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Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics

Part I

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Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

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Executive Summary

To be effective, collective security integrates international legal obligations with great power politics. Convergence of modalities of interpretation of law constrains advancement of competing political interests of great powers. Collective security is functionally synonymous with 'multilateral diplomacy,' or, standing 'conference diplomacy,'¹ and closely related to globalization. It legally binds many states and international organizations through integration of (inter)(trans)national vital interests and obligations. It employs pacific settlement of international disputes prior to Security Council decisions (vice recommendations) to mandate use of collective force to mitigate "threats to global peace and security and aggression."

Collective defense and collective security co-exist as distinct models of international comity, yet may be linked by causality, correlation, and/or coincidence. They may occur concurrently but are not mutually exclusive. The former's threshold is "armed attack" against those states bound by a collective defense treaty, whereas the latter's threshold is "threats to global peace and security and aggression" per the sui generis treaty, the UN Charter.² The former invokes international obligations of fewer states concerning vital interests, arguably 'plurilateral diplomacy'³ whereas the latter is the larger model, 'multilateral diplomacy.'

When considered together, these two legal-politico phenomena form a symbiotic or fused framework that enables diagnostic analysis to more clearly assesses select root issues in sovereign defense and international peace and security. This kind of analysis enables policy makers, advisors, commanders and staff to distinguish defense from security issues during policy and operational planning processes and to predict related risks and risk.

The analysis is most effective when collective security is diagnosed in terms of 'agency and structure.'

1. Introduction

This brief proposes that if debate on sovereign defense and international peace and security is to be (more) deeply informed, then its analysis, be it descriptive, diagnostic, prescriptive or predictive, should occur within a framework of one or more established disciplines. Illustratively, law, political science, science and technology, military doctrine, are the currencies that create the debate's merit.

One such framework is the symbiosis or fusion of collective defense with collective security assessed in terms of the discipline international law. An earlier RAUSI Research Brief assessed select root issues in collective defense grounded in UN Charter Arts 2(4) and 51.⁴ This second brief finishes construction of the framework with diagnostic analysis of select root issues in collective security.

¹ G. R. Berridge, *Diplomacy, Theory and Practice*, 146-167 (Palgrave 2nd ed 2002).

² Blaine Sloan, The United Nations Charter as a Constitution, 1(1) *Pace International Law Review* 61 (1989) <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1002&context=pilr>.

³ William Alan Reinsch, *Plurilateral or Multilateral*, Commentary, Center for Strategic and International Studies (20 July 2020) <https://www.csis.org/analysis/plurilateral-or-multilateral>.

⁴ LJ Howard, *Collective Self-Defense and Armed Attack*, RAUSI Research Brief Volume 1 Issue 1 (November 2020) <https://www.rausi.ca/research-test/258-rausi-research-brief-volume-1-issue-1-collective-self-defense-and-armed-attack>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

The brief's practical use is threefold.

1. It assists policy makers, commanders, advisors and staff in distinguishing differences between defense and security missions and related vital national interests.
2. It reduces ambiguity in interpreting follow-on orders and rules of engagement.
3. It enhances appreciation of problematic legal obligations flowing from international into domestic law in dualist legal systems.⁵

This brief is published in two separate and consecutive parts.

1. **Part I** first overviews conceptual designs of collective security (§2). It then assesses select précis of four events in the evolution of collective security (§3), viz., Peace of Westphalia (1648), Congress of Vienna (1813), failure of the League of Nations (1923-1939), stand up of the United Nations (24 October 1945).
2. **Part II** assesses illustrative applications of international law in the practice of collective security (§4). These include abbreviated case notes and analyses of select UN Security Council (UNSC) Resolutions (S/Res) setting out advisory recommendations and binding decisions per UN Charter (1945)⁶ Ch. VII Arts 39 to 49 concerning 'threats to or breach of the peace or acts of aggression.' Conclusions follow (§5).

2. Designs of collective security

2.1 Introduction

Three versions of designs offer optional diagnoses of root issues in collective security, being authoritative (§2.2), supplemental (§2.3), and alternative (§2.4). Conclusions follow (§2.5).

2.2 Authoritative designs

'Collective security' was first termed per se during sessions of British parliament and conference diplomacy ~1934.⁷ Subsequent definitions and understandings of an effective operational model of collective security are many but seldom settled. Nevertheless, a former Legal Advisor to the British Foreign and Commonwealth Office (1999 – 2006) and member of the International Law Commission (2008 – present) recently (2013) offered one authoritative description. It cites a system whose root center of gravity is gauged in terms of advancement of interests. On the other hand, survival of the state, while perhaps thought the object of collective security, is more the outcome of successful management of interests.

⁵ Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law* 3(3) Vienna Online Journal on International Constitutional Law, (2009) 170
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559002.

⁶ Charter of the United Nations (892 UNTS 119 concluded 26 June 1945 in force 24 October 1945)
<https://www.un.org/en/charter-united-nations/>.

⁷ Alan Sharp, *Collective Security* n 2 EGO (18 June 2013) citing Hansard, Her Majesty's Stationery Office
http://hansard.millbanksystems.com/commons/1934/jul/30/armaments#S5CV0292P0_19340730_HOC_318,
<http://ieg-ego.eu/en/threads/alliances-and-wars/alliances-and-treaties/alan-sharp-collective-security>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

Collective security has been referred to as 'a system, regional or global, in which each state in the system accepts that the security of one is the concern of all and agrees to join in a collective response to threats to, and breaches of, the peace'.⁽¹⁾ [Recently] it has come to have a wider meaning [that also incorporates human rights, viz.,] ... any event or process that leads to large-scale death or lessening of life chances undermines States as the basic unit of the international system and poses a threat to international security.⁽²⁾ So defined [sic], there are six inter-connected clusters of threats with which the world must be concerned. The first include economic and social threats, including poverty, infectious disease, and environmental degradation. The remaining five clusters concern traditional threats to State security, namely inter-State conflict, internal conflict, weapons of mass destruction, terrorism, and transnational organized crime.⁸

