The prohibition on the use of force—as explained earlier—may well be part of what Hart calls the minimum content of natural law, that is, some of the rules that make a legal order viable.[194] But this does not mean that a legal order's existence is *dependent* on the use of force being prohibited. In this sense, a possible disintegration of the prohibition on the use of force would not mean reverting to a pre-legal stage where international relations were not governed by law. As was alluded to above, it could even be defended that, from an Austinian and Kelsenian vantage point, because law boils down to a set of rules that can be coercively enforced,[195] a greater freedom to resort to force can even be seen as enhancing the threat of sanction for violations of international law and harden the constraints on which the order in question is based.

5.2. The International Collective Security System

It has been argued, so far, that the demise of the prohibition on the use of force would not undermine the legal character of the international order. Despite the ban on the use of force being

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[193] *See* League of Nations Covenant arts. 12–13 & 15–16 (legislating that, in the event there is a conflict between two countries, the dispute should be submitted to arbitration or the Council for resolution).

[194] HART, *supra* note 27, at 193–94.

[195] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 201 (The Noonday Press 1954) (stating that the duties the law imposes "are enforced by moral sanctions: by hear on the part of nations, or by fear on the part of sovereigns"); Hans Kelsen, *Théorie du Droit International Public*, 84 RECUEIL DES COURS 1, at 12–13 (1953) (describing the function of the law as that of leading mankind to abstain from committing specific acts that are deemed to be detrimental and suggesting the infliction of harm on those that deviate as a means of enforcing the law); *see also* Kelsen, *supra* note 184, at 124. (characterizing the law as a system of constraint, with the founding norms of the judicial system prescribing said constraint).

classically deemed a "cornerstone of the U.N. Charter,"[196] this Article submits that it is the current collective security system that will be the most affected by any dilution of the prohibition on the use of force. It is not that the disappearance of the prohibition on the use of force would jeopardize the existence of the collective security system. Rather, it is that the impact of the demise of the prohibition on the use of force would bring about a fundamental overhaul of the essence of that system. More precisely, it is argued here that the disintegration of the prohibition on the use of force will be followed by a radical transformation of the U.N. system.

To understand the revolutionary impact on the U.N. system that could follow a significant dilution of Article 2(4), it is important to stress preliminarily that the demise of the prohibition on the use of force would certainly not bring about the dissolution of the U.N. First, because even if it is demonstrated that, short of the prohibition enshrined in Article 2(4), the U.N. has outlived its usefulness, the dissolution of the U.N. still requires the formal termination of its constitutive treaty by Member States.[197] It is not at all certain that States would accept formal termination the U.N. Charter even if it were proven that force is no longer prohibited. Second, and more importantly, although regulating the use of force and maintaining peace and security was originally conceived as the overarching function of the organization, the disintegration of Article 2(4) would not annihilate the *raison d'être* of the U.N.

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[196] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 148 (Dec. 19).

[197] *See* Articles of Agreement of the World Bank art. VI, Feb. 16, 1989, 60 Stat. 1457, 2 U.N.T.S. 180 (stating that permanent suspension of World Bank operations requires agreement by a majority of the Governors); Articles of Agreement of the International Monetary Fund sec. 2, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (demonstrating that there are a few constitutive treaties of international organizations that provide for the liquidation of the international organization concerned by one of its organs); *see also* Agreement on the Establishment of the Korean Peninsula Energy Development Organization (KEDO) art. XIV, Mar. 9, 1995, 1873 U.N.T.S. 417 ("This Agreement may be amended, terminated, or suspended by written agreement of all Executive Board Members, or, if such agreement is not achievable by written agreement of a majority of the Executive Board Members."); Kigab Park, Korea Univ., Legal Problems Arising from the Dissolution of an International Organization: the Case of the Korean Peninsular Energy Development Organization (KEDO): Dissolution de facto or Hibernation?, Presentation at the Biennal Conference of the European Society of International Law (Sept. 5, 2008) (discussing the legal difficulties pertaining to the situation of KEDO).

Indeed, the U.N. is not exclusively entrusted with curtailing violence in the international arena. The U.N. performs many other tasks, which are only loosely related to the maintenance of peace and security. No State could convincingly claim termination for impossibility of performance[198] or fundamental change of circumstances.[199] In this sense, the U.N. would no doubt outlive the unraveling of the prohibition on the use of force.

It follows from the foregoing that, in the case of a dilution of Article 2(4), regulatory powers utilized by the organs of the U.N., and especially the Security Council, would remain at the disposal of the Member States, irrespective of the state of the law regarding the use of force. The use of these regulatory instruments, and especially the powers under Chapter VII of the U.N. Charter, has

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[198] Vienna Convention on the Law of Treaties, *supra* note 60, art. 61:

> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
>
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

[199] *See* Vienna Convention on the Law of Treaties, *supra* note 60, art. 62:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary; or (*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

long surpassed the maintenance of international peace and security. Indeed, the practice of the Security Council within the framework of Chapter VII of the Charter has long gone beyond the original limits and purposes of the Charter. For instance, it is no longer contested that some of the Security Council's main achievements lie in the non-military measures that it has ordered.[200] This is well illustrated by the fact that, now, the Security Council is mostly using the powers conferred upon it by Chapter VII for non-military purposes. Moreover, the measures that are typically ordered by the Security Council are not conceived as measures preceding a possible authorization to use force. They are construed as the true end of the Council's action.

