THE POSITION OF THE EUROPEAN SECURITY ARCHITECTURE WITHIN THE INTERNATIONAL LEGAL ORDER

NIGEL D WHITE*

Abstract

With the universal architecture for peace and security centred upon the UN Charter of 1945 and the Non-Proliferation Treaty (NPT) of 1968 being built on great power foundations, there are manifest problems when there is no consensus amongst those great powers in the face of existential threats to peace and security. The question considered in this article is whether the European Security Architecture (ESA), consisting of the North Atlantic Treaty Organization (NATO), the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU), can forge a different and distinct path that can provide security for States and individuals while remaining within the international rule of law. In contrast to the executive-dominated universal collective security system, power and authority in the ESA are much more diffuse, fluid and overlapping, with a mixture of foundational documents ranging from the constitutional/supranational (the EU), contractual (NATO) and political (the OSCE), as well as a range of overlapping competences, powers and practice in: peaceful settlement; the promotion of human rights and democracy; the enforcement of fundamental rules of international law by non-forcible measures; collective defence commitments; crisis management; and nuclear deterrence. The ESA, though less constitutional in a hierarchical sense when compared to the UN/NPT system, promises greater connection between security and law, but is it capable of deterring and confronting naked aggression and other egregious violations of international law?

Keywords: European Security Architecture; collective security; collective defence; international law; OSCE; NATO; EU

* Professor of Public International Law, University of Nottingham, UK. E-mail: nigel.white@nottingham.ac.uk

1. INTRODUCTION

The post-Second World War settlement was based on great power domination of both collective security (in form of the permanent membership of the UN Security Council embedded in the UN Charter 1945) and of the most powerful weapons (in the form of nuclear-weapon-State (NWS) status granted by the Non-Proliferation Treaty (NPT) 1968). The constitutional order for collective security created in 1945 by the victorious States and their allies gave preference to security over law and, in practice, has primarily been concerned with great power security governance.

With the universal architecture for peace and security being built on great power foundations, there are manifest problems when there is no consensus amongst those States in the face of existential threats to peace and security, sometimes coming from one of the great powers themselves. The question considered in this article is whether the European Security Architecture (ESA), consisting of the North Atlantic Treaty Organization (NATO), the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU), can forge a different and distinct path that can provide security for States and individuals while remaining within the international rule of law. The obstacles are clearly significant given the constitutional settlement of 1945 (supplemented in 1968), which built an overarching universal constitution governing collective security on great power foundations. Any regional system or sub-system of collective security that either challenges or does not accord with the conception of collective security as embodied in the UN Charter and NPT is likely to be judged as operating outside the international legal order, even though such a judgement is based on the acceptance of a universal system in which great power domination can prevail over law.

In contrast to the executive-dominated universal collective security system, power and authority in the ESA are much more diffuse, fluid and overlapping, with a mixture of foundational documents ranging from the constitutional/supranational (the EU), contractual (NATO) and political (the OSCE), as well as a range of overlapping competences, powers and practice in: peaceful settlement; the promotion of human rights and democracy; the enforcement of fundamental rules of international law by non-forcible measures; collective defence commitments; crisis management; and nuclear deterrence. The ESA, though less constitutional in a hierarchical sense when compared to the UN/NPT system, promises greater connection between security and law, but is it capable of deterring and confronting naked aggression and other egregious violations of international law?

The article is divided into six sections, which explore: the universal collective security system and its underpinning purpose of providing for great power security governance; the ESA and whether it can better provide peace through law than the UN/NPT system; the OSCE and whether it can provide the basis of a European security community; NATO's movement from collective defence organization to collective security organization and back again as the threat from Russia grows; and the EU's ambiguous role in the ESA, which sees it not as a military power but an economic one attempting to enforce the rule of law through sanctions. The aim is to deconstruct the universal system of collective security embodied in the UN Charter and NPT, to reveal it to be one not based on law but on great power security governance, and then to ask the question of whether the ESA can provide a more legitimate form of security based on law, even if it is one limited by regionalism. It is argued that the disparate-appearing

grouping of organizations making up the ESA has the potential to do this, but that potential remains far from realized.

2. UNIVERSAL COLLECTIVE SECURITY OR GREAT POWER SECURITY?

According to David Held, the post-1945 world order has been characterized by the emergence of a "complex architecture of global governance".[1] However, the increase in transnationalism and intergovernmentalism, which have been elements of this development, has been uneven and is least developed in the area of peace and security, where sovereignty and great power politics still dominate. "Dominant interests have, in short, continued to trump the reform of security arrangements and multilateral approaches to security challenges",[2] centred around the post-1945 consensus in the five permanent (P5) members of the UN Security Council and in their status as NWS under the NPT. However, Held and others warn us not "to underestimate the successes wrought by the UN system and the geopolitical stability that followed its foundation …. [t]he decades that followed the Second World War were marked by peace between the great powers, although there were many proxy wars fought out in the global South".[3] Held points to both the UN and nuclear deterrence "as essential to containment of great power rivalry in the postwar period".[4] He also points to NATO and European integration that "[t]ogether … with the UN at the centre, constituted a postwar security order that effectively put an end to the great scourge of the modern era – conflict between the great powers".[5] The security system, however, was not designed to "adjust organically to fluctuations in national power …. [i]nstead, the power of the original set of leading states is firmly embedded in the institutions",[6] exemplified by the continued dominance of both the UN and the NPT by the US, Russia, China, the UK and France, even though military, economic and nuclear power now extends beyond that group of States. The failure, sometimes inability, to achieve "significant coordination and compromise" to tackle increasingly complex security problems, concerning both human and state security,[7] has led to "gridlock" in the UN/NPT system of collective security.[8]

Writing on the UN Charter in 1946, Brierly presciently wrote on the effect of the UN Charter: "instead of limiting the sovereignty of States we have actually extended the sovereignty of the Great Powers, the only States whose sovereignty is a still a formidable reality in the modern world".[9] Although there may be justifiable objections to the continued designation of "Great Power" status, particularly to European powers (France and the UK), the issue is not whether

---

[1] HELD, "The Diffusion of Authority", in WEISS and WILKINSON (eds.), *International Organizations and Global Governance*, London, p. 60 ff., p. 67.
[2] *Ibid.*
[3] HALE, HELD and YOUNG, "Gridlock: From Self-reinforcing Interdependence to Second-order Cooperation Problems", Global Policy, 2013, p. 223 ff., p. 225. See further HALE, HELD and YOUNG, *Gridlock: Why Global Cooperation is Failing when We Need it Most*, Cambridge, 2013.
[4] HALE, HELD and YOUNG, *cit. supra* note 3.
[5] *Ibid.*
[6] *Ibid.*, p. 227.
[7] *Ibid.*, p. 229.
[8] *Ibid.*, p. 233.
[9] BRIERLY, "The Covenant and the Charter", British Yearbook of International Law, 1946 p. 83 ff., p. 93.

the P5 are *de facto* great powers (in terms of military or other forms of power) but that they are *de jure* great powers by dint of what Gerry Simpson has termed a "legalised hierarchy" embedded in foundational treaties,[10] namely the UN Charter and the NPT. The constitutional settlement embodied in the UN Charter of 1945 effectively created "a virtual world dictatorship by the great powers".[11] That constitutional hierarchy in matters of peace and security was reinforced by the "grand bargain" on nuclear security embodied in the NPT of 1968.[12]

In both the UN Charter and in the NPT, security can prevail over other principles even those of international law. A close scrutiny of the UN Charter shows that the security powers of the Security Council are, where necessary, prioritized over other basic principles – whether it is the principle of sovereign equality, the prohibition on the use of force, the principle of non-intervention, the autonomous right of self-defence or enforcement powers of regional organizations.[13] The Security Council is an exception to all of these principles when it is using its powers under Chapter VII,[14] moreover with the power to override conflicting treaty obligations of States.[15] Under the NPT, NWS retain the right to possess nuclear weapons, though committing themselves to negotiate towards nuclear disarmament,[16] while non-nuclear-weapons-States (NNWS) agree to give them up or not to acquire them in return for assistance with the development of the peaceful uses of nuclear power. As with the privileging of the P5 in the UN Charter, the same States are given special status under the NPT in apparent disregard of the fundamental principle of sovereign equality that is meant to underpin the international legal order.