This 2013 citation's three footnoted sources reflect recent (2004 to 2013) research into collective security as a global political system. A 2020 update to one great power's approach to collective security is the 2020 hypothesis that a 2021-Biden-post-Trump renaissance in the US' approach to multilateralism will modify collective security. The rebirth includes rebalancing the relative influence of the great powers at the UN and similar fora of conference diplomacy on issues that characterize 21st century collective security, e.g., advancing the Paris Agreement⁹ on climate change, funding the World Health Organization, furthering human rights universally, and renegotiating de-nuclearization and arms control protocols.¹⁰

2.3 A supplemental design; global administrative law

Collective security or multilateralism may be interpreted as a model of globalization. In this model, the emerging regimes of global administrative law provide for obligations to mitigate broader and

⁸ Erika de Wet, Sir Michael Wood, *Collective Security*, Max Planck Encyclopedia of Public International Law (July 2013) https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Herdegen/de_Wet/WiSe_2017/Voelkerrecht_III_Collective_Security/EPIL_Collective_Security.pdf; see also Erika de Wet, Sir Michael Wood, *Collective Security*, Oxford Public International Law (July 2013) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e270> citing (1) Vaughan Lowe, Adam Roberts, Jennifer, Welsh et al, eds, *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, 13 (Oxford UP 2008); (2) UN doc A/59/2005 (21 March 2005) *In larger freedom: towards development, security and human rights for all* ¶¶77-78 <http://undocs.org/A/59/2005>; (3) UN doc A59/565 (02 December 2004) *UN High-Level Panel on Threats, Challenges and Change*, 25 https://www.un.org/ruleoflaw/files/gaA.59.565_En.pdf.

⁹ Paris Agreement (concluded 12 December 2015 in force 04 November 2016) https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

¹⁰ Stewart Patrick, *What a Biden Win Would mean for the Future of Multilateralism* World Politics Review (15 October 2020) https://www.worldpoliticsreview.com/articles/29165/what-a-biden-win-would-mean-for-the-future-of-multilateralism?utm_source=governanceupdate&utm_medium=email&utm_campaign=GlobalGovernance2020Dec21&utm_term=GlobalGovernance; see also Council on Foreign Relations (December 2020) citing *America and multilateralism: Back to the Golden Age | Paris Peace Forum 2020* (12 November 2020) <https://www.youtube.com/watch?v=eS1ccPyAFBA>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

borderless transnational issues through regulatory measures.¹¹ Such issues lie beyond the jurisdiction of any one state's national laws. While perhaps expressed in terms more detailed than international treaties, global administrative law enables the advancement of such issues that thereby further collective security.

2.4 An alternative design; agency and structure

This brief proposes that the authoritative and supplemental designs above may be further diagnosed, in terms of their root elements, 'agency and structure.'¹² Agency and structure is a modeling device used by social scientists to differentiate those certain elements in a system that act independently – as agency – from the remaining elements in the system which form structure. Further, agency's purpose is to act directly upon structure in order to enable structure to achieve structure's goals of collective security. Moreover, agency is not a catalyst that assists structure; the existence of agency is the necessary condition to achieve goals. This model can be employed to diagnose collective security in real terms.

In terms of structure, collective security incorporates two elements in the following priority of impact:

1. the aggregate of states' competing vital national interests and universal transnational interests, all co-dependent in a 21st century globalized society;
2. the individual sovereigns, each:
 - a. who enjoys equal legal standing, as affirmed by the legal principle of sovereignty;
 - b. who possesses international legal personality, which enables states to consent to be bound to international obligations arising from treaties and customary international law;
 - c. whose statehood derives from:
 - i. their satisfying the four obligations per the Treaty of Montevideo (1933);¹³
 - ii. the unilateral (vice collective) recognition of statehood as declared by other states, (vice such recognition's being gained merely through being constituted as a state);¹⁴

¹¹ Benedict Kingsbury, Administrative Governance; What, How, and Who Should Public International Law Regulate? New Problems of Global Administrative Governance (UN Audio Visual Library 20 August 2008) https://legal.un.org/avl/lis/Kingsbury_IL.html

¹² Colin Hay, *Globalisation as a Problem of Political Analysis: Restoring Agents to a 'Process without a Subject' and Politics to a Logic of Economic Compulsion* 15(3) Cambridge Review of International Affairs 379 (2002); see also Colin Hay, *What Place for Ideas in the Structure-Agency Debate? Globalisation as a 'Process Without a Subject'* Web Site for Critical Realism (2001) http://www.criticalrealism.com/archive/cshay_wpisad.html#:~:text=Globalisation%20as%20a%20'Process%20Without%20a%20Subject',-By%20COLIN%20HAY&text=Ideas%20are%20invariably%20the%20spectre,debate%20on%20structure%20and%20agency.

¹³ Treaty of Montevideo (1933) (165 LNTS 19 concluded 26 December 1933 in force 26 December 1934) <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>

¹⁴ John Dugard, *International Law: A South African Perspective* (Juta 3rd edn 2005) 90-101.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

- iii. the “first general principle of law recognized by civilized nations,”¹⁵ i.e., “the principle of self-preservation;”¹⁶

In terms of agency, collective security consists of international organizations that:

1. are not states but are the product of states' treaty agreements, and hence agents of a unitary body of states;
2. possesses international legal personality and have legal standing in the international order;
3. exercise powers as permitted (delegated or implied) by states;¹⁷
4. modulate the systemic diplomacy occurring among states concerning their interests.

2.5 Conclusion; a proposed design of collective security

The brief proposes the following set of norms.