By virtue of these non-military measures, it is well-known that the Council has been implementing all sorts of policies: reconstructing States,[201] fighting impunity through the creation of judicial bodies,[202] fighting terrorism through the adoption of individual sanctions,[203] and so on. Additional tasks alien to the maintenance of peace and security have been conferred upon the Council through non-U.N. mechanisms such as the International Criminal Court before which proceedings can be ignited by the

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[200] *See generally* Vera Gowlland-Debbas, *UN Sanctions and International Law: An Overview*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 1 (Vera Gowlland-Debbas ed., 2001) (discussing the debate over the legitimacy and long-term effects of economic sanctions on states); Tams, *supra* note 86, at 377 (discussing the Security Council's adoption of "general 'law-making' resolutions" where it has deemed military sanctions unnecessary).

[201] *See* S.C. Res. 1244, *supra* note 24 (condemning acts of violence against the Kosovo population). *See generally* Jean d'Aspremont, *Post-Conflict Administrations as Democracy-Building Instruments*, 9 CHI. J. INT'L L. 1, 1 (2008) (discussing the use of international organizations to create or reconstruct democratic states); Jean d'Aspremont, *Regulating Statehood: The Kosovo Status Settlement*, 20 LEIDEN J. INT'L L. 649, 649 (2007) (arguing that the "proposed regulation of [the] statehood" of Kosovo surpassed past international involvement in the reconstruction of States).

[202] *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (describing the establishment of the ICTR); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (describing the establishment of the ICTY). *See generally* S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (describing the creation of the Special Tribunal for Lebanon).

[203] *See* S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (declaring international opposition to the Taliban); S.C. Res. 1135, U.N. Doc. S/RES/1135 (Oct. 29, 1997) (declaring international opposition to the members of the UNITA in Angola).

Council.[204] This tendency is also underpinned by the current debates about entrusting the Council with the responsibility of making findings about the existence of crimes of aggression.[205] Overall, the Council has increasingly vacated its role of guardian of the order and has focused on problems of justice. In doing so, the "Police" have ventured into the "Temple," as was famously described by Martti Koskenniemi.[206] The promotion of justice by the Security Council is obviously at odds with the original policing role that was reserved to the Council by the authors of the Charter, as well as by earlier practice, where classically it was the General Assembly that could seek to promote justice on the international plane.[207] It is nonetheless this role that would enable the collective security system to outlive the dilution of the prohibition on the use of force.

It is not only that the relevance of the U.N. system would not be jeopardized by a dilution of the prohibition on the use of force. This Article also argues that the tendency of the Security Council to embrace responsibilities in world regulation and the promotion of justice would be dramatically inflated by a dilution of the prohibition on the use of force. Indeed, in the absence of any clear prohibition on the use of force, the Council's responsibility to

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[204] *See* Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90 (establishing an "independent permanent International Criminal Court . . . with jurisdiction over the most serious crimes of concern to the international community as a whole").

[205] *See* Press Conference, United Nations, Special Working Group on the Crime of Aggression (Feb. 13, 2009), http://www.un.org/News/briefings/docs/2009/090213_ICC.doc.htm (discussing the I.C.C.'s jurisdiction over the crime of aggression). *See generally* Niels Blokker, *The Crime of Aggression and the United Nations Security Council*, 20 LEIDEN J. INT'L L. 867, 886-87 (2007) (discussing the debate over the Security Council's role in determining I.C.C. jurisdiction, and rejecting the view that the determination of whether there has been a crime of aggression should be left exclusively to the Security Council).

[206] Koskenniemi, *supra* note 19, at 328-29.

[207] *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/3201 (S-VI) (May 1, 1974) (defining a new economic order to promote principles of justice and equity among states); *see also* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (Dec. 14, 1960) (prohibiting colonialism in recognition of individual rights to equality and self-determination); Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons, G.A. Res. 49/75, U.N. Doc. A/RES/49/75 (Dec. 15, 1994) (promoting disarmament and requesting that the I.C.J. review the legality of the threat or use of nuclear weapons).

maintain order and to authorize the use of force to stem threats to international peace would ebb. It would no longer be necessary to seek authorization to use force and the maintenance of the international peace and order would no longer be dependent on the Council. States, acting unilaterally or on the basis of ad hoc coalitions, would be able to maintain order.[208] This is probably what the idea of coalitions of the willing—which constitutes the antithesis of the maintenance of order by the international community[209]—already foreshadows. Deprived of its main responsibilities in the maintenance of order, the Security Council would inextricably concentrate on its newer functions (i.e. world regulation and the promotion of justice). It follows that the Security Council would not necessarily be a victim of the dilution of the prohibition on the use of force and would in fact expand its role as a world regulator.