Both the UN Charter and the NPT are premised on the great powers having privileges, namely the veto power in the Charter and NWS status in the NPT, in return for a basic or negative form of security in the form of the absence of great power conflict that would again swallow the world. The UN Charter also promises positive security in the form of the threat of collective measures to deter aggression and, where necessary and agreement is possible, action by the great powers to preserve peace and security. However, the cooperation and compromise necessary to tackle increasingly complex security problems have not been found in any consistent sense either during the Cold War or in recent times. The brief period of cooperation that followed the end of the Cold War, when the Security Council massively extended its understanding of peace and security,[17] has given way to a narrow consensus on certain forms peacekeeping and counter-terrorism measures.

The consequences of the structure of both the UN Charter and the NPT are that universal collective security is inevitably driven by great power security concerns, whether in finding consensus to establish peacekeeping operations, sanctions against pariah States or terrorist organizations, or the occasional military action to tackle aggressors and threats. When the great

[10] SIMPSON, *Great Powers and Outlaw States*, Cambridge, 2004, p. 62.
[11] New York Times, 7 May 1945.
[12] JOYNER, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford, p. 8.
[13] Arts. 2(1), 2(4), 2(7), 51, 53 of the Charter of the United Nations, 1945.
[14] Ibid., Arts. 41 and 42.
[15] Ibid., Art. 103.
[16] Art. VI of the Nuclear Non-Proliferation Treaty, 1968. But see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports, 1996, p. 226 ff., p.264, where Art. VI was said to contain an obligation of result (to disarm) and not just an obligation of conduct (to negotiate to disarm).
[17] Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, 31 January 1992, UN Doc. S/23500 (1992).

powers themselves are potentially in confrontation the UN is reduced to a forum for diplomacy, evidenced by the diffusion of the Cuban missile crisis in 1962. Furthermore, despite the weaknesses of the UN Charter as regards arms control and disarmament, the UN has achieved successes in this field but only when it has practiced what Krause has termed "great power security governance". Krause explains that "no concrete action by the UN" on WMD "was possible until Washington and Moscow agreed in the early 1960s to move forward on arms control discussions. All major achievements – the NPT, CWC, BTWC – required great power consensus; when it did not exist, such as in the Comprehensive Test Ban Treaty, disarmament efforts stalled".[18] Furthermore, the partial collapse in the nuclear consensus between the great powers has led to the US withdrawing in 2002 from the Anti-Ballistic Missile (ABM) Treaty 1972,[19] and in 2019 from the Intermediate-Range Nuclear Forces (INF) Treaty 1987, and Russia's 2023 suspension of participation in the New Strategic Arms Reduction (New Start) Treaty 2010. These actions suggest that the US and Russia no longer fully subscribe to the "most important goal of arms control", which is to stabilise the relationship of mutual deterrence between the great powers.[20]

3. EUROPEAN SECURITY ARCHITECTURE: PEACE THROUGH LAW?

The idea of achieving peace through law can be traced back to the advent of the League of Nations in 1919.[21] For example, the British Prime Minister Lloyd George understood the Covenant of the League of Nations as embodying a collective security system that would achieve peace through legal procedures. He was of the opinion that had such a treaty existed in the summer of 1914 war would not have broken out as political leaders would have been required to discuss and resolve their differences by the processes and machinery of the League.[22] Nevertheless, there was an indication in 1919 that the leaders of the great powers at the time were of the opinion that a legal procedural approach would not stop a government set on a long-term policy of aggression as occurred in 1939.[23]

Whether a system of collective security could operate within the rule of law was discussed by Hans Kelsen in 1944 before a draft of the UN Charter had emerged, but with the experience of the League to draw upon. Kelsen argued that "the solution of the problem of a durable peace can only be sought within the framework of international law",[24] otherwise States, particularly the great powers, would continue to be judges in their own cause by deciding when it was in their interests to wage war. Furthermore, it was essential to remove that judgement from States to an independent organization. However, Kelsen argued that peace through law could not be achieved through the political organs of an organization. He pointed to the experience of the League of Nations: "[t]his union of States, which is so far the biggest international community

[18] KRAUSE, "Disarmament", in WEISS and DAWS (eds.), *The Oxford Handbook on the United Nations*, Oxford, 2007, p. 287 ff., p. 297.
[19] MÜLLERSON, "The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law", International and Comparative Law Quarterly, 2001, p. 509 ff.
[20] BULL, "The Classical Approach to Arms Control Twenty Three Years After", as summarized in R. O'Neill and D.N. Schwartz, *Hedley Bull on Arms Control*, London, 1987, p. 8.
[21] LLOYD, *Peace Through Law: Britain and the International Court in the 1920s*, London, 1997.
[22] HENIG, *The League of* Nations, Chicago, 2010, p. 43.
[23] *Ibid*., p. 44.
[24] KELSEN, *Peace through Law*, Chapel Hill, 1944, p. 13.

to secure international peace, has failed completely".[25] He pointed to a "fatal fault of its construction", namely that "the authors of the Covenant placed at the center of this international organization not the Permanent Court of International Justice, but a kind of international government, the Council of the League of Nations".[26] Kelsen argued that "the more effective the power conferred upon the international organization, the more guarantees which must be given by its constitution that this power will be exercised only for the maintenance of the law; and the only serious guarantee for the legal exercise of power is the provision that the armed forces at the disposal" of the organization "is to be employed not at the order of a political body but in execution of the decision of a court".[27]

The idea that peace through law could only be achieved by ensuring that an international court would be central to collective security has undoubted attraction for the rule of law. However, it failed to recognize the centralization and amalgamation of political and legal power that would be encapsulated in the UN Charter. In contrast to Kelsen's position, the question then becomes whether peace through law is possible within the organization constituted by the Charter of the United Nations in 1945. In some ways the Charter rendered the possibility of peace through law being delivered by the UN's political organs – the Security Council and the General Assembly – even less likely than under the system embodied in the Covenant of the League of Nations 1919. Under the Covenant the duties of member States to take collective security action were not as clearly dependent upon a Council decision,[28] whereas under the Charter the obligations on member States to take enforcement measures under Chapter VII are dependent upon a decision of the Security Council, in other words are dependent upon the support of each permanent member.[29] Those decisions are unaccountable to the membership or to the International Court of Justice and they embody an approach to collective security that, at least where the great powers are involved with their often differing perceptions of peace and security, is difficult to see as a form is peace through law. As made clear by Brierly in 1946: "we have been led into a cul-de-sac by the over-hasty pursuit of a perfectionist policy, and by a too shallow diagnosis of the causes of failure of the League. By insisting that only an institution which has the power to decide can act effectively we have created one that can neither decide nor act".[30]

With the universal architecture for peace and security being constructed on great power foundations, there are manifest problems when there is no consensus amongst those great power States as to how to tackle existential threats to international peace and security. The question considered in this article is whether the ESA, consisting of NATO, OSCE and EU, can forge a different and distinct path that can provide security to States and individuals while remaining within the international rule of law. The obstacles are clearly significant given the constitutional settlement of 1945, which built the overarching universal constitution governing collective security on great power foundations. Any system or sub-system of collective security that either challenges or does not accord with the conception as embodied in the UN Charter is likely to be judged as operating outside of the international legal order, for example by disregarding Article 53(1) of the Charter specifically, which requires that any regional

[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*., p. 49.
[28] Art. 16(1) of the Covenant of the League of Nations, 1919.
[29] Arts. 41-42 of the Charter of the United Nations, 1945.
[30] BRIERLY, *cit. supra* note 9, p. 93.

enforcement action is authorized by the UN Security Council,[31] even though such a judgment on legality is based on the acceptance of a universal system in which great power dominance can prevail over law.

