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The Collective Security System and the Enforcement of International Law

(or a Catharsis for the Austinian Imperative Complex of International Lawyers)

Jean d'Aspremont^{*}

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,¹ 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 imperative 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.mpepil.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.

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.³ 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.⁴ Enforcement is necessarily reactive to a behavior unwanted by the legal

³ See gen. Nicos Stravopoulos, 'The Relevance of Coercion: Some Preliminaries', Oxford Legal Studies Research Paper No. 19/2009, at 3.

⁴ Jutta Brunnée, 'Compliance Control', in Geir Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007) 373-390.

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

⁵ On this distinction, see further Christian Tams, 'Enforcement', in G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007), 391-409.

⁶ See also *infra* 4 c).

⁷ Jeremy Waldron, 'Who needs rules of recognition', *New York University School of Law, Public Law and Legal Theory Research Paper Series*, Working paper No. 09-21, April 2009, available at <http://ssrn.com/abstract=1358477>. These criticisms have been further discussed by Giorgio Pino, 'Farewell to the Rule of Recognition?', *Problema* 5/265 (2011) 299. For an attempt to refine the concept of rule of recognition in the form of a "shared plan" between law-applying authorities, see Scott J. Shapiro, 'What is the rule of recognition (and does it exist)?', *Public Law & Legal Theory Research Paper Series*, Research Paper No. 181, available at <http://ssrn.com/abstract=1304645>.

⁸ Even Hart recognizes that some minimal compliance is necessary for the system to exist. See Herbert L.A. Hart, *The Concept of Law* (Oxford University Press, 1997, 2nd ed.) 59-60, at 110-111. (Hart, *Concept of Law*) On Hart's famous distinction between efficacy and effectiveness of law, see Gerald J. Postema, 'Rethinking the efficacy of Law', in M. Kramer, C. Grant, B. Colburn and A. Hatzistavrou (eds) *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 45, at 47.

⁹ See in particular how the term « sanctions » has permeated the legal discourse. See gen. Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (Kluwer Law International, 2002).

an actor's reason for action with a view to making it abide by the standard of conduct prescribed by international law.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 *per se* and it is the linguistic usage of a word, within a given interpretative community,¹¹ that determines its contextual meaning in that community.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, *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 treaty¹³ or unlawful interference in internal affairs,¹⁴ and is used interchangeably with *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-forcible coercive powers.

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

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¹² See the famous paragraph of Ludwig Wittgenstein, *Philosophical Investigations* (translated by G.E.M. Anscombe) (Blackwell Publishing, 3rd ed. 2001) para. 201. The abandonment of the varieties of philosophical foundationalism is described in Richard Rorty's famous book, *Philosophy and the Mirror of Nature* (25th Anniversary Edition, Princeton University Press, 2009).

¹³ See articles 51 and 52 of the 1969 Vienna Conventions on the Law of Treaties, 1155 UNTS 331 and 1986 Vienna Conventions on the Law of Treaties, 25 ILM 543. See. Giovanni Distefano, 'Article 51', in Olivier Corten and P. Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (Brussels, Bruylant, 2006), 1835-1862 and Oliver. Corten, 'Article 52', in Olivier Corten and P. Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (Bruylant, 2006), 1867-1900.

¹⁴ See article 2(7) of the UN Charter. On the various sources and meaning of the principle of non-interference, see Maziar Jamnejad and (Sir) Michael Wood, 'The Principle of non-intervention', *Leiden Journal of International Law* (2009), 22, 345-381; see also Joe Verhoeven, 'Non-intervention: affaires intérieures ou 'vie privée'? *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (Pedone, 1991) 493-500.

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.¹⁵ 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,¹⁶ 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.¹⁷ The Austinian handicap of international law is well known and widely-discussed in the literature.¹⁸ It constitutes a common charge made by critics who are often called the "deniers".²⁰ 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

¹⁵ See John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (Hackett Publishing, Indianapolis, first published 1832, reprinted 1998), para. 201.

