The collective security system and the enforcement of international law

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The Collective Security System
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(or a Catharsis for the Austinian Imperatival Complex of International Lawyers)

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Here is a famous fable about international law: international law is riven by an enforcement
disability, for it lacks a general mechanism to ensure that any behavior unwanted by its
primary rules is systematically and automatically sanctioned. Although commonly heard
among circles of neophytes and non-specialists, this perennial tale has never been totally
ridiculed by international lawyers as, like most fables, it touches on a sensitive chord.
Though international lawyers have developed powerful argumentative tools to diminish the
ontologically devastating consequences of this fable, they do not like to be reminded that
international law somehow suffers from an enforcement disability. Indeed, the fable points
to a recurrent complex afflicting them. Certainly, it is an emotional discomfort that
international lawyers have learnt to live with and which they have successfully repressed
over time. Yet, like any complex, it is never completely reined in and it resurfaces from
time to time, especially when they venture beyond their closed peer-circles. Indeed, when
they step out of the epistemic community of international law, international lawyers,
confronted with the enforcement disability of international law, feel compelled to
rehabilitate international law as law. The “enforcement complex” of international lawyers is
particularly rekindled each time blatant violations of international law dominate the
headlines of mainstream news media worldwide. This is why international lawyers

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1 Despite the unanimity in rejecting the Austinian imperatival handicap, this charge “still left traces in the
international discourse”. See Alain Pellet, ‘Sanctions’, in Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of
Public International Law, OUP, available at http://www.m pepil.com/home, para. 3. (Pellet, Sanctions)
constantly revisit this question and feel the need to regularly reaffirm how such disability does not strip international law of its legal pedigree.

In this context, it seems hard to deny that the two-step process that led to the creation of a collective security system in the 20th century bore a sweeping therapeutic effect on the abovementioned complex of international lawyers. Whilst the failure of the League of Nations procedural framework for the resort to coercive powers exacerbated the “enforcement complex” of the discipline, the subsequent design of the “Chapter VII” mechanism of the UN Charter, envisaged in the suburbs of Washington and finalized in San Francisco, created the hope that an enforcement procedure, endowed with real credentials, had finally been delivered to those who had long await its arrival. Despite being mainly oriented towards the settlement of disputes, the UN Charter was enthusiastically received by the international legal community for improving enforcement capabilities of international law. Though those hopes were quickly dashed by the Cold War stalemate, the collective security system put in place by the UN Charter has fundamentally vindicated the ambitions of the epistemic community of international law and assuaged their complex.

These introductory epistemological considerations explain why, since 1945, it has become impossible to reflect upon the enforcement of international law in isolation from developments affecting the collective security system. It is against this backdrop that a parallel is drawn between the incremental sophistication of the enforcement of international law through the gradual consolidation of the collective security system and the evolving perceptions about the international legal system among international lawyers. More precisely, this chapter argues that the extent to which the collective security system contributes to the enforcement of international law informs understandings of international law as a whole. It is important to emphasize, however, that, although grappling with the contribution made by the collective security system to the enforcement of international law as whole, this chapter maintains its distance from the perennial endeavors traditionally made by international lawyers to rehabilitate international law as law.²

² The international lawyers making these efforts are usually those who feel existentially engaged in, and responsible for, international law and are especially troubled by its the enforcement disability.
The Collective Security System and the Enforcement of International Law

After a few brief terminological remarks on the concepts of enforcement, coercion and sanction (1), this chapter will briefly recall the theoretical debates about the role of enforcement in our understanding of international law (2). A few observations will then be formulated as to how the creation of a collective security system regulating the use of force, irrespective of its actual enforcement function, came to upend the way in which enforcement of international law is understood by international lawyers (3). Taking into account recent developments pertaining to non-state actors, as well as targeted and smart sanctions, it will reevaluate the coercive role that can be performed by the collective security system (4). Finally, this chapter will explain how the various steps in the development of the collective security system and our understanding thereof directly impinge on how international law as a whole is perceived. The concluding remarks will invite some critical reflections on the need of a catharsis that will purge international lawyers’ “enforcement obsession” vis-à-vis their reading of the collective security system (5).

1. Sanctions as an authorized form of coercion for the sake of enforcement

Strictly speaking, a sanction constitutes only one type of coercion. The term sanction usually refers to that type of coercion, which is authorized in a legal system with a view to changing a subject’s reasons for action and reversing any of its behavior that runs contra the prescriptions of that system. Sanctions thus constitute a form of authorized coercion by opposition to the non-authorized forms of coercions which, if performed, can in turn lead to sanctions, i.e. authorized forms of coercion.

Enforcement designates the more global phenomenon by which the system interferes with a subject’s reasons for action through the adoption of sanctions with a view to making it abide by its prescription. Enforcement must accordingly be distinguished from compliance control operating independently of breaches, such as fact-finding, verification or inspection. Enforcement is necessarily reactive to a behavior unwanted by the legal

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system.\(^5\) It must equally be distinguished from retribution and punitive mechanism as it is geared towards the restoration of legality, although it cannot be excluded, especially in international law, that sanctions through which coercion is exercised in the process of enforcement come with a retributive and punitive dimension.\(^6\)

The question of enforcement arises with respect to primary norms, as much as secondary norms. Most of the time, however, the question of enforcement of primary norms draws most of the attention because it is - albeit erroneously - presupposed that secondary rules do not need to be enforced. Indeed, it is often assumed that law-applying authorities necessarily comply with secondary rules.\(^7\) More than compliance with primary norms by primary subjects,\(^8\) respect of secondary rules by law-applying authorities and officials is even construed as being a prerequisite for having a legal system in the first place. It is also what essentially distinguishes primary from secondary norms. This is why it is traditionally taken for granted that law-applying authorities and officials comply with secondary rules. Although the question of the enforcement of secondary rules upon law-applying authorities is more complicated than is often assumed, even in international law, the following observations, in a rather traditional fashion, continue to zero in on enforcement of primary prescriptions of international law.

Enforcement, sanction and coercion are frequently used interchangeably in academic literature.\(^9\) Most of the time, the three concepts designate the process of interference with

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6 See also infra 4 c).
an actor’s reason for action with a view to making it abide by the standard of conduct prescribed by international law.\textsuperscript{10} It would probably be vain to bemoan such semantic nonchalance and suggest a better semantic scheme that would differentiate them. It is uncontested that words have no meaning \textit{per se} and it is the linguistic usage of a word, within a given interpretative community,\textsuperscript{11} that determines its contextual meaning in that community.\textsuperscript{12} It would therefore be of no avail to attempt to counter the usage by which these terms are construed as synonymous. Additionally, it remains uncertain whether distinguishing between sanction, coercion and enforcement would enable us to greatly refine our understanding of the whole phenomenon of enforcement. The problems of enforcement in connection with the collective security system in international law are not of a definitional nature. This is why, for the sake of the following considerations, \textit{coercion} only refers to authorized coercion. The term as it is used here does not refer to the forms of coercion which are expressly prohibited by international law, such as unlawful interference with a subject’s consent to a treaty\textsuperscript{13} or unlawful interference in internal affairs,\textsuperscript{14} and is used interchangeably with \textit{sanctions} which are a form of exercise of coercive power. In the UN context, the term sanction is often associated with some specific exercise of non-forceful coercive powers.