Despite potential obstacles, and given the endemic structural weaknesses in the UN system of collective security, does the system of security governance embodied in the ESA have the potential to deliver peace through law? In this context, security governance has been defined as comprising of five elements: "hierarchy; the interaction of a large number of actors, both public and private; institutionalisation that is both formal and informal; relations between actors that are ideational in character, structured by norms and understandings as much as by formal regulations; and, finally, collective purpose".[32] The emergence of a much more fluid collective security regime in the ESA, structured by norms as well as laws, challenges formalist constitutional expectations. However, it is possible to examine the main components of the ESA, as well as to assess the whole, to see if it can deliver both collective security and law.

NATO, the EU and the OSCE together have been described as constituting the "European security architecture".[33] There are arguments to be made about whether the Russian-dominated Collective Security Treaty Organization (CTSO), established in 2002, should be included in any analysis of European security.[34] Certainly, in considering how security is balanced in Europe, the CTSO should be included in any analysis. However, in trying to discern constitutional and institutional cooperation to provide for European security, the orthodox components of the ESA will be studied here.[35] An examination of these organizations, conceptually and legally, demonstrates that although together they do not provide a fully-developed constitutional form of collective security, they provide some elements of security governance, including deterrence principally through NATO, and of law promotion and enforcement through the EU and OSCE. The paradox is that the universal system of collective security centred upon the UN rests upon a "a primitive constitutional framework",[36] which constitutionally and institutionally prioritizes security over law when the interests of the great powers are at stake. In contrast to the executive-dominated UN, power and authority in the ESA are much more diffuse, fluid and overlapping, with a mixture of foundational documents ranging from the constitutional/supranational (the EU), contractual (NATO) and political (the

[31] Within the ESA, only the OSCE has expressly stated, since 1992, that it is a regional body within the meaning of Chapter VIII of the UN Charter, available at: <https://www.osce.org/partnerships/111477>.
[32] WEBBER, CROFT, HOWORTH, TERRIFF and KRAHMANN, 'The governance of European security', Review of International Studies, 2004, p. 3 ff., p. 8.
[33] For example, MOSSER, "Embracing 'embedded security': the OSCE's understated but significant role in the European security architecture", European Security, 2015, p. 579 ff., p. 583.
[34] FREIRE, "The Russia Factor in European Security: Back to the Future?", Carleton University CES Policy Brief, August 2017. See also Russia's proposal for a European Security Treaty discussed in ZAGORSKI, "The Russian Proposal for a Treaty on European Security: From Medvedev Initiative to the Corfu Process", OSCE Yearbook, 2009, p. 43 ff.
[35] The role of the Council of Europe in the ESA is another area that deserves consideration – see for example NATO's Rome Declaration of 1991: "The challenges we will face in this new Europe cannot be comprehensively addressed by one institution alone, but only in a framework of interlocking institutions tying together the countries of Europe and North America. Consequently, we are working towards a new European security architecture in which NATO, the CSCE, the European Community, the WEU and the Council of Europe complement each other" – Declaration on Peace and Cooperation issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council, Rome, 8 November 1991, para. 3.
[36] COHEN, "The United States and the United Nations Secretariat: a preliminary appraisal", McGill Law Journal, 1953, p. 169 ff., p. 172.

OSCE). This system, though less constitutional in a formal hierarchical sense than the UN, will be shown to promise greater connection between security and law, but is it capable of deterring and confronting naked aggression or other egregious violations of international law?

4. THE OSCE: THE BASIS OF A EUROPEAN SECURITY COMMUNITY?

Ultimately, the UN system was premised on the military power of the great powers deterring or confronting aggression. In contrast to a such a collective security system based on action and coercion, Karl Deutsch considered various historical arrangements of States that at least partly succeeded in removing conflict within their membership. Based on this evidence he defined a "security community" as "one in which there is a real assurance that the members of that community will not fight each other physically, but will settle their disputes in some other way".[37] He went on to say that "if the entire world were integrated as a security-community, wars would be automatically eliminated".[38] By integration, he did not necessarily mean amalgamation into one super-State, rather the attainment of a "sense of community and of institutions and practices strong enough and widespread enough to assure for a long time, dependable expectations of peaceful change".[39] When States "become integrated to the point that they have a sense of community" there arises the "assurance that they will settle their differences short of war".[40] Community flows from "shared understandings, transnational values and transaction flows". Once established, a security community generates stable expectations of peaceful change.[41] In some ways the OSCE has the potential to create such a community through its pan-European membership and through its broad normative and institutional framework. However, the deeper attributes of a security community are lacking: "shared understandings" in the OSCE appear to be currently absent between Western States and Russia; "transnational values" are currently disputed; and "transaction flows" have slowed or come to a halt.

The OSCE has no constitutive treaty, and therefore no legal autonomy in terms of collective security powers. This appears to mean that sovereign equality prevails over great power hierarchies, and that the OSCE cannot be a coercive instrument for change. When the Conference on Security and Cooperation in Europe (CSCE) was established in 1975 "it was explicitly agreed that the CSCE would not be established as an international organization", and that although it was given a more formal structure in the Charter of Paris of 1990, and changed its name to the OSCE in 1994 at the Budapest Summit, the full trappings of an inter-governmental organization were not present, including the absence of international legal personality.[42] Russia has effectively blocked the granting of personality to the OSCE until the organization has "its own legally binding constituent instrument".[43]

---

[37] DEUTSCH, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*, New York, 1957, pp. 5-6.
[38] *Ibid.*
[39] *Ibid.*
[40] ADLER AND BARNETT, "Security Communities in Theoretical Perspective", in ADLER and BARNETT (eds.), *Security Communities*, Cambridge, 1998, p. 1 ff, p. 4.
[41] *Ibid.*, pp. 4–6.
[42] SCHEMERS AND BLOKKER, *International Institutional Law*, 6th edn., Leiden, 2018, pp. 36-37.
[43] *Ibid.*, p. 1032.