¹⁶ On the Austinian handicap of international law, see gen. Anthony D'Amato, 'Is International Law Really 'Law' 79 *Northwestern University Law Review* 1293 (1985). (D'Amato, *International Law*) See also Jean d'Aspremont, Jean, 'Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperatival Handicap of the International Legal System' (January 29, 2012), available at SSRN: <http://ssrn.com/abstract=1995041>. (d'Aspremont, *Herbert Hart*)

¹⁸ On the Austinian handicap of international law, see gen. Anthony D'Amato, 'Is International Law Really 'Law' 79 *Northwestern University Law Review* 1293 (1985). (D'Amato, *International Law*) See also Jean d'Aspremont, Jean, 'Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperatival Handicap of the International Legal System' (January 29, 2012), available at SSRN: <http://ssrn.com/abstract=1995041>. (d'Aspremont, *Herbert Hart*)

¹⁸ On the Austinian handicap of international law, see gen. Anthony D'Amato, 'Is International Law Really 'Law' 79 *Northwestern University Law Review* 1293 (1985). (D'Amato, *International Law*) See also Jean d'Aspremont, Jean, 'Herbert Hart and the Enforcement of International Law: Substituting Social Disability to the Austinian Imperatival Handicap of the International Legal System' (January 29, 2012), available at SSRN: <http://ssrn.com/abstract=1995041>. (d'Aspremont, *Herbert Hart*)

²⁰ For an illustration, see John R. Bolton, 'War and the United States Military: Is there Really 'Law' in International Affairs?' 10 (2000) *Transnational Law and Contemporary Problems* at 1.

rejected the Austinian charge against international law.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 imperativist 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 imperativist handicap must be briefly recalled here. On 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 imperativist charge is based and claim that the legal pedigree of international law is not dependent on it being a coercive order (b).

a) International law as a coercive normative order

The first argumentative construction to rebut the Austinian imperativist 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.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.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

²² Prosper Weil, ‘Le droit international en quête de son identité. Cours général de droit international public’, *Collected Courses*, 1992-IV (237), at 54. (Weil, *Collected Courses*)

²³ See gen. Hans Kelsen, ‘Théorie du droit international public’ 84 (1953) *Collected Courses*, at 1-203, especially 13-17. For a discussion of that aspect of Kelsen’s theory, see Jörg Kammerhofer ‘Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law’, 22 *Leiden Journal of International Law* (2009), 235-249, at 227-228 (Kammerhofer, *Which Kelsen?*); see also Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, 2010), *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, 2010), at 84-92. (Bernstorff, *Hans Kelsen*)

²⁴ See Kaltenborn as studied by Bernstorff, *Hans Kelsen* at 15-20.

measure”.²⁵ Indeed, for Kelsen, coercion is what distinguishes a legal order from an “ought-order” such as morality and religion.²⁶ While, in this respect, there is certainly kinship with the Austinian 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.²⁷

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.²⁸ 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.²⁹ 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.³⁰

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,

²⁵ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens and Sons, 1950), at 34. (Kelsen, *Fundamental Problems*)

²⁶ Bernstorff, *Hans Kelsen* at 86.

²⁷ Kammerhofer, *Which Kelsen?* at 228.

²⁸ Hans Kelsen, *Principles of International Law* (Rinehart, 1952), at 14-15 (Kelsen, *Principles*). See the remarks of J. Kammerhofer, *Which Kelsen?* at 228 ; see also Bernstorff, *Hans Kelsen* at 90-91.

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 imperative 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

³¹ Bernstorff, *Hans Kelsen* at 88.

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.

³⁴ *Ibid.* at 735-736 (For Kelsen, Article 41 plays the role of “reprisals” and Article 42 plays the role of war).

³⁵ H Kelsen, *Fundamental Problems* at 734.

³⁶ 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 juridiction 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 Dino Kritsiotis, “International Law and the Relative of Enforcement”, in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law*, (Cambridge University Press, 2012) p. 266.

³⁸ 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.

³⁹ 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”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.⁴¹

b) International law as a source-based order

Another avenue overcoming the Austinian imperativist 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,⁴² that the Austinian imperativist handicap was rejected.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.⁴⁴ He

⁴⁰ See Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, New York, 2005). This echoes the earlier position advocated by H. Morgenthau, *Politics Among Nations* (New York, NY: Alfred A. Knopf, 1948), 211, esp. 229. For a challenge of this position, see Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2011), especially 99-149.

⁴¹ For a different view among American international legal scholars, see D'Amato, *International Law*.

⁴² See gen. J. d'Aspremont, “Herbert Hart in Post-Modern International Legal Scholarship”, in J. d'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, 2013) (forthcoming).