Collective security functions as agency and structure. It advances the global panorama of issues. It incorporates the lawful conduct of all parties forming the international order. It requires those parties to satisfy different international obligations. It is an enduring phenomenon. The degree to which that norm is followed determines the degree of international peace and security.

This proposition will be confirmed or refuted during the review of select events in international affairs assessed in the next sections of the brief.

In contrast, and to complete the combined framework of analysis of sovereign defense and international peace and security, collective defense is narrow in scope, includes only the parties to the dispute, and is a temporary phenomenon lasting until the dispute is settled. It is not mutually exclusive from collective security and may have a relationship with collective security that is based on causality, correlation, or coincidence.

3. Evidence to confirm or refute the proposed design

3.1 Introduction

No one global understanding of collective security exists. Western models of collective security differ from Asian models. What constitutes a threat to international peace and security varies by e.g.,

¹⁵ Statute of the International Court of Justice (concluded 18 April 1946) (ICJ Statute) Art 38(1) (c) annexed to the Charter of the United Nations (892 UNTS 119 concluded 26 June 1945 in force 24 October 1945). <https://www.icj-cij.org/en/statute>.

¹⁶ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 29-104 (Cambridge UP 1953, 2006).

¹⁷ Henry G. Schermers and Neils M. Blokker, *International Institutional Law* (Martinus Nijhoff 4th ed 2003), §206-§236.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

national and cultural values, and by its character – from acts of terrorism by non-state actors to development of arsenals of nuclear and cyber weapons of certain states.¹⁸

One efficient approach to settling many kinds of intractable issues is to enlarge the issues. Assessing the effectiveness of collective security over its four-hundred-year history is one such issue. Enlarging the issue by tracking four select events during the evolution of collective security along two axes, politico-diplomacy (3.2) and legal (3.3) further assists the task.

3.2 Politico-diplomacy track

3.2.1 Peace of Westphalia 1648

Some analysts interpret collective security as the outcomes of the hierarchical ranking of states that emerged from the Peace of Westphalia (1648),¹⁹ the instrument concluding the Thirty Years War. The agreement settled a complex of disputes among German Catholics and Protestants, European royal families such as the Austro-Spanish Hapsburgs and French Bourbons, the Holy Roman Empire, and assorted feudal regimes and principalities. It produced an embryonic international order of nation states, one of the elements of structure.

However, agency and remaining elements of structure were absent, as might be expected in the initial stage of evolution of collective security. Further, as the profile of the many envoys to the Congress of Vienna were to illustrate, the demographic of the international order was not exclusively that of states.

3.2.2 Congress of Vienna 1815

One hundred sixty years later, the Congress of Vienna (1814 – 1815) concluded the Napoleonic Wars. Delegates included those from the four great powers, Austria, Great Britain, Prussia and Russia. In terms of structure, the diplomatic conference yielded new territorial jurisdiction to Russia, concluded the 300-state Holy Roman Empire and shaped a 30-state Prussia that subsequently grew to a federated Germany. In terms of agency, the Congress introduced the Concert of Europe, a system of periodic congresses to settle disputes among European states. However, the system lacked international personality, permanency and procedural rules, and was eclipsed in 1820 by ad hoc meetings of the great powers until 1878. Outputs and outcomes of the great powers' state practice during Pax Britannica (1815 – 1914) tabled the costs and consequences of scaled armed conflict, producing casualties in the tens of millions. They set initial groundwork for nascent states' contentious but eventually successful pursuit of self-determination during the latter half of the twentieth century. As structure evolved, effective agency had yet to take effect.

¹⁸ Manfred Hack, *Collective Security in Asia*, Dialogue on Globalization Briefing Papers (May 2004) <https://library.fes.de/pdf-files/iez/global/02012.pdf>.

¹⁹ Beatrice de Graaf, Christoph Kampmann, *The Peace of Westphalia also had its dark side* (EurekAlert, American Association for the Advancement of Science 19 September 2018) https://www.eurekalert.org/pub_releases/2018-09/coe-po091918.php.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