The development of "consensus-minus one" decision making in 1992 for certain political actions was a slight nudge away from sovereign equality, and in some ways is harking back to the Concert of Europe established in 1815 to manage the post-Napoleonic peace in Europe.[44] The history of modern dispute settlement starts with Napoleon's final defeat at Waterloo in 1815 and the ending of the Napoleonic revolutionary wars. The Final Act of the Congress of Vienna was arguably a more comprehensive settlement of peace, at least in Europe, than its successor (the League of Nations), and more adaptable than the UN, especially in the way it allowed powerful States to opt out of any collective action when they were unable to support its efforts, while remaining part of the Concert. Although the Concert of Europe has been characterised as a security community,[45] it is clear that the OSCE, more widely the ESA, has not be able to extend the idea of a European security community to Russia, evidenced by the fact that consensus-minus-one has not been used to any great extent and certainly not to manage great power tensions.[46]

However, the OSCE has the potential to be a forum for diplomacy and peaceful settlement by enabling the great powers (minus China) to achieve shared understandings on European peace. However, while the OSCE has had successes as a form of "embedded security" within a number of member States particularly in its "human dimension" activities,[47] its increasing concern with the nexus between security and rights has led to it focusing on democracy, minority and human rights within States rather than with more traditional forms of security between States and between the great powers.[48] Although the three "baskets" or "dimensions" (political and security issues, economic cooperation, and human rights),[49] first crafted in the Helsinki Final Act 1975 are viewed by the OSCE "as being of equal importance and interconnected", "this does not imply, however, that the commitments, funding and even structures of the three dimensions are equal or similar".[50] As regards the political and security/military dimension, which ought to be directed at great power security governance, the OSCE's Forum for Security Cooperation, whose mandate is to "deal with a wide range of politico-military issues ranging from traditional security between and within states",[51] with functions including "providing a platform for dialogue",[52] has the potential, as yet unrealised, to provide a basis for pan-European security.

---

[44] Prague Meeting of the CSCE Council, 30-31 January 1992: "The Council decided, in order to develop further the CSCE's capability to safeguard human rights, democracy and the rule of law through peaceful means, that appropriate action may be taken by the Council or the Committee of Senior Officials, if necessary in the absence of the consent of the State concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments. Such actions would consist of political declarations or other political steps to apply outside the territory of the State concerned. This decision is without prejudice to existing CSCE mechanisms".

[45] KUPCHAN, *How Enemies Become Friends: The Sources of Stable Peace*, Princeton, 2010, p. 236: "The Concert of Europe functioned successfully as a security community from the close of the Napoleonic Wars in 1815 through the middle of the nineteenth century".

[46] MOSSER, *cit. supra* note 31, p. 583.

[47] *Ibid*., p. 590: this has meant that "subordinate institutions within the OSCE … operate in ways more akin to an NGO and less like a traditional security IO".

[48] *Ibid*., p. 584.

[49] OSCE, "Who We Are", available at <https://www.osce.org/whatistheosce>.

[50] WOHLFELD and TANNER, "Comprehensive Security and New Challenges: Strengthening the OSCE", Istituto Affari Internazionali, 2021, p. 1 ff., p. 4.

[51] OSCE, Forum for Security Co-operation, "Who We Are: Mandate", available at <https://www.osce.org/forum-for-security-cooperation/107448>.

[52] OSCE, Forum for Security Co-operation, "Who We Are: Providing a Platform for Dialogue", available at < https://www.osce.org/forum-for-security-cooperation/107434>. See also, "Belgium

The CSCE was formed in 1975 as an attempt at great power security governance and, to this end, the Helsinki Final Act's ten principles guiding relations between participating States were built on key principles of the UN Charter. Those ten principles are: (i) sovereign equality and respect for rights inherent in sovereignty; (ii) refraining from the threat or use of force; (iii) inviolability of frontiers; (iv) territorial integrity of States; (v) peaceful settlement of disputes; (vi) non-intervention in internal affairs; (vii) respect for human rights and fundamental freedoms, including freedoms of thought, conscience and religion or belief; (viii) equal rights and self-determination of peoples; (ix) cooperation among States; and (x) fulfilment in good faith of obligations under international law.[53] Essentially these principles give the CSCE/OSCE, as a consensus organization respecting sovereign equality, a solid foundation in basic principles of international law upon which it could have built a pan-European form of security cooperation. However, despite its wide membership crossing the divide between West and East, it has failed to develop as a forum for the peaceful settlement of disputes,[54] especially in managing the relationship between the US (increasingly NATO) and Russia which must be the basis for any system of European collective security.[55] In the Ukraine conflict of 2022, both Russia and Ukraine (supported but not defended by NATO States) seem to be pursuing peace through victory rather than any form of peace through negotiation in a throwback to the British approach to the prosecution of the war against Germany in the First World War.[56]

The view that the OSCE reflects the divides in Europe rather than provides a forum for closing those divides is evidenced by the exchange between Russia and the US before the OSCE Permanent Council on the occasion of the 45th anniversary of the Helsinki Final Act in 2020. The Russian ambassador stated that: "the OSCE has not succeeded in becoming a kind of 'European Security Council'. Instead of building bridges between conflict parties, our unique entity is in many respects 'running idle'. Surely it was created not for the trading of accusations but to support, in a professional manner, the search for points of convergence, to facilitate rapprochement and the development of responses to common challenges".[57] In contrast, the US representative stated that "my Russian friend has said that human rights issues are seventh

---

announces priorities as FSC Chair amidst Russia's war against Ukraine", OSCE News 7 September 2022: "the war against Ukraine will remain at the heart of the FSC's discussions during Belgium's tenure as FSC Chair ….".

[53] Conference on Security and Co-operation in Europe, Helsinki Final Act 1975, available at <https://www.osce.org/files/f/documents/5/c/39501.pdf>.

[54] See "Conflict prevention and resolution", available at < https://www.osce.org/conflict-prevention-and-resolution>, which mentions the OSCE's network of field operations. It also highlights the Court of Conciliation and Arbitration established by the Stockholm Convention 1992, which is mandated to settle by means of conciliation or arbitration disputes between States that are submitted to it. In May 2022, the President of the Court, Emmanuel Decaux, stated that he hoped the anniversary of the Convention "will be a wakeup call, to remind us that a peaceful settlement of disputes is preferable to violence and war. And, by its very existence, the Court of Conciliation and Arbitration is a reminder that the ideal of 'peace by law' constitutes the cornerstone of European security" – osce.org, news, 19 May 2022, available at < https://www.osce.org/court-of-conciliation-and-arbitration/518988>.

[55] See the withdrawal of the OSCE SMM Monitoring Teams from Ukraine on 26 February 2022, after the invasion of Ukraine by Russia on 24 February 2022, available at < https://www.osce.org/special-monitoring-mission-to-ukraine-closed>.

[56] TOOZE, *The Deluge: The Great War and the Remaking of Global* Order, London, 2015, p. 78: "Passchendale was an expression of the British government's grim determination to silence once and for all the talk of peace without victory".

[57] PC.DEL/1055/20, 30 July 2020, available at < https://www.osce.org/files/f/documents/d/5/463623.pdf>.

among the ten principles, but the fact that human rights was included by the agreement of all those countries as a fundamental principle of the Helsinki Final Act was new. And it remains today a principle [sic] focus. A new idea about human freedoms and security not only in Europe, but all across the world. And the Helsinki Final Act does that. The OSCE is about human rights. The Helsinki Accords are about human rights".[58]

While there is clearly a role for a soft-security organization with a normative focus on democracy and human rights in Europe and its peripheries, the OSCE remains the only element of the ESA that includes Russia, and it could provide a basis for collective European and wider security in the form of a security community facilitating the prevention of aggression and peaceful settlement of disputes and conflicts in accordance with the fundamental rules of the UN Charter and international law contained in the Helsinki Final Act itself.