\textsuperscript{10} On the concept of interpretative community, see Stanley Fish, \textit{Is There a Text in This Class? The Authority of Interpretative Community} (Harvard University Press, 1982); see also Stanley Fish, \textit{Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies} (Duke University Press, 1989), at 141.

\textsuperscript{11} On the concept of interpretative community, see Stanley Fish, \textit{Is There a Text in This Class? The Authority of Interpretative Community} (Harvard University Press, 1982); see also Stanley Fish, \textit{Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies} (Duke University Press, 1989), at 141.


2. Neutralizing the Austinian imperatival handicap of international law

The enforcement disability of international law is often addressed in reference to John Austin who derided international law as morality for this same shortcoming. From such a perspective, international law cannot be properly considered law in a strict sense, that is, a set of commands, for it can only be enforced by moral sanctions. Austin’s demotion of international law to morality was informed by his view that law necessarily ought to be backed by sanctions. This conception was shared with Jeremy Bentham, although the latter contended that some commands would still be law even if supported only by moral and religious sanctions or if accompanied by an offer of reward. The Austinian handicap of international law is well known and widely-discussed in the literature. It constitutes a common charge made by critics who are often called the “deniers”. These thinkers position themselves against the legal pedigree of international law and, hence, against the international legal scholarship as a whole, which they ridicule for deifying its object of study.

It will come as no surprise that international legal scholars promptly rebuffed such a charge. Threatened by what they perceived as a compelling attack against the nobility of their object of study and thus their own identity, international lawyers have unanimously

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rejected the Austinian charge against international law.\textsuperscript{22} The rejection of the Austinian handicap of international law by international lawyers manifested itself in the adoption of some powerful counter-argumentation. Two different argumentative tools against the Austinian imperatival handicap of international law were devised by international legal scholars. Although there may be others, these tools represent the chief avenues through which one may circumvent the Austinian objection.

Two classical counter-objections against the Austinian imperatival handicap must be briefly recalled here. One the one hand, scholars like Kelsen, while embracing a coercive conception of international law, strove to demonstrate that international law was a set of commands “armed with sanctions” (a). On the other hand, other scholars challenge the definitional premise on which the Austinian imperatival charge is based and claim that the legal pedigree of international law is not dependent on it being a coercive order (b).

\textbf{a) International law as a coercive normative order}

The first argumentative construction to rebut the Austinian imperatival handicap turns Austin’s argument on its head. Kelsen embodies such a rejection as he did not deny the necessity to ground law in coercion, but affirmed that international law was a coercive order where sanction was mainly decentralized.\textsuperscript{23} He relied on decentralized coercion to affirm the coercive character of international law, an approach that was not entirely unprecedented but is personified by his work.\textsuperscript{24}

For Kelsen, a legal order is different from other kinds of positive normative orders, particularly morality, because they are coercive orders “in the sense that they react to antisocial ‘facts’ … if necessary using physical force, hence is inflicted as a coercive


\textsuperscript{24} See Kaltenborn as studied by Bernstorff, \textit{Hans Kelsen} at 15-20.
Indeed, for Kelsen, coercion is what distinguishes a legal order from an “ought-order” such as morality and religion. While, in this respect, there is certainly kinship with the Austian imperatival conception of law, Kelsen stops short of saying that membership to the legal order hinges on this norm being accompanied by a sanction. Non-coercive norms are not invalid. Coercion is a constitutive element of the legal order as a whole but not a validity criterion of each of the norms composing that legal order.

For Kelsen, the extent to which the exercise of coercion against the unwanted behavior is organized and institutionalized will usually serve as an indication of the development of the legal order. If the use of physical coercion becomes a delict while, at the same time, a sanction is authorized by the legal order that is claiming a monopoly on the use of physical coercion, then the legal order concerned is no longer a primitive legal order. In his view, primitive legal orders fall short of empowering an organ with the task of applying (physical) coercion. They allow self-help and leave this function to subjects injured by the delict. In Kelsen’s view, international law was undoubtedly such an underdeveloped order because coercion was mainly decentralized. Yet, he never went so far as Austin to deny that international law was actual law and even explained why it was undeniably so. His demonstration that international law is endowed with enforcement powers was informed by his agenda to help international law survive its inability to prevent the second world war and buoy the emergence of an international order of peace.

Kelsen’s concept of law, when applied to international law, leads to the conclusion that international law is “true law” for it contains institutions performing coercion. In particular,

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26 Bernstorff, Hans Kelsen at 86.
27 Kammerhofer, Which Kelsen? at 228.
29 Kelsen, Principles at 18-64.
30 The implicit agenda behind some aspects of Kelsen’s Pure Theory has been the object of much discussion. See for instance Bernstorff, Hans Kelsen at 84; B. Simma, according to whom Kelsen was intent on countering Hegel which had been translated into legal theory by Jellinek and thus aimed at strengthening the idea of an international rule of law: Bruno Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’, EJIL 6 (1995), 33-54, p. 41. Some similar arguments are made by F. Rigaux, who argues that Kelsen opposed not only Hegel but also Triepel’s dualism: Francois Rigaux, ‘Hans Kelsen on International Law’ EJIL 9 (1998) No. 2, 325-343, p. 326.
Kelsen found that reprisals and war, the “legally stipulated consequence(s) of breach of law”, perform such a function.\(^{31}\) International law, in Kelsen’s eyes, regulates the resort to both reprisals and wars and found some institutional forms of decentralized coercion in wars and reprisals.\(^{32}\) Discussing the Chapter VII mechanism of the UN Charter, he affirmed that enforcement actions under articles 39, 41 and 42 could potentially be interpreted as sanctions because such measures react to violations of the UN Charter.\(^{34}\) He insisted that the sanctions adopted under article 41 do not formally presuppose a violation of international law but only necessitate a finding that there has been a breach to the peace and security.\(^{35}\)

Some famous international lawyers expressly endorsed Kelsen’s neutralization of the Austinian imperatival handicap of international law.\(^{36}\) Many others, while not expressly espousing Kelsen’s approach, similarly contested the Austin’s contention that there were no enforcement mechanisms, even at his own time.\(^{37}\) This view also finds support in the case law of the International Court of Justice.\(^{38}\) Others pushed the Kelsenian counterargument further by arguing that international law was a coercive order not only because of the existence of decentralized forms of sanctions but also by virtue of a wide range of soft enforcement mechanisms.\(^{39}\) Although sanctions in international law are sometimes