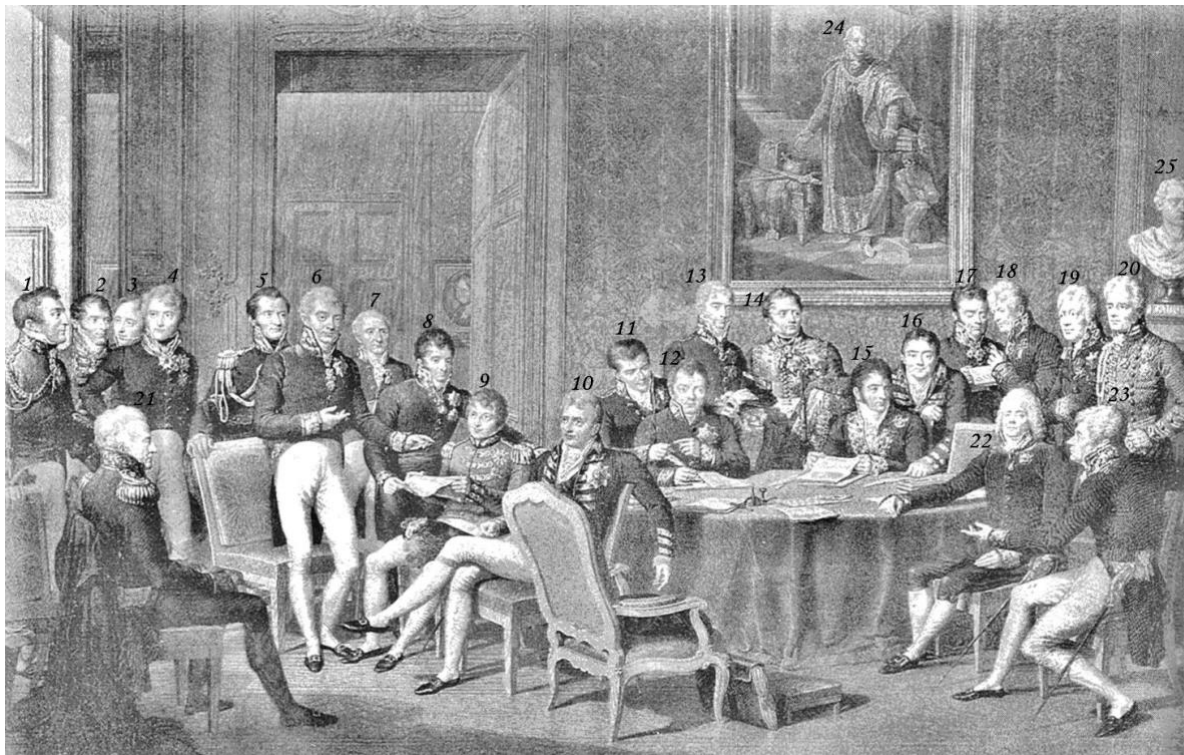


Fig. 1: Vienna Congress in the house of Prince Metternich

The Duke of Wellington's assuming lead of the British delegation fr. Castlereagh 03 February 1815

by Jean Baptiste Isabey (1767-1855); pen and ink with wash, 84.5 x 107.0 cm

1. Duke of Wellington (UK); 2. Joaquim Lobo da Silveira (Portugal); 3. Antonio Saldanha da Gama (Portugal); 4. Count Löwenhielm (Sweden); 5. Jean de Noailles (France); 6. Prince von Metternich (Austria); 7. Dupin the Elder (France); 8. Count Nesselrode (Russia); 9. Duke de Palmela (Portugal); 10. Viscount Castlereagh (UK); 11. Duke of Dalberg (France); 12. Ignaz Heinrich von Wessenberg (Confederation of the Rhine); 13. Andreas Razumovsky (Russia); 14. Charles Stewart, 3rd Marquess of Londonderry (UK); 15. Pedro Gomez Labrador, Marquis of Labrador (Spain); 16. Richard Le Poer Trench, 2nd Earl of Clancarty (UK); 17. Wacken (Recorder); 18. Friedrich von Gentz (Congress Secretary); 19. Baron Friedrich Wilhelm Christian Karl Ferdinand von Humboldt (Prussia); 20. William Schaw Cathcart, 1st Earl Cathcart (UK); 21. Prince Karl August von Hardenberg (Prussia); 22. Talleyrand (France); 23. Count Gustav Ernst von Stackelberg (Russia); 24. probably Francis II (Austria), Holy Roman Emperor; 25. Count Wenzel Anton Kaunitz d. 1794 (Austria).²⁰

Notably, both Westphalia and Vienna lacked an independent and rules-based operational agency to effect the outputs and intended outcomes as negotiated by states during their two respective epochs, which accounted in part for their eventual shortcomings. Post-Vienna disputes among great powers and lesser powers became increasingly complex and globalized as national socio-economic models became increasingly internationalized. Illustratively, in the Crimean War (1853 – 1856) an Ottoman Empire – UK alliance stopped Russia from expanding its territory south, as the UK's vital national interests were commercial trade with India and the Middle East.

Further, the two Opium Wars (1839 – 1842; 1856 – 1860) pitted European powers, UK, Portugal, and later France and the US, against the Qing dynasty. Following the British East India Company's

²⁰ (c) Jan Losenicky, https://commons.wikimedia.org/wiki/File:Vienna_Congress.jpg; Held at The Royal Collection Trust, UK.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

scaled and belligerent imposition of India-sourced opium throughout Chinese society, China attempted to repel it by modest use of force. As a reprisal, a British Expeditionary Forces, including 44 ships, overwhelmed China's meagre defenses. Rapacious conditions of China's surrender followed, e.g., unconscionable terms of trade levied against China, and de jure colonization of Hong Kong. Macau suffered similar treatment from Portugal. Subsequently, Russia compelled China to cede its north east territory, including Vladivostok. The Boxer Rebellion (1899), which coalesced Chinese opposition to such pervasive foreign influence, was crushed by forces from Austria, France, Germany, Italy, Russia and the UK.

Outcomes of the Opium Wars continue to shape a great power's approach to 21st century collective security amid maturing globalization, a settled structure and a robust agency in the form of the UNSC.



Fig. 2: The 18th (Royal Irish) Regiment of Foot storming of the forts of Amoy (present day Xiamen, Fujian province, China) 26 August 1841 by Michael Angelo Hayes (artist), James Henry Lynch (lithographer), watercolor²¹

During the century of Pax Britannica, ad hoc diplomatic conferences concluded international instruments built on the progressive development of international law. The Geneva Convention

²¹ Held at the Anne S.K. Brown Military Collection. Brown Digital Repository, Brown University Library, <https://repository.library.brown.edu/studio/item/bdr:230295/>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

(1864)²² was replaced in 1906²³, and later expanded in 1928, 1929, 1949 and 1977. The first Hague Conference (1897)²⁴ contained four conventions and three declarations, the second conference (1907)²⁵, thirteen conventions. These instruments provided largely for the conduct of combatants during armed conflict, an expected output as the international order itself began to learn of and appreciate the scale and gravity of recent armed conflict and its costs in life and humanity. The international order left unsettled the grounds on which armed conflict could start; the first conventions of each of the two Hague Conferences only 'provided for pacific settlement of international disputes.' In terms of the proposition (§2.4), while structure continued to mature and settle following 1918, future scaled and permanent conference diplomacy, as agency, would have to be stood up in order to invoke effective treaty law to mitigate this shortcoming.

Notwithstanding a gentle trend toward transparent multilateral diplomacy, great powers also found it suitable to conduct bi-lateral diplomacy in secret. Illustratively, anticipating the conclusion of WWI, the Sykes – Picot Agreement (1916)²⁶ delimited British and French mandates in Iraq and Syria in advance of the favorable outputs and outcomes of treaties that would conclude WWI. However, the agreement was kept secret from another British envoy (High Commissioner of the UK to Egypt, McMahon) who was negotiating for Arab self-determination.²⁷ Transparent agency was still needed.

²² Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva (22 Stat. 940; Treaty Series 377 concluded 22 August 1864 in force 22 June 1865) <https://ihl-databases.icrc.org/ihl/INTRO/120>; https://avalon.law.yale.edu/19th_century/geneva04.asp.

²³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva (06 July 1906 in force 09 August 1907) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aacc125641e0038bfd6.9e45>.

²⁴ *The Laws of War* (Goldman Law Library, Yale Law School) https://avalon.law.yale.edu/subject_menus/lawwar.asp.

²⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (concluded 18 October 1907 in force 26 January 1910) (International Committee of the Red Cross) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aacc125641e0038bfd6>.

²⁶ The Sykes-Picot Agreement (1916) (Ratified 09 and 16 May 2016) (Goldman Law Library, Yale Law School) https://avalon.law.yale.edu/20th_century/sykes.asp.

²⁷ Gonzague Orsolin, *Sykes-Picot agreements: A double negotiation resulting in a betrayal* (Université catholique de Louvain 2016) http://global-initiativ.weebly.com/uploads/4/8/0/4/48042567/sykes-picot_agreements.pdf.



Fig. 3: Colonel Sir Tatton Benvenuto Mark Sykes, 6th Baronet



Fig. 4: François Marie Denis Georges-Picot

As per the outputs and outcomes of the Opium Wars, those of the Sykes – Picot Agreement (1916) shaped foreign influence in extra-territorial jurisdictions but did not advance any model of collective security. Such influence continues to impact multi-lateral diplomacy in 21st century collective security amid maturing globalization, settled structure and robust agency.

3.2.3 Versailles and the Covenant of the League of Nations 1918

US President's Wilson's 14 Points (January 1918)²⁸ shaped outputs in anticipation of the WWI peace treaties of 1919. Notably, the first point provided for "open covenants ... openly arrived at..." with the presumed intent to avoid intractable political situations that would otherwise likely follow, similar to those per the Sykes – Picot Agreement two years earlier. Transparent diplomacy would appear to be a necessary condition of collective security, one enabled by the specific agency that was expressly cited in Wilson's fourteenth point.

The fourteenth point was among the first expressed models of 20th century collective security to cite agency; "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." The Covenant of the League of Nations (1919)²⁹ was amended in 1924 and 1934. It provided for a standing institution, including an Assembly, Executive Council, Secretariat,³⁰ and, the

²⁸ President Woodrow Wilson's Fourteen Points (08 January 2018) (Goldman Law Library, Yale Law School) https://avalon.law.yale.edu/20th_century/wilson14.asp.

²⁹ The Covenant of the League of Nations (concluded 28 June 1919 in force 10 January 1920, as amended to 1934) (Goldman Law Library, Yale Law School) https://avalon.law.yale.edu/20th_century/leagcov.asp

³⁰ Supra n 29 Arts 2 – 6.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

Permanent Court of International Justice with its own statute.³¹ Such organs, together with others, are extant in the League's successor, the United Nations.

However, the Covenant did not provide the League with provisions for enforcement of its rules. The League was exclusive in admitting membership, thus denying diplomatic recourse to remaining states. It was focused principally on international armed conflict, rather than employing a holistic approach that would address core reasons for armed conflict arising in the first place, e.g., shortcomings in socio-economic rights, human rights, political and cultural rights.³² Agency had begun in form but not yet in substance.

Hence, the legally grounded framework contrasted with the overriding pragmatism of realpolitik. Great power politics overtook provisions of the Covenant and the sixteen peace treaties that settled WWI,³³ inter alia the Treaty of Versailles (1919)³⁴ concerning Germany and the Treaty of Sèvres (1920)³⁵ concerning the Ottoman Empire.

*Confidence in the League of Nations' ability to deter aggression ... was ... harmful [by] directing attention away from the need to prepare for the inevitable aggression when it came ... [B]elief in the ability of rules and institutions to deter aggression [was] abstract, utopian, and [distanced] from ... the application of power by states to fulfill their interests."*³⁶

Sustained appetites post-1918 of vanquished states of WWI to regain their losses in sovereign territory prevailed over victors' success. Illustratively, the Treaty of Sèvres (1920) *disassembled much of the 1914 Ottoman Empire*, recognised the right to self-determination for Armenians and Kurds, and expanded Greek territorial jurisdiction eastward to the Anatolian west coast and the Aegean islands commanding the Dardanelles. Subsequently, however, Turkey's new nationalist leader, Mustafa Kemal (Atatürk), repudiated the Treaty of Sèvres and negotiated the Treaty of Lausanne (1923)³⁷ The latter treaty restored to Turkey its jurisdiction over parts of its territory ceded

³¹ Supra n 29 Art 14; see also Statute of the Permanent Court of International Justice (16 December 1920) <https://www.refworld.org/docid/40421d5e4.html>.

³² Robert Kolb, trans by Katherine Del Mar, *An Introduction to the Law of the United Nations* (Hart 2010) 5-20.

³³ Agence France-Presse, *WWI Centenary: 7 peace treaties that ended the first world war, from Versailles to Lausanne* (South China Morning Post 11 November 2018) <https://www.scmp.com/yp/discover/lifestyle/features/article/3058235/wwi-centenary-7-peace-treaties-ended-first-world-war>.

³⁴ Treaty of Peace with Germany (concluded 28 June 1919 entered into force 10 January 1920) <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>.

³⁵ The Treaty of Peace between the Allied and Associated Powers and Turkey Signed at Sèvres (concluded 10 August 1920) https://www.armenian-genocide.org/Affirmation.236/current_category.49/affirmation_detail.html.