5. NATO: FROM COLLECTIVE DEFENCE TO COLLECTIVE SECURITY AND BACK AGAIN

Unlike the OSCE, NATO is founded on a clear treaty basis – the North Atlantic Treaty 1949. However, it is by itself a narrow contractual-type treaty as opposed to a constitutional one.[59] This has led to some debate about the true legal nature of NATO, including disagreements about whether NATO is an international legal person with legal autonomy from its member States. Gazzini states that the fact that NATO makes decisions by unanimous decision or by consensus leaves little room for the development of any distinct will on the part of the organization.[60] Blokker, on the other hand, while not clearly stating that NATO possesses international legal personality, emphasises the evolution of NATO from a purely collective defence pact to something akin to a collective security organization by means of implied powers and practice,[61] to state that NATO has the attributes of an inter-governmental organization such as immunity and can be held responsible and accountable, separate from the responsibility and accountability of State parties.[62]

While the original treaty only expressly provided for a Council of all State parties (known as the North Atlantic Council), that body was empowered in Article 9 to set up "subsidiary bodies",[63] and it has established a complex system of such bodies that together make up NATO as an organization, buttressed by the militaries of the State parties. As stated by Mosquera: "although the 'O' in NATO was not expressly mentioned in the Treaty, it is evident from Article 9, that among the primary intentions of the drafters was that of giving options to the constituent States in order to run an 'alliance' into an 'organization' as and when deemed appropriate".[64] All of this suggests that NATO is more than a defence pact and is rather the

[58] PC.DEL/1052/20, 30 July 2020, available at, < https://www.osce.org/permanent-council/463629>.
[59] WHITE, *The Law of International Organisations*, 3rd edn., Manchester, 2017, pp. 82-83.
[60] GAZZINI, "The relationship between international legal personality and the autonomy of international organizations", COLLINS and WHITE (eds.), *International Organizations and the Idea of Autonomy*, London, 2011, p. 196 ff., p. 203.
[61] BLOKKER, "NATO as an International Organization: Ten Brief Observations", Emory International Law Review, 2019, p. 29 ff., p. 30.
[62] *Ibid*., pp. 32-4.
[63] The North Atlantic Treaty, Washington, 1949, Art. 9.
[64] MUNOZ MOSQUERA, "The North Atlantic Treaty: Article 9 and NATO's Institutionalization", Emory International Law Review, 2019, p. 149 ff., p. 150.

fulcrum of a "community of like-minded nations",[65] concerned with security in a much broader sense than simply deterring or confronting aggression. The blurring of functions, between collective defence and collective enforcement, has enabled NATO to avoid being seen at least unambiguously as a regional organization within the meaning of Chapter VIII of the UN Charter,[66] which includes the requirement in Article 53 that any enforcement action undertaken by a regional organization has to be authorized by the UN Security Council. Despite this lack of clarity, the original foundation of NATO upon the right of collective self-defence as embodied in Article 51 of the UN Charter,[67] along with several other references in the NATO Treaty to the supremacy of the rights and obligations of the UN Charter and the primary responsibility of the UN Security Council for international peace and security,[68] have enabled NATO effectively to claim that it "operates inside the Charter but outside the veto".[69]

The language of the North Atlantic Treaty of 1949 suggests that it was not constituting an organization at the time of its adoption - the use of the term "parties" to the treaty as opposed to "members" of an organization, and of "subsidiary bodies" not "subsidiary organs", and by the fact that any decisions are made by the parties acting together. The heart of the North Atlantic Treaty is the commitment in Article 5 whereby each State party is provided with defence in return for contributing to the defence of others. Even that provision is not as strong as a cast-iron guarantee that the other parties will come to the defence of the attacked State,[70] in that it provides that each state party "will assist" the attacked party "by taking forthwith, individually and in concert with the other Parties, such action *as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area".[71]

Even though the treaty forming the basis of NATO appears limited, NATO's reinvention as a collective security organization with the end of the Cold War was evidenced by its enforcement actions in Bosnia starting in 1993 under a Security Council mandate,[72] and in Kosovo in 1999. In Kosovo, the Alliance had to break universal collective security law by failing to secure an authorization from the UN Security Council in order to respond to core crimes being committed by Serb forces. This heralded a claim by NATO not only to provide collective defence to members under Article 5 but also to undertake "non-Article 5 crisis response operations", potentially outside the North Atlantic Area. This claim was first stated in the Alliance's "Strategic Concept" of 1999,[73] and repeated in the "Comprehensive Political Guidance" of

[65] HARTOV, "The North Atlantic Treaty – Preamble and Principles", Emory International Law Review, 2019, p. 37 ff., p. 40.
[66] *Ibid*., pp. 46-49.
[67] Art. 5 of The North Atlantic Treaty, 1949.
[68] *Ibid*., Art. 7.
[69] HEINDEL, KALIJARVI and WILCOX, "The North Atlantic Treaty in the United States Senate", American Journal of International Law, 1949, p. 633 ff., p. 638.
[70] KAPLAN, "Origins of NATO: 1948-1949", Emory International Law Review, 2019, p. 11 ff., p. 24.
[71] Art. 5 of The North Atlantic Treaty, 1949, emphasis added. On the scope of the commitment under Art. 5 see SCHMITT, "The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited", Emory International Law Review, 2019, p. 85 ff., pp. 113-115. Art. 5 has only been invoked once: after the attacks of 11 September 2001 on the US.
[72] Starting with the authorization of a no-fly zone in UN Doc. S/RES/816/1993, 31 March 1993.
[73] NATO Press Release NAC-S(99)65, 24 April 1999, para. 47.

2006,[74] and the "Strategic Concept" of 2010.[75] In effect, this was a claim by NATO to be a collective security organization as well as a collective defence pact, although the extent of its commitments as a security actor was left largely undefined and without clear legal foundation. NATO seemed to have given itself the right to intervene for wider security goals but was not willing to specify the legal framework and limitations upon this right, moreover how such actions might be compatible with the UN Charter.

Despite the move from alliance to organization, NATO has at its heart a contractual agreement that only identifies rights and duties for State parties within a self-defined non-universal geo-political group of States, meaning that NATO is incapable of performing a universal, impartial, and constitutional role; meaning that it cannot by itself fill the void left by an ineffective and gridlocked UN collective security system. It has adopted policies and strategies that amount to self-authorization to act beyond Article 5 of the North Atlantic Treaty, but without any clear legal framework including an attribution of powers from its membership for doing so. This signifies that any NATO actions and measures beyond Article 5 have to be based on general principles of international law, including those prohibiting intervention without the consent of the State involved or enforcement action without the authorization of the Security Council.

However, Russia' aggressive actions against Ukraine have led to a reconsideration of NATO's functions. Perot has accurately summarised the trend:

> "During the post-Cold War era, the Atlantic alliance had broadened the scope of its actions, moving away from the territorial defence of Europe to focus on out-of-area crisis management. Yet, after 2014 and the first Ukrainian crisis, NATO already begun to shift back to its original mission – collective defence, as enshrined in Article 5 of the Washington Treaty. Russia's second aggression against Ukraine in 2022 is likely to swing back the pendulum even more firmly in this direction, by highlighting the risks that once again hang over the territorial integrity and sovereignty of European countries".[76]

This has been confirmed in NATO's Strategic Concept of 29 June 2022,[77] produced against the backdrop of the war in Ukraine. In this document, the organization has noticeably contracted its aims and functions, at least in the short-term. To some extent, NATO has gone back into its defensive shell, which at least provides for certainty for State parties, but it does not provide for collective security at least outside of NATO's membership.[78] Although the Concept states that "NATO will continue to fulfil three core tasks: deterrence and defence;

---

[74] 'Comprehensive Political Guidance', endorsed by NATO Heads of State and Government, 29 November 2006, para. 11; see also paras. 2-8. Available at <https://www.nato.int/cps/en/natohq/official_texts_56425.htm>

[75] 'Strategic Concept for the Defence and Security of Members of the North Atlantic Treaty Organization', adopted by Heads of State and Government at the NATO Summit in Lisbon, 19-20 November 2010, para. 4(b). Available at <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf>.