⁴³ Pellet makes a similar finding; see Pellet, *Sanctions*.

⁴⁴ Hart, *Concept of Law* at 216-20. See also J. Raz, *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.⁴⁵

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".⁴⁶ 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.⁴⁷ 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.⁴⁸ 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

⁴⁵ Hart, *Concept of Law* at 179-180.

⁴⁶ Hart, *Concept of Law* at 232-237.

⁴⁷ I have defended this elsewhere. See d'Aspremont, *Herbert Hart*.

⁴⁸ *Ibid.*

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.⁴⁹

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 imperativ 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 imperativ 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.⁵⁰ According to these lawyers, the organization and institutionalization of the sanction are only indications of the degree of institutionalization of a legal order,⁵¹ 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.⁵²

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".

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,⁵⁴ endeavored to reject realist skepticism towards international law⁵⁵. Yet, it was interpreted slightly differently by these scholars, for, drawing on Hart,⁵⁷ they claimed that, at the heart of international law, lies a belief.⁵⁸ 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.⁵⁹

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 behaviours 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

⁵⁴ Louis Henkin, *How Nations Behave* (2d ed. Columbia University Press, New York, 1979), 329-32.

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.

⁵⁷ See Louis Henkin, *How Nations Behave* (2d ed. Columbia University Press, New York, 1979), p. 58.

⁵⁸ Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2011), especially 99-149, p. 78.

⁵⁹ For a famous embodiment of this approach, see Thomas Frank, *The Power of Legitimacy among Nations* (New York, Oxford University Press, 1990). See also Anne-Marie Slaughter's embrace of the democratic peace theory and her contention that the march towards democracy necessarily brings about greater compliance with rules on the prohibition to use force. See Anne-Marie Slaughter, *International Law in a World of Liberal States* 6 *EJIL* 503 (1995). For a criticism, see Jose Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" (2001) 12 *European Journal of International Law* 183-2.

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.⁶⁰ Although performing other functions, such as punitive and retributive,⁶¹ 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.⁶² 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

⁶⁰ James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., (Clarendon Press, 1963), p. 398; Derek W. Bowett, *Self-Defence in International Law* (Manchester University Press, 1958), p. 11; G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement", 19 *Modern Law Review* (1956), p. 8.

⁶¹ Elisabeth Zoller, *Peacetime Unilateral Remedies: an Analysis of Countermeasures* (Transnational Publications, 1984), p. 55. See also *infra* 4d).

⁶² See gen. Math Noortmann, *Enforcing International Law: from Self-Help to Self-Contained Regimes* (Ashgate, 2005).

international law to be a very positive development and a factor of progress.⁶³ This shift brought an end to what has been perceived as the dark age of international law.⁶⁴

The various steps of this move towards a centralized collective security system are well known.⁶⁵ After the adoption of the 1907 Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts⁶⁶ and the partial proceduralization and institutionalization of war under the League of Nations,⁶⁷ the adoption of the Briand-Kellogg Pact⁶⁸ 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.⁶⁹ 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.⁷⁰ 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*.⁷¹ 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

⁶³ See also the critical remarks of David Kennedy, "The Move to Institutions", 8 *Cardozo Law Review* (1987) 841. See also Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T.M.C. Asser Press, 2010).

⁶⁴ Hector A. Munro, "The Case of the Corfu Minefield" 10 *Modern Law Review* (1947) 363-376; Interestingly, that period of time is sometimes – oddly – portrayed as being very positivistic (see Joachim von Elbe, "The Evolution of the Concept of Just War in International Law", 33 *American Journal of International Law* (1939) 684-685).

⁶⁵ See chapter XXX in this volume.

⁶⁶ See gen. James Brown Scott, *The Hague convention (II) of 1907 respecting the limitation of the employment of force for the recovery of contract debts* (Washington DC, Endowment, 1915).

⁶⁷ See gen. David Kennedy, "The Move to Institutions", 8 *Cardozo Law Review* (1987) 841

⁶⁸ See gen. Georges Rambert, *Le Droit de la Guerre et le Pacte Briand-Kellogg* (Lausanne, Payot & cie, 1931); David H. Miller, *The Peace Pact of Paris : a Study of the Briand-Kellogg Treaty* (New York, Putnam's sons, 1928).