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32 To that end, he relied on the theory of bellum iustum by virtue of which some wars could be deemed legal and other not. This is an aspect of Kelsen’s theory which is most controversial for it is not certain that wars were unlawful before the Pact Briand-Kellog.
33 *Ibid.* at 735-736 (For Kelsen, Article 41 plays the role of “reprisals” and Article 42 plays the role of war).
34 H Kelsen, *Fundamental Problems* at 734.
35 Paul Guggenheim, Traité de droit international public, Tome I, 1953, Librairie de l’Université, Georg & Cie SA, Genève. See also Oppenheim, 8th ed., p. 8, Para. 8). For a similar view, but in a milder form, see Ch. Leben, it is the “possibility to have resort to a judge, although this remains very minimalistic in fact. (Ch. Lebel, “La jurisdication internationale”, *Droits*, 1989, pp. 143 ff); see also A. D’Amato, “The Coerciveness of International Law”, 52 *German Yearbook of International Law* (2009), 437-460.
37 See the rather confident and upbeat reading of international law by the International Court of Justice in 1966: “In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception...” (ICJ, South West Africa, Second Phase, Ethiopia v. South Africa; Liberia v. South Africa, 18 July 1966, ICJ Rep. 1966., para. 86.
38 For an interesting attempt to refute the Austinian handicap of international law by virtue of a conception of enforcement based on “outcasting”, see Oona Hathaway and Scott J. Shapiro, “Outcasting: Enforcement in Domestic and International Law”, 212 *Yale Law Journal* (2011) 252.
perceived as “weak” or “ineffective”\textsuperscript{40}, especially in some strands of the American international legal scholarship, the finding that international law is endowed with sanctions mechanisms has enjoyed wide support, even among American legal scholars.\textsuperscript{41}

b) International law as a source-based order

Another avenue overcoming the Austinian imperatival handicap is to strip the concept of international law of any coercive feature and demote sanctions to, at the most, a condition of the effectiveness of international law, as opposed to a condition of its existence. It is not unreasonable to say that this is the route commonly taken by most international lawyers nowadays, albeit sometimes unconsciously or unreflectively. International law is thought in isolation of its sanctions, the latter being at best construed as an effectiveness-enhancement mechanism.

It is not certain that the paternity for such an approach should be ascribed to Hart. Yet, it is usually under the banner of a Hartian approach to international law, which is quite dominant in the international legal scholarship, though not always for good reasons,\textsuperscript{42} that the Austinian imperatival handicap was rejected.\textsuperscript{43} Hart expressly broke with the sanction-based conception of law popular in the, until then, dominant utilitarian tradition of Hobbes, Bentham and Austin. Even if Hart agreed that law is an expression of will, coercive mechanisms no longer constitute a central feature of any legal system, for it is entirely conceivable that a legal system does not need coercive mechanisms.\textsuperscript{44} He


\textsuperscript{41}For a different view among American international legal scholars, see D’Amato, \textit{International Law}.


\textsuperscript{43}Pellet makes a similar finding; see Pellet, \textit{Sanctions}.

\textsuperscript{44}Hart, \textit{Concept of Law} at 216-20. See also J. Raz, \textit{Practical Reason and Norms} (Princeton University Press, 1990), pp. 154-162.
recognised that enforcement mechanisms are common and that they are not necessary for such systems to be legal systems.\footnote{Hart, Concept of Law at 179-180.}

This is the extent to which Hart helps to accommodate the enforcement deficiencies of international law when it comes to enforcement. First, although for different reasons, Hart demoted international law to "law improperly so called".\footnote{Hart, Concept of Law at 232-237.} More fundamentally, enforcement, while having been wiped out from the surface of Hart's theory, re-enters through the back door. While not being a constitutive feature of Hart's concept of law, enforcement is an implied prerequisite of a Hartian legal system. Hart's Concept of Law, albeit preserving the role of enforcement on its surface, gains its prominent role by way of repercussion. Indeed, Hart's concept of law presupposes the existence of law-applying authority, thereby making an enforcement mechanism absolutely essential. In my view, although secondary at first glance, enforcement in Hart's theory resurfaces in the form of law-application.\footnote{I have defended this elsewhere. See d’Aspremont, Herbert Hart.}

In the absence of law-applying authorities, there can simply not be any social practice of law-identification generating communitarian semantics to the rule of recognition. Without law-applying authorities, there cannot be meaningful rules of recognition: no law-applying authority, no production of meaning for the rule of recognition and thus no meaningful theory of sources. Law-application, and the practice of law-identification (ascertainment) that comes with it, is thus an indispensable condition for the existence of a legal system.

By elevating the practice of ascertainment by law-applying authorities to a linchpin of the rule of recognition, Hart substituted one handicap for another. In this sense, Hart only provides a temporary respite from the Austinian handicap, which he subsequently reintroduces in another form.\footnote{Ibid.} A social requirement, which is not necessarily fulfilled by international law, follows the imperatival Austinian requirement. It is uncertain that international law can always accumulate a sufficient amount of social practice for meaningful rules of recognition to emerge. It is not that we lack law-applying authority. Nor is it that courts and tribunals fail to sufficiently apply and identify international rules. It is
simply that there is little awareness by law-applying authorities that they share a linguistic community. In practice, international judges do not cultivate a strong sense of membership to the same linguistic community. Each court, in isolation from one other’s activities, carries out the practice of law-ascertainment.  

Here is certainly not the place to dwell on such theoretical questions. For the sake of these brief observations, it suffices to highlight that a Hartian take on international law plays down the Austinian imperatival handicap of international law but unearths another form of disability: the deficient social conscience of courts and tribunals in relation to the social practice feeding in the rule of recognition, and the great inability of the system to produce a consistent social practice of law-identification, without which there cannot be sound and meaningful rules of recognition. In Hart’s understanding of law, the Austinian disability of the international legal system is superseded by another, equally serious ailment.

Whatever the actual value of Hart’s rebuttal of the Austinian imperatival handicap, it is important to highlight that such an approach has been followed by many international lawyers who construe sanction at best as a condition of the effectiveness of international law and not as a condition of its existence.  

According to these lawyers, the organization and institutionalization of the sanction are only indications of the degree of institutionalization of a legal order, which in that sense must be seen as lagging behind domestic or regional legal orders. This view received some support by the International Court of Justice in the Barcelona Traction case.

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49 For a discussion on the social deficiency of international law and the absence of social conscience of international courts and tribunal, see J. d’Aspremont, Formalism and the Sources of International Law (Oxford University Press, 2011), at 213 ff.

50 Gerald G. Fitzmaurice, “The Foundations of the Authority of International Law and the Problem of Enforcement”, 19 Modern Law Review (1956), 1 et seq. On a similar move on this question in 19th century German scholarship, see Bernstorff, Hans Kelsen at 85; The so-called “Manhattan School” of international law has even contended that sanction is not necessary for the effectiveness of international law. See the famous contention by T. Franck that “powerless” rules are obeyed, even by powerful states. See Thomas M. Franck, The Power of Legitimacy Among Nations (OUP, 1990, p. 3).

51 Weil, Collected Courses at 55.

52 ICJ, Barcelona Traction, Second Phase, 5 February 1970, ICJ Rep. 1970, para. 82: “The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right”.

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It is interesting to note that in American legal scholarship, the Hartian rejection of the constitutive role of sanctions was energetically vindicated by a number of scholars who, following Louis Henkin, endeavored to reject realist skepticism towards international law. Yet, it was interpreted slightly differently by these scholars, for, drawing on Hart, they claimed that, at the heart of international law, lies a belief. Such a belief, in their view, manifests itself in the dominant compliant behavior of states. This behaviorist and necessarily empirical turn is important to mention, even though it is not strictly in line with a Hartian understanding of law that favours compliance by law-applying authorities over primary actors. Indeed, this turn opened the way for a new strand of scholarship in American literature focused on compliance by primary actors and the driving forces behind the pull for compliance of international law.