[76] PEROT, "NATO, the EU and the Return of Collective Defence", CSDS Policy Brief, 12/2022, 13 May 2022, p. 1.

[77] 'NATO 2022 Strategic Concept', adopted at the Madrid Summit, 29-30 June 2022, available at <https://www.nato.int/strategic-concept/>.

[78] NATO, "Relations with Russia", available at <https://www.nato.int/cps/en/natolive/topics_50090.htm>

crisis prevention and management; and cooperative security",[79] crisis prevention and management are given less substance than in previous iterations,[80] while defence and deterrence are fortified and given more substance. The 2022 Concept ensures that Article 5 is made relevant to cyber and hybrid attacks,[81] and keys into the doctrine of nuclear deterrence under the NPT,[82] but not significantly into the collective security system of the UN Charter except for very general statements of principle.[83] In terms of co-operative security, the OSCE is only mentioned in the context of human security;[84] and the concept of a European Security Architecture is not mentioned. However, NATO-EU Euro-Atlantic security is emphasized.[85]

6. THE EU'S AMBIGUOUS ROLE: ENFORCING THE RULE OF LAW BY NON-FORCIBLE MEANS

The EU's position in the ESA is perhaps the most ambiguous, both legally and in terms of its contribution to the security of the region and beyond. The Treaty on European Union (TEU) promises a Common Foreign and Security Policy (CFSP) to "cover all areas of foreign policy and all questions relating to the Union's security",[86] including a Common Security and Defence Policy (CSDP), "which shall provide the Union with an operational capacity drawing on civilian and military assets".[87] There is clear ambition on the part of the EU to become an autonomous security actor promoting "peace and security within and beyond its borders".[88] However, in practice the EU falls short of this, even in respect of what may be viewed as a core function of providing for the defence of Europe and EU member States. According to Wessel and others: "[t]he rather limited focus of the CFSP reveals that it does not 'cover all areas of foreign policy and all questions relating to the Union's security' … and is far from constituting

[79] NATO Strategic Concept 2022, *cit. supra* note 77, para. 4.
[80] *Ibid*., paras. 35, 38.
[81] *Ibid*., paras. 25 and 27.
[82] *Ibid*., paras. 28-9, 33. The North Atlantic Council issued the following statement on the Treaty on the Prohibition of Nuclear Weapons of 2017: "The ban treaty is at odds with the existing non-proliferation and disarmament architecture. This risks undermining the NPT, which has been at the heart of global non-proliferation and disarmament efforts for almost 50 years, and the IAEA Safeguards regime which supports it. … The fundamental purpose of NATO's nuclear capability is to preserve peace, prevent coercion, and deter aggression. Allies' goal is to bolster deterrence as a core element of our collective defence and to contribute to the indivisible security of the Alliance. As long as nuclear weapons exist, NATO will remain a nuclear alliance. … As Allies committed to advancing security through deterrence, defence, disarmament, non-proliferation and arms control, we, the Allied nations, cannot support this treaty. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. Thus we would not accept any argument that this treaty reflects or in any way contributes to the development of customary international law". NATO Press Release (2017) 135, 20 September 2017.
[83] NATO Strategic Concept 2022, *cit. supra* note 77, para. 3
[84] *Ibid*., para. 39.
[85] *Ibid*., para. 43.
[86] Art. 24(1) of the Treaty on European Union.
[87] *Ibid*., Art. 42(1).
[88] See the concept of "strategic autonomy" in European External Action Service, "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", June 2016, p. 9, available at <https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf>.

a common defence by the 'progressive framing' of a common defence policy. In short, CFSP does not seem to live up to what it was intended to entail".[89]

In the broader field of peace and security, there is no doubt that the EU's non-forcible measures, or sanctions, are an important part of its armoury and, when combined with those of its allies particularly the UK and US, can make a real impact on States and non-state actors (NSAs) threatening or breaching European and international peace and security.[90] In comparison, the other instruments of the EU's CFSP (which includes the CSDP)[91] are under-utilized:

> "The CFSP provides a wide spectrum of instruments including sanctions, missions, operations, the assignment of EU Special Representatives and measures for arms control. A systematic analysis of CFSP activities reveals considerable shortcomings in the use of these instruments … [S]tudy shows that the numbers of missions are stagnating at a low level, while sanctions are imposed extensively and frequently – presumably because they are a comparatively low-cost instrument for achieving foreign policy objectives".[92]

This is confirmed in a study by Wessel and others, which found that over 70% of all formal CFSP decisions concerned the imposition or adjustment of sanctions regimes.[93] Another study by Giumelli and others found that the OSCE's civilian missions outnumber those of the EU.[94]

In contrast to other regional organizations, the EU's sanctioning competence is external facing and targeted at non-member States and individuals and organizations from those States, although measures only bind EU member States.[95] Given that these external measures do not bind the target State, only EU member States, the lack of consent to be bound by the target State is not a legally insurmountable problem. However, assuming that a collective sanctioning power normally belongs to an inter-governmental organization for the purpose of controlling its membership and is based upon obligations upon member States found in the constituent treaty, the legal basis claimed for the EU's external measures has to be found elsewhere specifically in the still-disputed doctrine of collective countermeasures.[96] If the EU's external non-forcible measures extend beyond the parameters of countermeasures, for example to become coercive measures of the type attributed to the UN Security Council, the legal ground

---

[89] WESSEL, ANTTILA, OBENHEIMER and URSU, "The future of EU Foreign, Security and Defence Policy: Assessing legal options for improvement", European Law Journal, 2020, p. 370 ff., p. 378.
[90] WHITE, "Shades of Grey: Autonomous Sanctions in the International Legal Order", in SUBEDI (ed.), *Unilateral Sanctions in International Law*, Oxford, p. 61 ff., pp. 62-64.
[91] Federal Foreign Office, Germany, "Common Foreign and Defence Policy" (CSDP): "The CSDP enables the EU to use civilian, police and military instruments to cover the full spectrum of crisis prevention, crisis management and post-crisis rehabilitation", available at <https://www.auswaertiges-amt.de/en/aussenpolitik/europe/gsvp-start/209178?openAccordionId=item-2495140-0-panel>.
[92] German Institute for International and Security Affairs, "Instruments", which contains an analysis of CFSP instruments, available at <https://www.swp-berlin.org/en/topics/dossiers/the-eu-common-foreign-and-security-policy/instruments>.
[93] WESSEL, ANTTILA, OBENHEIMER and URSU, *cit. supra* note 89, p. 375.
[94] GIUMELLI, HOFFMANN and KSIAZCZAKOVA, "The When, What, Where and Why of European Union Sanctions", European Security, 2021, p. 1 ff., p. 4.
[95] Art. 29 of the Treaty on European Union; Art. 215 of the Treaty on the Functioning of the European Union. See GESTRI, "Sanctions Imposed by the European Union: Legal and Institutional Aspects", in RONZITTI (ed.), *Coercive Diplomacy, Sanctions and International Law*, Leiden, 2016, p. 70 ff., p. 100.
[96] GESTRI, *cit. supra* note 95, p. 99.