⁶⁹ On the prohibition of the treaty of force, see generally Nikolaos Tsagourias, *The Prohibition of Threats of Force*, in Nigel White, Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Elgar, 2012), forthcoming, available at SSRN: <http://ssrn.com/abstract=2074015>; see also François Dubuisson and Anne. Lagerwall, "Que signifie encore l'interdiction de recourir a la menace de la force?", in K. Bannelier, T. Christakis, O. Corten and B. Delcourt (eds), *L'intervention en Irak et le Droit International* (Paris, Pedone, 2004), at 83.

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,⁷² 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 43.⁷³ 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 20th 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 *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-defense⁷⁴ or the state of necessity,⁷⁵ the UN Charter has eliminated any measure of *forcible* self-help. The rejection

⁷² On this equilibrium in the UN Charter, see Oscar Schachter, "United Nations Law", 88 *American Journal of International Law* (1994), p. 14.

⁷³ See gen. Marie-Françoise Furet, "Article 43", in J.-P. Cot, A. Pellet and M. Forteau (eds.), *La Charte des Nations Unies – Commentaire article par article* (3d ed., Paris, Economica, 2005), pp. 1259-1268.

⁷⁴ O. Corten, *The Law Against War* (Oxford, Hart, 2010), pp. 348-400; Christine Gray, *International Law and the Use of Force*, 3d ed. (Oxford, OUP, 2008), 348-369. In the same vein, Kammerhofer, *Which Kelsen?* At 244-245; On the rejection of collective self-defense as an enforcement mechanism, see Dissenting Opinion of Judge Jennings, ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Rep, 1986, p. 545.

⁷⁵ Sarah Heathcote, "Est-ce que l'état de nécessité est un principe de droit international coutumier?", 40 *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 *University of Pennsylvania Journal of International Law* (2010), 1133-1135 (d'Aspremont, *Mapping the Concepts*).

of military counter-measures by the International Law Commission buttresses that position.⁷⁶

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.”⁷⁷

A similar position was echoed in the *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.”⁷⁸

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

⁷⁶ 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, *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, 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).

⁷⁷ ICJ, *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.), *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.), *The ICJ and the evolution of international law : the enduring impact of the "Corfu Channel" case* (London, Routledge, 2012)226-241.

⁷⁸ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Rep, 1986, p. 134, para. 268.

competences to take *non-forcible* coercive measures.⁷⁹ 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,⁸⁰ the UN Charter reinforced, centralized and systematized such a mechanism.

These provisions were first used during the crisis in Rhodesia in 1965,⁸¹ which was quickly followed by many other instances.⁸² 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,⁸³ as is illustrated today by the Security Council's use of its Chapter VII powers for mostly non-military purposes.⁸⁴ 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.

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).

⁸⁴ For an analysis of that practice, See Lori Damrosch, "Enforcing international law through non-forcible measures", 269 *Collected Courses*, 9-250 (1997), esp. 102-154. More recently, see Andrea Charron, *UN Sanctions and Conflict: Responding to Peace and Security Threats* (Routledge, 2011).

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 States⁸⁵ or fighting impunity through the creation of judicial bodies.⁸⁶ 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.⁸⁷ 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”,⁸⁸ a development that is at odds with the idea that the promotion of justice has been reserved for General Assembly.⁸⁹

It is unnecessary to discuss the legality of these radical alterations to the Charter, which were brought about by “subsequent practice”⁹⁰. 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

⁸⁵ See S.C. Res. 1244 (1999) on Kosovo.

⁸⁶ See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (on the establishment of the ICTY); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (on the establishment of the ICTR). See more generally S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (on the creation of the Special Tribunal for Lebanon).

⁸⁷ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Article 13.

⁸⁸ Martti Koskenniemi, “The Police in the Temple: Order, Justice and the UN: A Dialectical View”, 6 *European Journal of International Law* (1995) 325-348, at 328-29.

⁸⁹ See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VII), U.N. Doc. A/RES/3201 (S-VII) (May 1, 1974); see also Declaration on the granting of independence to colonial countries and peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960); Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons, G.A. Res. 49/75, U.N. Doc. A/RES/49/75 (Dec. 15, 1994).