3. Centralization and Individualization of Enforcement of International Law

Enforcement in international law has witnessed two key moves over the last two centuries. There is a lot of controversy regarding the extent to which the collective security system can itself be considered a centralized enforcement mechanism of international law. Irrespective of whether the collective security system can be elevated into an enforcement mechanism per se, its creation has fundamentally impinged the understanding of sanctions by the international legal system of unwanted behaviors at the international level. Whatever the ultimate function performed by the collective security system, its creation has led to a decommissioning of self-help as the primary enforcement tool of international law. For this reason, the first major evolution affecting enforcement is the gradual move to a collective enforcement.

55 For a follower of Henkin’s use of Hart, see e.g. Mary Ellen O’Connell, The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement (Oxford University Press, 2011). See also Abram Chayes and Antonia Handler Chayes, The New Sovereignty (Cambridge: Harvard University Press, 1995) according to which resources allocated to coercive sanctions are misplaced and should be better allocated by attempting to change states behaviour through managerial strategies.
security system and the partial decommissioning of self-help as enforcement tool (a). Over the years, however, the sanction mechanism of the collective security system has itself undergone significant changes, and accordingly sanctions of unwanted behaviours have been customized to an unprecedented degree (b). These two moves, however, should not obfuscate the persistence of other more disparate mechanisms endowed with some enforcement function (c).

**a) Decommissioning self-help: the move to the collective security system**

Until the 20th century, international law adopted a very permissive posture towards self-help, which was entirely unregulated. As a result, self-help, which includes forcible measures, was elevated into the primary enforcement mechanism of the international legal order. Although performing other functions, such as punitive and retributive, the enforcement function of self-help was both past-looking and forward-looking. Self-help constituted a means for a state to coerce another state to cease the breach of an obligation owed to it and possibly to repair the harm resulting therefrom.

The central position of self-help as a tool for the enforcement of international law was gradually dismantled in the first half of the 20th century. Indeed, although it did not disappear completely from the range of reactions available under international law, self-help was decommissioned as the central tool of enforcement of international law as a result of a move that, curiously, is considered in retrospect by the epistemic community of

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international law to be a very positive development and a factor of progress. This shift brought an end to what has been perceived as the dark age of international law.

The various steps of this move towards a centralized collective security system are well known. After the adoption of the 1907 Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts and the partial proceduralization and institutionalization of war under the League of Nations, the adoption of the Briand-Kellogg Pact was the knell bell of self-help as the central enforcement tool of international law. Such a decommissioning of self-help was confirmed and generalized by the UN Charter in 1945, which prohibited both the threat and the use of force. Although not excluding decentralized forms of authorized non-forcible coercion, it empowered one central body with coercive powers. In contrast with the Pact of the League of Nations, the UN Charter placed the power to make a finding that could trigger the sanction mechanism in one centralized body, rather than leaving the determination to member states. Also in contrast with the Pact, the determination of the non-forcible coercive measures was left to the discretion of the Council and not formally designed ex ante. The centralization inherent in the Chapter VII architecture coexisted with a high degree of politicization. The resulting politicization of the policing function of the Security Council was informed both by the need to place more emphasis on dispute settlement

65 See chapter XXX in this volume.
68 See gen. Georges Rambert, Le Droit de la Guerre et le Pacte Briand-Kellogg (Lausanne, Payot & cie, 1931);
70 Article 16 of the Pact of the League of Nations.
71 Ibid. For an unsuccessful application, see Albert E. Highley, The Actions of the States Members of the League of Nations in Application of Sanctions against Italy (Thèse Université de Genève, Geneva, 1938).
rather than the restoration of legality,\textsuperscript{71} and by a sense of realism after the fate of Article 16 of the Pact of the League of Nations. Accordingly, political discretion was expressly provided for in the Charter and the automaticity found in the Pact of the League, which is often construed as one of the causes of the failure of the League System, was abandoned. The Pact of the League of Nations and the UN Charter did not dovetail as regards the decentralization implementation of the forcible and non-forcible measures, which both put forward. In the case of forcible coercive measures, however, the approach taken by the latter had been more the result of the desuetude of Article 43.\textsuperscript{73} There is little doubt that this centralization of the exercise of coercive powers by and through the Security Council is the hallmark of the move to a collective security regime in the first half of the 20\textsuperscript{th} century.

This does not mean that the move towards the collective security system is always welcomed in the epistemic community of international law. Much debate persists both as to whether Chapter VII itself puts in place an enforcement mechanism \textit{stricto sensu} and whether the prohibition to use force by the Briand-Kellogg Pact and subsequently by the UN Charter still left some room for decentralized enforcement performed through forcible self-help. It is slightly uncertain whether the forcible coercive powers centralized in the Security Council necessarily exclude the decentralized forcible coercive powers of States. This largely depends on how one construes self-defense. It seems that the dominant position among experts is that, whether in the form of self-defense\textsuperscript{74} or the state of necessity,\textsuperscript{75} the UN Charter has eliminated any measure of forcible self-help. The rejection

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\textsuperscript{75} Sarah Heathcote, “Est-ce que l’état de nécessité est un principe de droit international coutumier?”, 40 \textit{Revue Belge de Droit International} 53 (2007); see also J. d’Aspremont, “Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law”, 31 \textit{University of Pennsylvania Journal of International Law} (2010), 1133-1135 (d’Aspremont, \textit{Mapping the Concepts}).
\end{flushright}
of military counter-measures by the International Law Commission buttresses that position.\footnote{See Article 50 of the Articles on the Responsibility of States, Report of the International Law Commission on the work of its Fifty-third session, \textit{Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)}, chp.IV.E.1 There is however some ambiguity in the earlier work of the ILC. See ILC, \textit{Rapport 1979, Yearbook of the International Law Commission, 1979, vol. II (2)}, note 593, p. 131 (where self-defence is seen as the only case of military reactive measures).}

The International Court of Justice expressly acknowledged this principled decommissioning of self-help as an enforcement measure in its first contentious case:

“The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”\footnote{ICJ, \textit{Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania,)}, Judgment of 9 April 1949, ICJ Rep, 1949, p. 35; See the critical remarks on that aspect of the case by T. Christakis, “Intervention and Self-Help”, in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds.), \textit{The ICJ and the evolution of international law: the enduring impact of the "Corfu Channel" case} (London, Routledge, 2012), p. 211-225; see also C. Gray, “A Policy of Force”, in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds.), \textit{The ICJ and the evolution of international law: the enduring impact of the "Corfu Channel" case} (London, Routledge, 2012)226-241.}

A similar position was echoed in the \textit{Nicaragua} case:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”\footnote{ICJ, \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, ICJ Rep, 1986, p. 134, para. 268.}

Equally important for the sake of this chapter is to recall that the Security Council was empowered, not only with a monopoly on forcible coercive measures, but also with express
competences to take *non-forcible* coercive measures. The other fundamental feature of the Charter’s collective security system that impacted the debate about the enforcement of international law is the power to adopt the non-forcible measures, which can potentially trump any conflicting rule of international law. Whilst the possibility for a central body to resort to non-forcible coercive measures was already present in the Pact of the League of Nations, the UN Charter reinforced, centralized and systematized such a mechanism.