³⁶ Martti Koskeniemi, *The Place of Law in Collective Security* 17 (2) Michigan J Intl L. (1996) 455, 455.

³⁷ Treaty of Peace with Turkey Signed at Lausanne (concluded 24 July 1923).

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

earlier, and its Art 20 recognized Britain's sovereignty over Cyprus. Fig. 5 compares Turkey's territory per the Treaties of Sèvres (1920) and Lausanne (1923).



Fig. 5: Turkey's territory per the Treaties of Sèvres (1920) and Lausanne (1923)



Fig. 6: Turkey post Treaty of Lausanne (1923)

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

International and non-international armed conflicts that have prevailed in this region subsequent to 1919 confirms the arguable ambivalence and / or naiveté of victor states at that time towards establishing a legally grounded regime of collective security. It suggests they still retained more confidence in great power politics than in international law in maintaining international peace and security. Such conflict may yet rise to a level of 'threats to and breaches of the peace and acts of aggression' that draw binding decisions from the UNSC under Ch. VII.

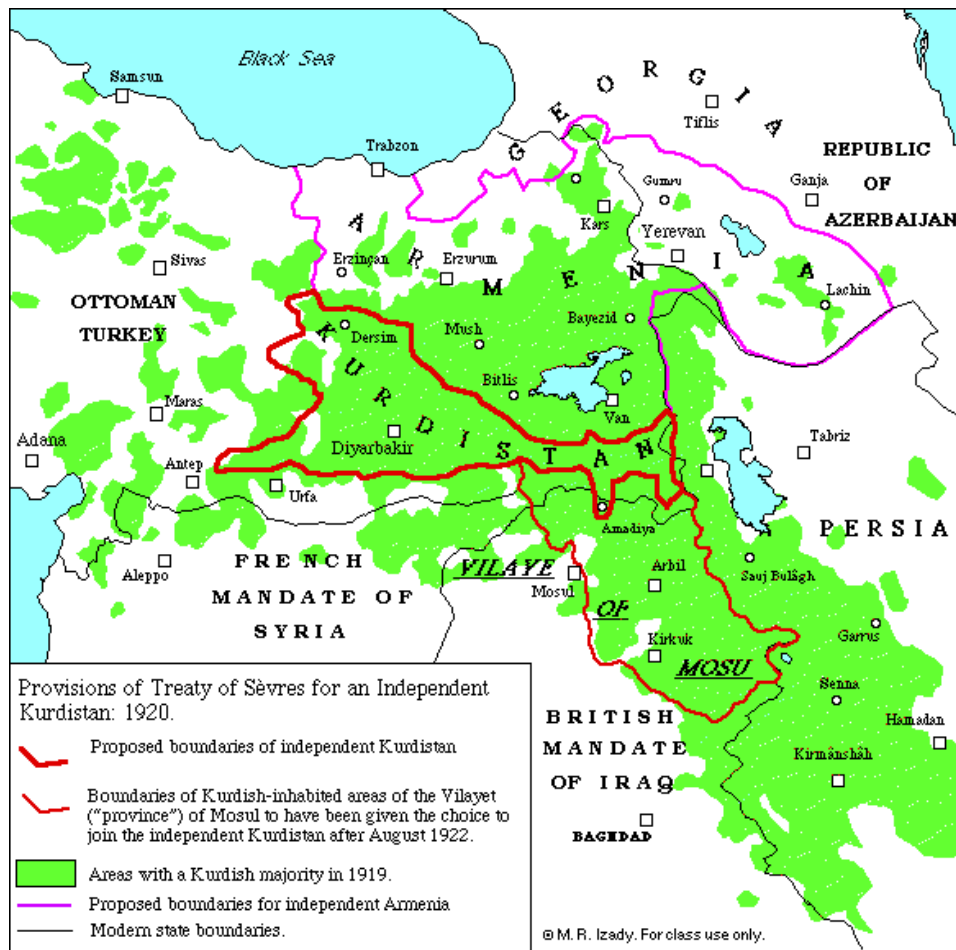


Fig. 7: Provisions of Treaty of Sevres for Independent Kurdistan: 1920³⁸

³⁸ © Nabaz Nawzad, *Sykes–Picot to be Blamed for the Century of Exterminations* (The times of Israel 17 May 2016) <https://blogs.timesofisrael.com/sykes-picot-to-be-blamed-for-the-century-of-exterminations/>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard



Fig. 8: Outcomes and shortcomings of Sykes – Picot, Versailles, League of Nations and of a general lack of collective security³⁹

Although the US-Wilson Administration was instrumental in concluding the Treaty of Versailles and the Covenant of the League of Nations, the US Senate refused to ratify both, perhaps on grounds of perceived risk of loss of sovereignty, an issue that continues (2021) to preclude the US' signing the Rome Statute⁴⁰ providing for the International Criminal Court.⁴¹ However, later noting the lack of

³⁹ Yaroslav Trofimov, illus.by Luci Gutierrez, *Would New Borders Mean Less Conflict in the Middle East? The region is living with the combustible legacy of states artificially carved from the remains of the Ottoman Empire* (Wall Street Journal 10 April 2015) <https://www.wsj.com/articles/would-new-borders-mean-less-conflict-in-the-middle-east-1428680793>.

⁴⁰ Rome Statute of the international Criminal Court (1998) (2187 UNTS 3 concluded 17 July 1998 in force 01 July 2002) <https://www.icc-cpi.int/nr/rdonlyres/add16852-ace9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>

⁴¹ Anthony Dworkin, *Why America is facing off against the International Criminal Court* The US long ago took umbrage at the – unlikely – prospect that the ICC could prosecute Americans. The consequences of this stance are now revealing themselves, European Council on Foreign Relations (08 September 2020) https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

politico-legal effect of both instruments, the US led negotiations seeking to redress the League's shortcomings. Yet, of the merely three articles comprising the ensuing General Treaty for Renunciation of War as an Instrument of National Policy (1928)⁴² (Kellogg-Briand Pact), only two articles were operative, and those too broadly drafted viz.,

The High Contracting Parties...condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy...[and] agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.