becomes more unstable in that they would represent steps towards claiming autonomous external sanctioning powers by a regional organization, and would represent a challenge to the universal collective security system.[97]

Gestri has stated that with a number of sanctions programmes in place, often imposed autonomously from the UN Security Council, the EU has become a "key player in the sanctions game" and, despite its claim to always act in full conformity with international law, the "EU can be regarded as a trailblazer by the advocates of the controversial doctrine of collective countermeasures in reaction to *erga omnes* obligations, having on numerous occasions adopted sanctions without being individually affected by the breach of international law allegedly committed by the target state".[98] Furthermore, Gestri points to the power of the EU to influence third States to bring their conduct towards the target State into line with the EU measures,[99] and the broadening jurisdictional scope of EU sanctions in spite of its criticisms of the extraterritorial extension of sanction regimes by the US.[100]

Collective countermeasures taken in response to violations of fundamental international laws remain controversial but, on a spectrum of legality, a strong argument can be made in their favour, especially in the absence of sanctions imposed by the UN Security Council. When the Security Council is deadlocked in the face of calls for responses to violations of fundamental rules, the EU might be able to fill the void because it may be able to agree on measures to be imposed in response to violations of international law when the Security Council cannot, enabling measures to be taken against regimes elites for violations of human rights (for example, in Zimbabwe),[101] and for committing aggression (for example, by Russia).[102] In this regard the EU demonstrates the capacity to undertake a law-based collective security role.

However, sanctions by themselves are not sufficient to deter powerful aggressors or other violators of fundamental international laws, which means that the EU's military capability and its members commitment to the defence and security of Europe requires examination. Considering the presence of a complex EU architecture in its traditional economic and market functions, the provision for the collective defence and security of Europe via the CSDP is rudimentary and overlaps with the commitments of EU state members of NATO, leading to support for a "multi-speed Europe" in the areas of defence and security.[103] In analysing the mutual assistance clause contained in Article 42(7) of the TEU, Perot concludes that the "fact remains that Article 42.7 …, unlike NATO's Article 5, is still not sufficiently supported by

---

[97] SICILIANOS, "Countermeasures in Response to Grave Violations of Obligations Owed to the International Community", in CRAWFORD, PELLET and OLLESON (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 1137 ff., p. 1140.
[98] GESTRI, *cit. supra* note 91, p. 99.
[99] *Ibid*.
[100] *Ibid*., p. 79.
[101] See for example, EU targeted sanctions against regime individuals in Zimbabwe (Council Decision 2011/101/CFSP of 15 February 2011, OJ L 42, 6), and Syria (Council Decision 2013/255/CFSP of 1 June 2013, OJ L 147, 14).
[102] Targeted sanctions were imposed against certain Russian individuals responsible for actions which undermined or threatened the territorial integrity, sovereignty and independence of Ukraine following the 2014 intervention in Crimea (Council Decision 2014/145/CFSP of 17 March 2014, OJ L 78, 16), and further measures followed the invasion of Ukraine by Russia in 2022 (Council Decision 2022/329/CFSP of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 50, 25).
[103] WESSEL, ANTTILA, OBENHEIMER and URSU, *cit. supra* note 89, p. 380.

practical arrangements for its implementation".[104] An attempt to address the weaknesses in defence and security against the backdrop of the Russian invasion of Ukraine was made in the EU's Strategic Compass of 2022.[105]

In the Strategic Compass, EU member States promise to develop a stronger EU security and defence capability over the next 5-10 years, in particular to: "[a]ct more quickly and decisively when facing crises; [s]ecure our citizens against fast-changing threats; [i]nvest in the capabilities and technologies we need; partner with others to achieve common goals", including by the development of "an EU Rapid Deployment Capacity, consisting of up to 5,000 troops that can be tailored and swiftly deployed for different types of crises", and greater interoperability of member States' armed forces. However, it is important to note that under the Strategic Compass, while it "underlines the need to do more to develop high-end, cutting-edge capabilities to equip full-spectrum military forces", the "capabilities will remain in the hands of Member States and will continue to be used in national, but also various multinational frameworks, including NATO or the UN".[106]

While promises of greater common security action are dependent on political agreement and military cooperation by EU member States, there remains the defence commitments of EU member States under the TEU, which creates obligations overlapping with those arising for NATO member States. As commented upon by Perot: "[s]ome aspects of the complex European security architecture, created by the overlap between NATO and the EU, are still underappreciated in such a critical domain as collective defence".[107] Perot analyses what are the three rudimentary legal "foundations" of European defence: Article 5 of the North Atlantic Treaty of 1949, and EU provisions introduced by the Lisbon Treaty 2009 - Articles 42(7) of the TEU (the mutual assistance clause),[108] and Article 222 of the Treaty on the Functioning of the European Union (solidarity clause),[109] to discern whether they signal a sufficiently strong

[104] PEROT, *cit. supra* note 76, p. 4.
[105] "A Strategic Compass for Security and Defence: For a European Union that protects its citizens, values and interests and contributes to international peace and security", available at < https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf>
[106] EU External Action, "Questions and answers: a background for the Strategic Compass", 21 March 2022, available at <https://www.eeas.europa.eu/eeas/questions-and-answers-background-strategic-compass_en>.
[107] PEROT, "The art of commitments: NATO, the EU, and the interplay between law and politics within Europe's collective defence architecture", European Security, 2019, p. 40 ff., p. 41.
[108] "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.
Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."
[109] "1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack … The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; …
2. Should a Member State be the object of a terrorist attack … the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council…".

intent and commitment to use collective force that will deter aggressions and attacks against NATO/EU member States.[110] Perot concludes that it is difficult to discern "along which lines a division of labour could be sketched out with respect to the binding force of the three clauses. Article 5 of the Washington Treaty is deliberately ambiguous; Article 42.7 TEU is less equivocal but is also qualified by important caveats; Article 222 of the TFEU is strongly binding for the Union institutions but not for EU member States themselves. Any pattern remains quite elusive here".[111] Even the stronger of the three clauses, namely Article 42(7) of the TEU, reflects the competing "demands of groups" of EU member States "wanting to retain a stance on neutrality, those wanting to retain the focus of defence policy in NATO and those with ambitions for a 'European' defence force".[112]

This raises questions about the level of commitment and therefore deterrent effect of the EU's defence and solidarity clauses, "in particular at a time when political fault lines within the Union itself are so deep and numerous".[113] Furthermore, the place of the nuclear deterrent in the ESA and the defence of Europe is ambiguous: "[while] this issue has traditionally been viewed as falling within the exclusive remit of NATO, the uncertainties about the US commitment has now sparked debates in foreign policy circles about whether and how Europeans should and could find a substitute to America's ultimate guarantee", in particular the extension of the French nuclear deterrent to member States of the EU.[114]

Nuclear deterrence is also problematic in the sense that it was shaped as a political and security doctrine in the Cold War,[115] and issues of its compatibility with both the *jus ad bellum* and the *jus in bello* have been left open. Fleck provides some clarity in understanding the doctrine of nuclear deterrence and its legal frame but also identifies the continuing ambiguity:

> "In the practice of States deterrence has two essential components, a clear denotation of military capability (and general will to use it) *and* a clear understanding by the adversary of what is the action from which one must refrain. No particular threat of force is necessary to make deterrence effective. A policy of deterrence … will not amount to an *unlawful* threat, unless the threatening State exceeds the requirements of self-defence … But more should be done assure that nuclear deterrence is not directed against the Purposes of the United Nations and that any use of nuclear force would be strictly limited as a last resort 'in an extreme situation of self-defence in which the very survival of the State would be at stake'."[116]