These provisions were first used during the crisis in Rhodesia in 1965, which was quickly followed by many other instances. It is known to all observers that the use of these non-forcible coercive measures came to surpass the maintenance of international peace and security *stricto sensu*. It is sometimes argued that some of the Security Council’s main achievements lie in the non-military measures that it has ordered, as is illustrated today by the Security Council’s use of its Chapter VII powers for mostly non-military purposes. Moreover, the measures that the Security Council typically orders are not conceived as measures preceding a possible authorization to use force; they are construed as the final end of the Council’s action.

The exercise of the Council’s powers to take non-forcible measures has been the theatre of another fundamental move affecting the question of enforcement: individualization. This second move must now be discussed, for it brought about a great and unprecedented sophistication of the non-forcible coercive powers of the Security Council, which in turn has had consequences on the perceived enforcement functions bestowed upon the Council.

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79 See in particular articles 25 and 41 and of the UN Charter.
80 See article 16 of the Pact of the League of Nations.
81 Resolution 216 (1965) and Resolution 217 (1965) on Southern Rhodesia.
82 Among others see, South Africa: Resolution 418 (1977); Irak Resolutions and 661 662 (1990); Libya: Resolution 748 (1992); Yugoslavia: Resolution 713 (1991); Sudan: Resolution 1054 (1996); Angola: Resolutions 1173 (1998) and 1295 (2000); Sierra Leone: Resolution 1306 (2000); Liberia: Resolution 1343 (2001).
83 This is one of the ideas behind Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (Dordrecht, Kluwer Law International, 2001).
b) Customizing international security: the move to individualization of sanctions

The conferral of non-forcible coercive powers to the Security Council is as important a change as the monopoly on measures involving the use of force, with which it was endowed. By virtue of non-forcible measures under Article 41 of the UN Charter, the Security Council has been implementing a broad range of policies, such as reconstructing States or fighting impunity through the creation of judicial bodies. Additional tasks alien to the maintenance of peace and security have been conferred upon the Council through non-UN mechanisms. For example, the Security Council can refer country-specific situations to the International Criminal Court, which has the power to launch investigations even in countries that are not signatory to the Rome Statute. All in all, the Council has increasingly vacated its role of guardian of the order and has focused on problems of justice. In doing so, the “Police” have, in Martti Koskenniemi’s famous words, ventured into the “Temple”, a development that is at odds with the idea that the promotion of justice has been reserved for General Assembly.

It is unnecessary to discuss the legality of these radical alterations to the Charter, which were brought about by “subsequent practice”. The substance ratione personae of the measures adopted in the exercise of the Security Council’s non-forcible coercive powers have evolved dramatically. Originally thought of as sanctions against states, the sanctions practice by the Security Council has increasingly been aimed at more specific and carefully

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89 On the notion of subsequent practice, see ILC, Study on Treaties and times: effect on treaties of subsequent agreement and practice, see preliminary study by George Nolte, A/63/10, Annex A. On the motives that can potential inform the choice for the use of subsequent practice in treaty interpretations, see Julian Arato, “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences”, 9 The Law and Practice of International Courts and Tribunals (2010) 443-494.
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delineated subjects, including the targeting of non-state entities. The ICJ subsequently recognised this practice when taking measures against non-state entities. Simultaneously, resulting from the concern over the humanitarian fallout of broad sanctions regimes, the Council turned to the use of “smart sanctions” and in particular to individual-oriented sanctions resting on a listing system by sanctions committees. As early as the crisis in Haiti in the early 1990s, the Security Council had initiated a new model of sanctions based on listings nominally designating individuals. The targeting of UNITA leaders and individuals in Sierra Leone followed this trend.

It is important to realize that such practices still continued to be of a collective nature as targeted individuals were being identified by virtue of their formal participation in a government or an organized insurgent group. This is why, the final step towards full individualization and de-territorialization only came later with the anti-terrorist policies which Member States decided to carry out through the collective security system, rather than through fully decentralized channels. The smart and targeted sanctions which they designed on that occasion – and which further institutionalized the Council’s exercise of its coercive powers – reached an unprecedented level of sophistication meant to avoid the fallout witnessed in the case of general and broad sanctions regimes. This practice of smart and targeted sanctions continued to consolidate itself. This did not prove unproblematic, especially in terms of the protection owed to the rights of individuals. Controversies were spurred by the challenge of the European Court of Justice and the creation of an

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92 ICJ, Advisory opinion, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), 22 July 2010, ICJ Rep., 2010, paras 116-117.
93 Pellet, Sanctions para. 33-38
94 Resolution 917 (1994).
95 Resolution 1127 (1997).
97 Pellet, Sanctions para. 36
98 Res 1390 (2002); 1452 (2002); 1455 (2003); 1526 (2004); 1617 (2005); 1735 (2006); 1904 (2009); 1989 (2011).
Interestingly, these recent developments have required the use of coercion by the Security Council to undergo a further process of customization and sophistication. Such practice shows that the coercion "authorized" by the international legal system has grown more precise and specific. The customization and sophistication of the exercise of non-forceful coercive power by the Council has reinforced the conviction of international lawyers that the collective security system can effectively perform enforcement functions. The move towards the collective security system and its period of sophistication has had affects on other reactive coercive mechanisms, which must be briefly recalled.

c) Coexistence with other coercive reactive mechanisms

The creation of a collective security system, and its growing individualization, customization and overall sophistication, have not occurred in a vacuum. The main change brought about by the collective security system is that coercive powers outside the UN framework can only be non-forceful. Forceful self-help was decommissioned and the power to resort to forcible coercive measures was bestowed exclusively upon the Council. Conversely, the non-forceful coercive powers of the Council were never meant to be exclusive of other coercive measures, either centralized or decentralized. Many of these measures even came with a much more explicit reactive character and were expressly geared towards enforcement.

Three types of such measures can be identified. They can be centralized and internal as in some institutional regimes like the WTO or the EU. They can be completely

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104 On these regimes, see the remarks of B. Simma, “Self-Contained Regimes” 16 Netherlands Yearbook of International Law (1985) 111.
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decentralized, being the object of some coordination by virtue of an international organization, such as the obligation not to recognize.\textsuperscript{105} Or, they can be completely decentralized like counter-measures, though coordination is not excluded. These measures perform enforcement sanctions. Among them, counter-measures probably constitute the enforcement measure “par excellence”.\textsuperscript{106} Such decentralized modes of enforcement of international law can, among other things, even constitute a very powerful tool for the enforcement of international law in the general interest.\textsuperscript{107} They can also perform other functions, such as measures possessing a coercive character but not aimed at enforcement. Instances of this latter type of measures include the termination of a treaty by virtue of the \textit{exceptio non adimpleti contractus}\textsuperscript{108} or the invalidity of a treaty by virtue of unauthorized coercion.\textsuperscript{109}

Furthermore, there is a range of informal mechanisms which have not been formally organized by international law and which nonetheless can be coercive and geared towards enforcement. This is the case for all measures that constitute retorsion and which do not need to be “authorized” by the international legal system.\textsuperscript{110} Eventually, there are all those measures whose coercive effect is purely “reputational”\textsuperscript{111} or “spontaneous”\textsuperscript{112}, whereby the interference boils down to damaging the reputation.