Fig. 9: Frank B. Kellogg
US Secretary of State, 1925 – 1929

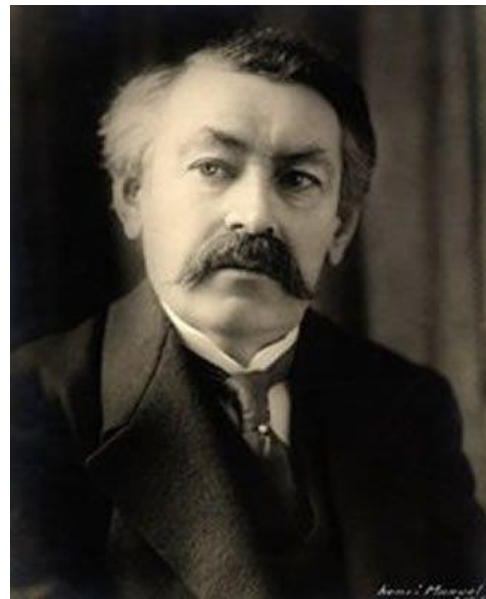


Fig. 10: Aristide Pierre Henri Briand
Statesman and France's envoy to the Pact

The Pacts' aspirational objects and purposes unaccompanied by enforcement provisions, and its negotiations conducted outside any agency despite the presence of structure, condemned the Pact as a failure in collective security, evidenced by events in the 1930s. However, the Pact may have usefully served as a rough first draft for the future UN Charter's Art 2(4) that express prohibited initial use of force except in self-defense, accompanies with enforcement provisions in Charter Ch. VII.

⁴² General Treaty for Renunciation of War as an Instrument of National Policy (concluded 27 August 1928 in force 24 July 1929) <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0732.pdf>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

3.2.4 UN Charter 1945

The Potsdam Agreement (1945) concerned the allied power's shared occupation of Germany⁴³ while the five Paris Peace Treaties (1947) concerned five of Germany's allies, Bulgaria, Finland, Hungary, Italy and Romania. "A peace treaty with Austria was not concluded until 1955, while bitter Allied disputes over the division of Germany during the Cold War prevented the conclusion of a peace treaty with Germany until German reunification in 1990."⁴⁴

Irrespective of these diplomatic manoeuvres in structure, agency finally materialized in substance through the UN Charter's provisions for its six, principal organs of the UN, viz., General Assembly, Security Council, Economic and Social Council, Trusteeship Council, the International Court of Justice, and the Secretariat, accompanied with a fluid number of specialized agencies, such as the World Bank, comprised of the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), all contributing to the calculus of collective security. The Charter has shaped the ensuing political settlement of WWII. However, assessment of the UN similar to that post-WWI persists.

*Nobody seems to believe anymore [at time of writing, 1987] in the chances of collective security; because of its constraining character, it is too contrary to the freedom of judgement and action implied by sovereignty; and ... it is in conflict with the imperatives of prudence in the nuclear age, in which the localization or insulation of conflicts appears far preferable to their generalization.*⁴⁵

Nevertheless, the Charter is a recognized source of international treaty law⁴⁶ and provides for the UN. The UN satisfies the legal definition of an international organization, given doctrinal necessity for an executive organ, i.e., UNSC.⁴⁷ Powers of the UNSC derive from doctrines of implied and delegated powers, a secondary source of law as are findings of the International Court of Justice (ICJ). In the *Reparations Advisory Opinion* (1949),⁴⁸ the ICJ determined the UN possesses international legal personality, enabling it to assume international legal obligations. It also enabled the UNSC to expect satisfaction of binding obligations undertaken by UN Member States, e.g., those arising from its decisions concerning collective security per Charter Ch. VII, *Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression*.

The Charter does not cite 'collective security' expressly, yet it cites 'security' 138 times in its Preamble and 105 operative articles. Hence, the Charter's object and purpose, de facto 'to provide

⁴³ Protocol of the Proceedings of the Berlin Conference (concluded 01 August 1945) https://www.nato.int/ebookshop/video/declassified/doc_files/Potsdam%20Agreement.pdf.

⁴⁴ Paris Peace Treaties (concluded 10 February 1947), Oxford Reference <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306594>.

⁴⁵ Stanley Hoffman, *Is There an International Order?* in Janus and Minerva, Essays in the Theory and Practice of International Politics (Routledge 1987) 85, 117, cited in Koskiniemi supra 16, 456.

⁴⁶ Supra n 15 Art 38(1) (a).

⁴⁷ Supra n 17.

⁴⁸ Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174 <https://www.icj-cij.org/public/files/case-related/4/004-19490411-ADV-01-00-EN.pdf>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

for collective security,' must derive from interpretation of its text. One of the bodies of secondary rules that shape primary rules in international law, the Vienna Convention on Treaties (1969) (VCLT)⁴⁹ Art 31 'General rule,' cites 'ordinary meaning' as means to interpret treaty. However, effectiveness in collective security becomes an omnibus model whose meaning must draw also on VCLT Art 32 'Supplementary means,' i.e., intent and conclusions of treaty drafters per the Charter's initial travaux préparatoires (1942-1945). Further, its meaning derives from states' differing protocols to enact international law into their national legislation and circumstantial context,⁵⁰ and from state practice following treaty ratification.⁵¹

State legal practitioners (Australia) ask, 'are Charter Ch. VII powers ultra vires and acquire legal effectiveness⁵² via an 'extra-legal measures model'?'⁵³ If true, Ch VII would lack both the objective character of settled state practice and the subjective expectation by states of being so, the two elements necessary for custom. Hence, Ch. VII would not be treaty law declaratory of custom. However, the ICJ determined in *Nicaragua* that Charter Art 2(4), which prohibits use of force to settle disputes, remains treaty law while also and distinctly being declaratory of custom.⁵⁴ Thus, treaty law may be interpretable as declaratory of custom but is so on an article-by-article vice treaty-as-a-whole basis. Hence, a state's subsequently selecting a modality of interpretation of law introduces one more subjective element into the determination of international law and reinforces the principle of sovereign supremacy. Arguably, Ch. VII may be considered both treaty and declaratory of custom.