The significance of the ambiguity in the idea of "the very survival of the State", introduced by a bare majority of judges in the 1996 opinion of the International Court of Justice, has come into sharp focus with the unprecedented statements coming from President Putin indicating that

[110] PEROT, *cit. supra* note 107, p. 42.
[111] *Ibid*., p. 57.
[112] WESSEL, ANTTILA, OBENHEIMER and URSU, *cit. supra* note 89, p. 380.
[113] PEROT, *cit. supra* note 107, p. 58.
[114] *Ibid*., p. 60.
[115] BRAITHWAITE, *Armageddon and Paranoia: The Nuclear Confrontation*, London, 2017, p. 118.
[116] FLECK, "Legal Aspects of Nuclear Weapons Doctrines", in BLACK-BRANCH and FLECK (eds.), *Nuclear Non-Proliferation in International Law: Volume v Legal Challenges for Nuclear Security and Deterrence*, The Hague, 2020, p. 351 ff., p. 354 citing *Legality of the Threat or Use of Nuclear Weapons, cit. supra* note 16, para. 96.

nuclear weapons are an option for Russia in the Ukraine conflict.[117] In addition, the lack of clarity on the position of the nuclear deterrent within the ESA and the legal parameters for the use of nuclear weapons continue to raise questions about both the legitimacy and legality of the doctrine of nuclear deterrence as currently conceived, and add to the perception that the possession and use of nuclear weapons remain barely contained within the international legal order.

In contrast to the visible hardening of NATO's Article 5 commitment to collective defence, the EU has shown less movement in that direction, even in the light of Russia's invasion of Ukraine in 2022, and the Strategic Compass, admittedly largely formulated before that paradigm-changing act of aggression, continues to focus on crisis management. This is evidenced by the advent of a Rapid Deployment Capacity of 5,000 troops, a force clearly insufficient to confront or deter large-scale aggression, but sufficient to undertake crisis management tasks. The EU's role in collective security and defence primarily remains locked into sanctions, which may fit the rule of law approach of the EU, and more broadly the concept of a largely peaceful political and legal order,[118] but ultimately lacks the necessary centralization of armed force that underpins such an order. Moreover, those non-forcible measures themselves are limited, at least in international law, by the doctrine of countermeasures, which restricts their coercive nature and have been shown to be insufficient by themselves to tackle aggression by a great power. To deter and tackle such aggression, the EU needs to strengthen its collective defence commitment, and accompanying resources, in support of NATO, but where necessary to act independently of it. In the end, the problem remains one of EU member States' sovereignty, which is most jealously guarded in the fields of security and defence. As Wessel and others conclude, sovereignty and the "Member States' general unwillingness to pool parts of it to allow the Union to more easily formulate its foreign and security policy" must be considered "as the greatest impediment to an 'ever closer union' in terms of foreign and security policy".[119]

7. CONCLUDING REMARKS

Currently, the ESA is unevenly fulfilling five collective security functions, and each of these is broadly compatible with international law. First, there is an underachieving peaceful settlement element centred on the OSCE, which is clearly compatible with the duty of States to settle their disputes peacefully in Article 2(3) of the UN Charter and with the procedures for pacific settlement in Chapter VI of the Charter. Secondly, there is the active promotion of human rights and democracy through the OSCE, and also through the EU.[120] Thirdly, the EU enforces fundamental rules of international law by adopting non-forcible measures against (some) aggressors and (some) other violators of international law (including instances of violations of human rights and denials of democracy), exploiting the ambiguities in international law governing such measures and in effect giving legality to collective countermeasures, and sometimes acting when the UN system is deadlocked. Fourthly, NATO, with some support from the EU, delivers a strengthening collective defence commitment built

[117] DE DREUZY and GILL, "Russia's nuclear coercion in Ukraine", NATO Review, 29 November 2022.
[118] KELSEN, "The Pure Theory of Law, Its Method and Fundamental Concepts", Law Quarterly Review, 1934, pp. 484-485.
[119] WESSEL, ANTTILA, OBENHEIMER and URSU, *cit. supra* note 89, p. 389.
[120] Art. 21(1) of the Treaty on European Union.

on Article 51 of the UN Charter, which serves to deter potential aggressors but only when the target is a NATO and/or EU member state. Fifthly, there is a continuing NATO and EU commitment to the doctrine of nuclear deterrence but with deliberate legal ambiguities surrounding the circumstances of the use of nuclear weapons.

In the absence of a legitimate and effective UN Security Council, which has been shown to be unachievable given its construction on great power foundations, the ESA could strengthen its collective security role in a number of ways whilst strengthening its position within the international legal order. First, by the OSCE reinvigorating its peaceful settlement function, making clear it is performing it as a regional organization within the meaning of Article 33 of Chapter VI of the UN Charter as well as Article 52(3) of Chapter VIII, and recommending the involvement of the Security Council under Chapter VI of the UN Charter or the General Assembly under Chapter IV in seeking peaceful solutions. In this way the OSCE would be connected to the UN collective security system. The EU could also connect to the UN collective security system by calling upon the UN Security Council to adopt sanctions against transgressors but, if that fails and the Security Council is deadlocked, by EU members seeking or supporting UN General Assembly resolutions which recommend that States and organizations take non-forcible collective security measures including sanctions to tackle threats to peace and security involving violations of international law.[121] Further connection with both collective security and international law would be achieved by the EU linking its non-forcible measures to peaceful settlement initiatives in the OSCE and UN, to incentivise settlement. Defence and security would be reinforced by NATO maintaining its newfound cast-iron commitment to the defence of its membership and by the EU following suit by developing capacity to match its own collective defence commitments. The defensive umbrella of NATO/EU could be extended to non-party/member States by prior agreement, but any such guarantees would have to be confined to responding to armed attacks/aggressions against such States in order to remain within Article 51 of the Charter. The Article 51 framework for collective defence as situated in the ESA includes the nuclear deterrent, but remaining ambiguities about the compatibility of the doctrine of nuclear deterrence with international law should be addressed. Finally, there is much room for improvement in terms of cooperation, more specifically coordination, between the three basic components of the ESA. While the membership of the OSCE, particularly the presence of Russia, prevents any move towards integration at least of this element of the ESA, the OSCE remains a linchpin as it provides an avenue towards diplomatic and peaceful solutions to disputes and conflicts based on classical principles of international law.

The achievement of a universal collective security system based on the rule of law remains a distant prospect. Robert Nozick argued that a "minimal state" would be achieved only when voluntary security provision by "protective associations" was replaced by a centralised organization that possessed a monopoly over the use of force and protected all members of society.[122] While the UN Charter of 1945 may have appeared to move international relations in that direction through the apparent centralization of legitimate force in the Security Council, its reliance on a collection of powerful States, each with its own geopolitical conception of the world, meant that security was not provided to all States. In this respect regional organizations

[121] BARBER, "Cooperating Through the General Assembly to End Serious Breaches of Peremptory Norms", International and Comparative Law Quarterly, 2022, p. 1 ff.
[122] NOZICK, *Anarchy, State and Utopia*, Oxford, 1974, p. 113.

and structures may be able to partly fill the void in the collective security system. However, it is part of the fundamental nature of a system of defence and security based on regional arrangements that they cannot provide universal security neither practically nor as of right, but they can contribute to peace and security of their membership and, admittedly in incomplete ways, beyond those borders, thereby making up to some degree for the lack of a minimal state at the international level.