A collective security system has therefore emerged in the 20\textsuperscript{th} century. The development of targeted and smart sanctions does not necessarily generate a simplification of the range of the coercive measures available in international law. It is beyond the scope of this chapter

\textsuperscript{105} See article 41 of the Articles on States Responsibility (2001).
\textsuperscript{108} V. article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.
\textsuperscript{112} De Visscher distinguished between techniques institutionnelles, techniques d’autoprotection and techniques spontanées. (Patrick De Visscher, “Cours general de droit international public”, 136 \textit{Collected Courses}, 1972, pp. 138-153).
to discuss how the sophisticated collective security system is to be articulated with regard to other coercive reactive mechanisms. The internal and external complexity of the exercise of coercive powers on the international law plane has been demonstrated. It will now be shown how the design of a collective security system and its great sophistication over the last two decades reinforced the conviction that the collective security system could be endowed with enforcement functions.

4. Enforcement of international law through the collective security system

While there seems to be unanimity among experts and observers that forcible self-help was banned by virtue of the collective security system and the prohibition to use force, there is much disagreement as to the impact of these instruments on the enforcement of international law through non-forcible measures. The decommissioning of self-help and the aforementioned sophistication of the Security Council’s exercise of non-forcible coercive power led to the growing expectation that the collective security system could perform enforcement functions, in one way or another. In spite of this general inclination to assign these enforcement responsibilities, there has not been much agreement as to the type of enforcement that could be bestowed upon the UN system. In particular, there have been four diverging views on the enforcement role that such mechanisms could play and which ought to be briefly outlined here. Mention is made of the enforcement of international law as a whole (a), the enforcement of the UN Charter prescriptions (b), the enforcement of peace (c) as well the enforcement of justice though retribution (d) that the collective security system is said to be capable of performing.

a) The collective security system as an enforcement mechanism of international law

According to that view, The use of the sanctions regime of Chapter VII can be considered an enforcement mechanism of international law when the threat to the peace is grounded in violations of international law. A number of authors accordingly argue for the

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113 See supra note 56.
114 See supra 3a).
115 See supra 3b).
coincidence of the maintenance of peace and security and the enforcement of international law.\textsuperscript{116} Some of those embracing this view have gone so far as to claim that, at least in explicit cases, the finding or determination of a violation recognized by the Council should be held to bear definitive legal effect.\textsuperscript{117}

This view is contested. Traditionally, the most compelling objection raised against this view pertains to the absence of any formal prerequisite for the Council to make a finding of wrongdoing by the subjects of the coercive measures.\textsuperscript{118} It is true that in practice, as is discussed below\textsuperscript{119}, the situations qualified as “breach of the peace” as well as many of the situations qualified as “threat to the peace” involved violations of the UN Charter and the corresponding customary rules.\textsuperscript{120} Likewise, systematic violations of human rights or humanitarian law have sometimes underpinned findings of a threat to the peace.\textsuperscript{121} However, there cannot be any automaticity between the two types of violation, because, as


\textsuperscript{119} See infra b)

\textsuperscript{120} Cfr infra 4b).

a matter of principle, the process of qualification remains entirely discretionary. Moreover, practice shows a plethora of examples where situations short of indicating any clear violation of international law were qualified as threats to the peace. It nonetheless happens that the Security Council raises the promotion of legality as one of the rationales for taking action under Chapter VII.\textsuperscript{122} Even if these express references were to be considered as anything more than diplomatic discourse, such a rationale remains purely occasional and thus no systemic conclusion can be drawn as to the enforcement role of the Security Council.\textsuperscript{123} It could also be argued that Chapter VII actions remain primarily aimed at the maintenance or establishment of a factual situation, rather than a legal one,\textsuperscript{124} and accordingly cannot be seen from the standpoint of international law, as constituting enforcement action \textit{per se}. It is true, however, that there are a number of regimes bestowing some enforcement responsibilities upon the Security Council or other UN organs.\textsuperscript{125} It must however be observed that these responsibilities conferred upon the Council are mostly intended as incentives for compliance and do not give the Council enforcement responsibilities \textit{per se}.\textsuperscript{126}

These reservations explain why the view that the collective security system, especially the Chapter VII mechanisms, has more commonly been conceived either as a regime geared towards the enforcement of the rules of the Charter (b), as a peace-enforcement regime (c), or, albeit more rarely, as a punitive regime (d).

\textsuperscript{122} See the preamble of resolutions creating the ICTY and ICTR: promotion of legality is not a the main goal but only in the interest of peace and security. See also S/PV.3175 22 February 1993 and S/PV.3217 of 25 May 1993.


\textsuperscript{125} See e.g. ICC Statute, article 13(b); Article V of the Convention the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151; Article XII(4)of the 1993 Chemical Weapons Convention, 1974 UNTS 45; Article 89 of the 1977 Additional Protocol I to the Geneva Conventions.

\textsuperscript{126} This necessity to distinguish between compliance control and enforcement does not however bar the charge of effectiveness and compliance. According to some scholars, whether or not such measures constitute enforcement measures, they barely are compliance-incentive and do little to enhance compliance with international law. The argument could thus be made that, from the standpoint of compliance, it is vain to seek to elevate the exercise of coercive powers by the Security Council in an enforcement responsibility. See criticisms and proposals for reform: Laurie Rosensweig, “United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law” 48 \textit{Austrian Journal of Public and International Law} (1995) 161-195.
b) The collective security system as a self-enforcing regime

The argument that any sanction adopted by virtue of Chapter VII can be seen as an enforcement measure of the Charter itself is likely to be less controversial than the understanding previously mentioned. According to this view, Chapter VII is not a mechanism geared towards law enforcement in general but solely against types of conduct unwanted by the Charter.¹²⁷ Such a position is commonly premised on the idea that any threat to the peace, breach of the peace or act of aggression necessarily constitutes a violation of the Charter and especially of article 2(4). The Charter itself could also be said to provide a limited underpinning for such a reading, particularly regarding those non-forcible measures taken under article 41, which envisages such measures as the enforcement of previous decisions taken by the Council itself.