⁴⁹ Vienna Convention on the Law of Treaties (1969) (1155 UNTS 331) concluded 23 May 1969 in force 27 January 1980) https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁰ *Olieificio Bestetti v Can Grain Ltd* (1979) 63 Riv. Di Diritto Internaz (1980) 529 et seq; *Parzinger e Nowak v Provincia autonoma di Bolzano e Comune di renon* (1986), 71 Riv. Di Diritto Internaz (1988) 426, cited in Luigi Sbolci, *Supplementary Means of Interpretation*, in Enzo Cannizzaro, ed, *The Law of Treaties; Beyond the Vienna Convention* (Oxford UP 2011) 145 nn 1-2.

⁵¹ Arbitral Award (17 July 1965), *Interpretation of the Air Transport Services Agreement between the United States and Italy*, XVI Reports of International Arbitral Awards (RIAA) (2006) 94; *Competence of the International Labour Organization in Regard to International Regulations of the Labour of Persons Employed in Agriculture*, Permanent Court of International Justice (PCIJ) Advisory Opinion (12 August 1922), Series B No 2, 39; *International Status of South West Africa* Advisory Opinion (11 July 1950) ICJ Rep (1950) 135-6; *Anglo-Iranian Oil Co (United Kingdom v Iran)* ICJ Rep 1952 Preliminary Objections, Judgment, 107, cited in Luigi Sbolci, *Supplementary Means of Interpretation*, in Enzo Cannizzaro, ed, *The Law of Treaties; Beyond the Vienna Convention* (Oxford UP 2011) 159-160 n 90.

⁵² *The Effectiveness of International Law*, ILA 76th Biennial Conference / ASIL 108th Annual Meeting (07-12 April 2014 Washington) https://www.asil.org/sites/default/files/annualmeeting/pdfs/2014_Program.pdf.

⁵³ Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, 26 (3) *European JIL* (2015) 671-698, citing Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 *Yale Law Journal* (2003) 1096, 1101.

⁵⁴ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter; Evolutions in Customary Law and Practice* (Cambridge University Press 2010), 511-550, and citing generally e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits Judgment ICJ Rep 1986, 14.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

Lastly, some analysts conflate collective defense with collective security,⁵⁵ understandably given Charter Art 51 provides for collective defense yet falls under Ch VII providing for collective security.

In sum, this framework of progressively developing primary- and secondary-sourced law is reinforced by the one subsidiary source of international law, “general principles of law recognized by civilized nations.”⁵⁶ The first principle, “the principle of self-preservation”⁵⁷ synthesizes law with realpolitik. International law provides a basis for collective security and effectiveness of international law rests on conditional consent of sovereigns. Law is not the exclusive determinant of state practice and cannot hold a monopoly on effecting international peace and security. However, a short overview of law informs the debate.

3.3 International law track

Contemporaneous with the foregoing evolution of politico-diplomatic doctrine that eventually derived a framework of collective security is the progressive development of public international law. Law does not describe or define versions of collective security but offers enabling conditions through two evolutions of law.

Hugo Grotius, a Dutch legal philosopher, drafted the seminal *De Jure Belli ac Pacis* (*The Rights of War and Peace*) (1625),⁵⁸ which advanced that a framework of natural law, grounded in ethical and moral righteousness and the ‘just cause of war,’ guided the conduct of states. Arguably, natural law enabled a degree of collective security throughout the international order concurrent with the conclusion of the Peace of Westphalia (1648) twenty-three years later.

Natural law was subsequently eclipsed by positive law, advanced by e.g., Jeremy Bentham’s *Principles of International Law* (1835)⁵⁹ and John Austin (d. 1859). Doctrinally, law emanates from commands of the sovereign and states’ legislatures and through international comity and conference diplomacy. As the international order matured through 1800s, governance structures comprising the international order also matured to be and become recognized sources of law enabling states to exercise jurisdiction and creativity in drafting international instruments to advance vital national interests and collective security.

However, proliferation of treaties and fragmentation of international law invite competing modalities of legal interpretations by an ever-growing international order of states, international organizations, non-state actors, transnationalism and epistemic influencers. Exponential growth of information,

⁵⁵ Anna Rulska, *The Tale of Two Narratives: NATO as a Collective Defense and Collective Security* Institution (doctoral dissertation 2010)

https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1089&context=gpis_etds.

⁵⁶ *Supra* n 15 Art 38(1) (c).

⁵⁷ *Supra* n 16, 29-104.

⁵⁸ John Yoo, *Hugo Grotius, De Jure Belli ac Pacis* (1625) (Hoover Institution 06 February 2019) <https://www.hoover.org/research/hugo-grotiuss-de-jure-belli-ac-pacis-1625>.

⁵⁹ *Jeremy Bentham* (Stanford Encyclopedia of Philosophy 28 January 2019) <https://plato.stanford.edu/entries/bentham/>.

Collective Security: a Practitioner's Brief on Agency and Structure in International Law and Great Power Politics, Part I

By LJ Howard

increasingly complex humanitarian emergencies, and opportunistic statism all challenge the likelihood of success in global convergence on the meaning of and means to sustain collective security and forestall its nemesis, state aggression.

4. Closing note

Part II of this brief will be published next month. It will conclude a diagnostic analysis of collective security by assessing UN Charter (1945) and the politico-legal calculus of the Security Council.

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