The idea that the responsibilities of the Security Council as a world regulator or a forum of justice may be reinforced by the demise of the prohibition on the use of force may, to some extent, seem paradoxical, since the dilution of the prohibition on the use of force is largely the outcome of States' confidence in their own powers and capabilities. On the one hand, states could be liberated from most constraints on their ability to use force. On the other hand, they would be subjected to a more powerful Council. This paradox must not be exaggerated. The States that are striving to extend the freedom to resort to force are commonly those that are at the helm of the Council. By diluting the prohibition on the use of force, these states are fostering their own ability to resort to war as well as the international mechanisms by which they can impose regulations and promote their own visions of justice.

However beneficial this may be for the superpowers, it is beyond doubt that the demise of the Council's role as guardian of the order would also present one advantage for those states that do not classically have a say in its regulation-making processes.

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[208] *See* Michael Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16, 34 (2003) (claiming that States will be able to maintain order without the help of the Security Council).

[209] *See generally* Eyal Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, *in* COALITIONS OF THE WILLING: AVANTGARDE OR THREAT? 1 (Christian Calliess et al. eds., 2007) (describing the increasing tendency of "like-minded states" to use informal processes instead of international law to coordinate).

Indeed, if stripped of its primary function in regulating the use of force, the Council would more clearly appear as what it currently is. Today, under the guise of the collective security system, the Council still manages to be portrayed as the guardian of peace and order. All of its actions are justified by reference to that precise goal despite the fact that the determination of a situation as constituting a threat to the peace boils down to a mere formality[210] and its powers are used for all sorts of different goals which are only loosely connected to the maintenance of peace and security. If someday the Council is deprived of its primary function as a result of the unraveling of the prohibition on the use of force, it will become more apparent that the Security Council has become a real world regulator.

Laying bare and reinforcing this crude reality of a Security Council turned into a world regulator would undoubtedly cause some unease. It is uncontested that, as a forum of justice and as a world regulator, the Council has proved to be an ill-equipped and inappropriate body. It suffices to mention the debates about the sanctions against individuals suspected of involvement in international terrorism-related activities[211] or the reluctance to extend the role of the Security Council in international criminal proceedings.[212] Preserving a Council exclusively focused on regulating the world and promoting justice would be contingent upon dramatically reforming the Council.[213] While the collective security system has provided the illusion that we can live in a world where security is the responsibility of a handful of veto-wielding States enjoying wide discretionary powers,[214] laying bare

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[210] *See* d'Argent, *supra* note 28, at 1145–46 (noting that the Security Council's responsibility under Article 39 to determine whether a situation constitutes a threat relies on the maintenance of peace and international security).

[211] *See, e.g.*, d'Aspremont & Dopagne, *supra* note 71, at 375–76 (describing the problems caused by the implementation of U.N. Security Council measures in the European legal order).

[212] *See* Press Conference, United Nations, *supra* note 205 (describing the recent debates in the special study group on aggression).

[213] *See also* Stromseth, *supra* note 5, at 629 ("We are . . . at a difficult and precarious transitional moment in the international legal system governing the use of force . . .").

[214] *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, para. 24 (Aug. 10, 2005) (discussing the discretion of the Security Council to determine the existence of a threat to, or a breach of, the peace). *Contra* Prosecutor v. Tadic, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 29 (Oct. 2, 1995).

the crude reality of its global regulatory position would spark a compelling and irresistible need for reform—especially in terms of transparency, due process, and participation.

Does the foregoing mean that we should rejoice at the dilution of the prohibition on the use of force because it could eventually reinforce the calls for greater transparency, due process, and participation in the collective security system? Not necessarily. First, a larger leeway for resorting to war could pave the way for an increase in violence despite the existence of non-legal constraints through public opinions, economic parameters, or even morality. Second, we need to bear in mind that the highly needed reform of the Council has long proved politically unfeasible.[215] Hence, it is not certain that, in the absence of such reform, a Council exclusively transformed into a world legislator by virtue of the complete liberalization of the use of force would be able to wield its powers with the same legitimacy and efficacy. If an increased inefficacy of the Council is the price to be paid for removing the veil under which it has been acting since the end of the Cold War, it may be wiser to continue to live under the illusion of an international legal order where force is strictly prohibited and its use carefully supervised by the Security Council.

[215] *See UN Begins Talks on Realigning Security Council*, INT'L HERALD TRIB., Feb. 20, 2009, *available at* http://www.nytimes.com/2009/02/20/world/americas/20iht-nations.4.20340168.html (discussing the new round of talks about reform of the Security Council that were ignited after the failure of the 2005 Summit to address the reform of the Council). *See also* Francois Murphy, *France, UK want Interim Change to UN Body–Sarkozy*, REUTERS, Jan. 16, 2009, *available at* http://in.reuters.com/article/economicNews/idINIndia-37489320090116 (discussing President Sarkozy's proposal that the only reform within reach is an informal agreement among veto-wielding powers to share their seats, particularly among European members).