Generally, the actual occurrence of an act of aggression or a breach of the peace will automatically constitute a violation of article 2(4), as well as other international obligations.¹²⁸ From an empirical perspective, this seems to have been the case when the Security Council sought to sanction what it qualified as an “aggressive act” or an “act of aggression”¹²⁹, or when the Council resorted to the qualification of “breach of the peace”.¹³⁰ Nevertheless, the connection between a finding of a breach to the peace and an act of aggression cannot be generalized because situations qualified as a “threat to peace” constitute the overwhelming majority of situations in which the Council resorts to the use of its Chapter VII powers. In some cases, the Council acknowledges that its own injunctions have not been respected and it subsequently adopts sanctions to address those

infringements or it formulates injunctions directly accompanied by a set of sanctions to be imposed if the injunction is not complied with by the set deadline.\textsuperscript{131} Sanctions of this nature taken by the Council can certainly be seen as enforcement measures of the Council’s own decisions, but these are rather limited situations of self-enforcement and cannot be generalized. Moreover, even in cases of self-enforcement, the Council continues to make use of its wide discretion in picking and choosing which of its injunctions it wishes to see enforced.\textsuperscript{132} More fundamentally, there are two objections against the idea that Chapter VII mechanisms necessarily operate as a Charter-enforcing tool. First, textually, one could argue that it is not accidental that article 2(4) speaks of a threat or use of force and article 39 of any threat to the peace, breach of the peace, or act of aggression.\textsuperscript{133} A second objection can be derived from this practice, especially when it involves a threat to the peace; Council has qualified a whole range of different situations as threat to the peace, despite the fact that they did not come close to a violation of article 2(4).\textsuperscript{134}

Mention must eventually be made of situations where the Security Council enforced decisions of the International Court of Justice. Such situations can be analyzed as cases of self-enforcement given the organic link between the Court and the UN Charter. Such situations of self-enforcement are the object of article 94 of the UN Charter, which sets up


a partial and non-exclusive enforcement regime. In that case, Security Council’s action, for instance in the form of a recommendation, is said to not to be dependent on a finding under article 39 of the Charter. It goes without saying that while action under articles 41 and 42 of the UN Charter are not precluded by article 94 (2), if they are directed at non-compliance with an ICJ decision, they must be preceded by a finding under article 39.

c) The collective security system as a peace-enforcement regime

The aforementioned objections to an understanding of the collective security system as a Charter enforcement mechanism explain why the most common view is that, outside of any finding of a violation of international law or of the Charter itself, the collective security system is only a peace enforcement regime. This view is premised on the idea that coercive measures under Chapter VII cannot be construed as sanctions because they are not necessarily a response to a wrong. Simply speaking, such measures are either forcible or non-forcible police measures that are geared towards the maintenance of peace and security. Such conclusions also hold true for complex peacekeeping missions, irrespective of whether they are created by the General Assembly or the Security Council.

While mainstream, this understanding of the UN Charter is certainly not without paradox, especially if the legal pedigree of a normative order is similarly conditioned on the

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136 See Constanze Schulte, Compliance with Decisions of the International Court of Justice (Oxford, New York: Oxford University Press, 2004), esp. 40-52 (who argues that article 94, paragraph 2 of the UN Charter only refers to non-forcible measure and sets a autonomous regime not dependent on Chapter VII).


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existence of sanction mechanisms. Indeed, if the Chapter VII mechanism cannot be considered an enforcement mechanism and if it did eliminate all forms of self-help as many authors argue, the adoption of the UN Charter could be seen as depriving international law as a whole of its natural enforcement tool. If one embraces a sanction-based conception of international law in the manner of Kelsen, Oppenheim or Guggenheim, the creation of the collective security system could be understood as enfeebling international law as law properly so-called.

This paradox should not be overblown. The abovementioned reading of the UN Charter, and the practice thereunder, does not exclude the possibility that the collective security system plays an indirect enforcement role for either for Charter obligations or for international law as a whole. Violations of both international law and Charter obligations can be construed as being constitutive of a threat to or breach of the peace or an act of aggression. It is the breach itself that is constitutive of a threat to the peace in such a textbook case. Practice provides examples of situations where a violation of humanitarian law, human rights law or the right to self-determination directly informed the finding of a threat to the peace. It is, however, difficult to draw any firm conclusions. Even when the Council expressly refers to a violation of international law in its qualification of a situation as a threat to the peace, it is never clear whether it is the violation itself that generates the threat to the peace or only the consequences thereof. Affirming that such references to violations of international law were, in themselves, threatening international peace and security remains speculative. It must be acknowledged that the wording of the sanctions grounded in situations of violations of the right to self-determination, could seem to indicate that violations themselves, more than their actual and factual consequences, led to a more automatic qualification of threat to the peace. This is not entirely surprising given the high place that such a principle and the policy carried out in its name features in the agenda of the international community and that of the UN. Nonetheless, this remains

139 Cfr supra a).
140 See supra note 56.
142 See supra note 106.
144 Resolution 216 (1965) and Resolution 217 (1965) on the situation in Rodhesia.
highly speculative. The practice of deriving the finding of a threat to the peace from a violation of a positive rule of international law or the UN Charter could elevate the collective security system to an *indirect* enforcement mechanism of either the former or the latter.

**d) The collective security system as punitive system**

Although such a view is more isolated, it has been argued that measures adopted under Chapter VII ultimately have a retributive function. Such a function can complement any of the other enforcement functions mentioned above. Authors amenable to this idea of retribution argue that the collective security system is not devoid of punitive dimensions in its Charter enforcement or peace enforcement role.\(^{145}\) In this sense, forcible and non-forcible measures under Chapter VII can be construed as retributive, at least in part. This finding may be true as a matter of fact and as a matter of diplomatic discourse.\(^{146}\) It is probably less a matter of the formal architecture of the UN Charter.\(^{147}\) The support for a retributive function of the Chapter VII mechanisms shows that another enforcement function has been assigned to the collective security system, namely the enforcement of a vague idea of justice embedded in the Charter.\(^{148}\)

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\(^{146}\) This sometimes pervades the political discourse of members of the Council (see debate about Irak in 1990, S/PV.2943 of 25 September 1990, p. 58; S/PV.2951 of 29 October 1990; or debate about Libya: S/PV.3063 of 31 March 1992, p. 66.


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The previous paragraphs have laid out the varying enforcement functions which international lawyers, buoyed by the decommissioning of self-help and the unprecedented sophistication of the collective security system, have assigned to the enforcement of international law, of UN law and of peace, or the enforcement of the vague idea of justice conveyed by the Charter. Although there are diverging opinions as to the nature and extent of the enforcement role that has been bestowed upon the collective security system, most international lawyers ascribe a specific enforcement dimension to the Charter and the collective security system that it establishes. The final section of this chapter will formulate some epistemological observations on the place of enforcement in the ethos of the epistemic community of international law.

5. Enforcement of international law through the collective security system: the need of a catharsis

The epistemic context in which the debate regarding the functions of the collective security system unfolds will now be examined. Attention is paid to the therapeutic effect continuously sought by international lawyers from the collective security system. As alluded to in the introduction of this chapter, there is no doubt that the collective security system and the institution of coercive mechanisms aimed at the maintenance or reestablishment of peace have sustained the self-confidence of a profession long wrought with distress by the enforcement disability of the international legal order. Put differently, confronted with the Austinian imperatival handicap of international law, international lawyers have been able to find solace in a collective security system that, despite being focused on dispute resolution, appeared to provide the teeth that international law was long lacking.

The therapeutic effect of the collective security system has not been limited solely to the rehabilitation of (the project of) international law as law, it has taken on the rehabilitation of a profession as a whole. In turn, the confidence of international lawyers in the credentials of “their law” has been conducive to the self-esteem of the entire profession. Indeed, assured of the ability of international law to enforce and maintain order, an aptitude they attribute to the UN Charter, has generated self-assuredness about the usefulness of their
own their efforts to streamline, understand and, for some of them, develop a system of rules that is not derided as toothless and inoffensive.

This confidence in international law as a whole is derived from the inception of the collective security system, and hence, the profession’s self-esteem resulting therefrom has remained hugely dependent on the stability of the system of collective security. When the collective security system enters a zone of dangerous turbulence, the confidence in international law as a whole and in its guardians can usually be seen to dwindle. These fluctuations have continued to hinge significantly on varying perceptions of the authority and effectiveness of the prohibition on the use of force, which the collective security system as a whole is both predicated on and designed to protect. For this reason, I argue that that the perceived solidity of the collective security system is inevitably reflected in the state of the ethos of the profession.

It is hardly controversial to say that the belief of international lawyers in the solidity of the collective security system has been fluctuating over time. The prohibition on the use of force, as well as the ability of the UN collective system to preserve its authority and effectiveness, have been regularly put under strain. Each controversial use of force by a State has sparked dire predictions from international legal scholars who came to envisage the demise of this prohibition. On occasion, claims been made that article 2(4) of the

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Charter is clinically dead 150, even by those who usually advocate a rather favorable and progressive reading of the international legal system. 151

We have now entered an era of greater liberalization of the use of force. 152 In my view, such liberalization has not manifested itself in either the dislocation of the prohibition on the use of force or the invocation of new “limitations” 153 to the prohibition. This conclusion is illustrated by the almost unanimous rejection of the doctrine of humanitarian intervention 154 and the absence of any alteration of ius ad bellum by the surprisingly successful doctrine of the Responsibility to Protect. Instead, the liberalization of the use of force in international law has materialized in a loosening framework for collective security and in the particular dilution of the existing limitations. The latter phenomenon can be seen in particular in the broadening of both the limits of Security Council’s authorizations 156 and the concept of self-


151 Louis Henkin, “The Reports of the Death of Article 2(4) Are Greatly Exaggerated”, 65 American Journal of International Law 544, 544 (1971) (arguing that while Article 2(4) is under assault, it is not dead).

152 d’Aspremont, Mapping the Concepts at 101-159.

153 A remark must be formulated about terminology. Situations where force can legally be used under current international law are better seen as “limitations.” Indeed, the term “limitation” seems better suited than the term “exception” or “qualification” in the sense that the situations where the use of force is allowed do not, strictly speaking, derogate from the prohibition. They simply limit its ambit. Likewise, the situations where force can lawfully be used, although being enshrined in provisions scattered throughout the entire U.N. Charter, can be seen as constitutive parts of a single rule. Envisaging the prohibition on the use of force as one single legal rule embracing the multilateral use of force authorized by the Security Council as well as the concept of self-defense enshrined in both Article 51 and customary international law also underpins the use of the term limitation instead of exception. Such terminology is also reflected in the case law of the International Court of Justice which in its decision in the Oil Platforms Case ceased to consider self-defense an exception to the prohibition to use force and qualified it a “limitation.” See Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 183 (addressing the requirements for measures to qualify as necessary self-defense). It is interesting to note that prior to that judgment, the Court considered self-defense an “exception” to the prohibition on the use of force. See Pierre d’Argent, “Du Commerce à l’Emploi de la Force: L’Affaire des Plates-Formes Pétrolières (Arrêt sur le Fond)”, 49 Annuaire Français de droit International 266 (2003).


156 d’Aspremont, Mapping the Concepts, at 125. In particular, the multiple attempts—especially by the United States and the United Kingdom—between 1991 and 2003 to “revive” the authorization to use force contained in Resolution 678 (1991) of the Security Council have convinced other States that future authorizations should be more carefully doled out. It cannot be excluded that this also stems from the overly generous and unlimited authorizations issued by an overactive Security Council in the immediate aftermath of the Cold War. See Lord Goldsmith, Attorney General Clarifies Legal Basis for Use of Force Against Iraq, 18 March 2003, cited in Franck, What Happens Now?, supra note 1, at 611 (citing Press Release, Foreign
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defense, especially in cases of armed attack by and against non-state actors. Notwithstanding such a liberalization, we have witnessed a continued vindication of the prohibition on the use of force and the existing system which has been further underpinned by the strong tendency of states using force in ambiguous circumstances still strive to justify their deeds by referring to the rules of international law pertaining to the use of force.

An overwhelming majority of international lawyers, myself included, believe that the prohibition enshrined in article 2(4) of the Charter, as well as the corresponding rule of customary international law, remains a central rule of international law. This conviction is held despite faltering authority and effectiveness in practice. I submit that international lawyers are inextricably inclined to vindicate article 2(4) of the Charter as a result of their awareness of its critical importance to the enforceability of international law, and hence to the profession’s self-esteem as a whole. The community realizes that the prohibition on the

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


159 For an illustration, see Lindsay Moir, Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror (Oxford, Hart Publishing, 2010), p. 3.
use of force is the cornerstone of their system of thoughts, and their ethos. It is this realization that leads international lawyers to deride those who venture to claim that contemporary practice has been lethal for the prohibition at the heart of the collective security system. The interpretative community of international law is dominated by bigotry towards the collective security system and its basic foundational norm. This prejudice in favor of article 2(4) and the customary corresponding rule is probably what informs, for instance, the common resort to the argumentative construction of an enduring *opinio juris*\(^{163}\) to try to salvage the customary rule corresponding to article 2(4) in the front of very contradicting practice.\(^{164}\)

This prejudice in favor of article 2(4) and the corresponding customary rule is what brings me back to the question of enforcement. It is uncontested that international lawyers’ understanding of the collective security system remains deeply affected by the respective conception of each scholar of the rules regulating the use of force and the aspirations that each has vested in the collective security system.\(^{165}\) The particular necessity felt by an entire interpretative community to uphold article 2(4) and its corresponding customary rule constitutes the manifestation of its aspirations in terms of enforcement of international law. The prejudice in favor of an ever-lasting prohibition on the use of force is the direct consequence of the assignment of enforcement tasks to the collective security system. In other words, it is because international lawyers endow some enforcement function to the very system whose sustainability hinges on the preservation of the prohibition that they avoid confronting anything that would demote article 2(4) to a norm close to desuetude. Accordingly, I suspect that, whether consciously or not, international lawyers have been balking at considering the death of the prohibition on the use of force out of fear this would wreak havoc on a collective security system that is crucial to their confidence in international law as a whole.

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In the light of the foregoing, I believe that stripping our understandings of the collective security system entirely of its enforcement dimensions would certainly help assuage our fears of losing confidence in the system and of enfeebling our self-esteem. Such a move would allow us to look without complex at article 2(4) and the collective security system. We should emancipate ourselves from the straightjacket of enforcement and confront the collective security system in earnest. In this sense, it is not until we overcome the projection of our desire for enforcement into the collective security system that we will be capable of liberating ourselves from a constraining complex. Disempowering the collective security system of any enforcement function would allow bolster the profession toward self-empowerment and enable us regain our ability to look more transparently at the collective security system. What the profession needs is not another round of studies on the enforcement function performed by the collective security mechanisms. What it needs is a catharsis to purge the mindset of the interpretative community of international law from its multifaceted obsession to construe the coercive powers authorized by the UN Charter as being geared towards the performance of enforcement functions.