⁹⁰ 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.

delineated subjects, including the targeting of non-state entities.⁹¹ The ICJ subsequently recognised this practice when taking measures against non-state entities.⁹² 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.⁹³ 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.⁹⁴ The targeting of UNITA leaders⁹⁵ and individuals in Sierra Leone followed this trend.⁹⁶

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-territorialization⁹⁷ 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.⁹⁸ The smart and targeted sanctions which they designed on that occasion – and which further institutionalized the Council’s exercise of its coercive powers⁹⁹ – 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.¹⁰⁰ Controversies were spurred by the challenge of the European Court of Justice¹⁰¹ and the creation of an

⁹¹ See Resolution 942 (1994) – Bosnian Serb; or UNITA in Angola Resolution 864 (1993).

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).

⁹⁶ Resolution 1171 (1998).

⁹⁷ Pellet, *Sanctions* para. 36

⁹⁸ Res 1390 (2002); 1452 (2002); 1455 (2003); 1526 (2004); 1617 (2005); 1735 (2006); 1904 (2009); 1989 (2011).

⁹⁹ On the Terrorism Committee, see gen. Eric Rosand, “Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism”, 97 *American Journal of International Law* (2003), 333-341.

¹⁰⁰ See gen. Larissa van den Herik, “The Security Council's Targeted Sanctions Regimes: in Need of Better Protection of the Individual”, 20 *Leiden Journal of International Law* (2007), 797-807.

¹⁰¹ Jean d'Aspremont and Frédéric Dopagne, “Kadi : the ECJ's Reminder of the Elementary Divide Between Legal Orders” 5 *International Organizations Law Review* (2008) 371-379.

Ombudsperson.¹⁰² Interestingly, these recent developments have required the use of coercion by the Security Council to undergo a further process of customization and sophistication.¹⁰³ 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-forcible 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-forcible. Forcible self-help was decommissioned and the power to resort to forcible coercive measures was bestowed exclusively upon the Council. Conversely, the non-forcible 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.¹⁰⁴ They can be completely

¹⁰²Laurence Boisson de Chazournes and Pieter-Jan Kuyper, “Mr. Kadi and Mrs. Prost: is the UN Ombudsperson Going to find herself between a Rock and a Hard Place?”, in Eva Rieter, Henri de Waele (eds), *Evolving Principles of International Law : Studies in Honour of Karel C. Wellens* (Nijhoff, Leiden, 2012), at 71-90; Kimberly Prost, “Fair Process and the Security Council : a Case for the Office of the Ombudsperson”, in Ana María Salinas de Frías, Katja L.H. Samuel, and Nigel D. White (eds), *Counter-Terrorism : International Law and Practice* (OUP, 2012), 409-423; Grant L. Willis, “Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson” 42 *Georgetown Journal of International Law* (2011) 673-745.

¹⁰³ On the mechanisms put in place after the European contestation, see Francesco Francioni, “The Right of Access to Justice to Challenge the Security Council's Targeted Sanctions : After-thoughts on ‘Kadi’”, in Ulrich Fastenrath (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), p. 908-922. See also Grant L. Willis, “Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson”, 42 *Georgetown Journal of International Law* 673-745 (2011).

¹⁰⁴ On these regimes, see the remarks of B. Simma, “Self-Contained Regimes” 16 *Netherlands Yearbook of International Law* (1985) 111.

decentralized, being the object of some coordination by virtue of an international organization, such as the obligation not to recognize.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”.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.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 *exceptio non adimpleti contractus*¹⁰⁸ or the invalidity of a treaty by virtue of unauthorized coercion.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.¹¹⁰ Eventually, there are all those measures whose coercive effect is purely “reputational”¹¹¹ or “spontaneous”¹¹², whereby the interference boils down to damaging the reputation.

A collective security system has therefore emerged in the 20th 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

¹⁰⁵ See article 41 of the Articles on States Responsibility (2001).

¹⁰⁶ See the critical remarks by Pierre-Marie Dupuy, “Observations sur la pratique récente des ‘sanctions’ de l’illicite”, 87 *Revue générale de droit international public* (1983), 505, esp. 526 ff.

¹⁰⁷ C. Tams, “Individual states as guardians of community interests”, in U. Fastenrath, R. Geiger, D. E. Khan, A. Paulus, S. von Schorlemer & C. Vedder (Eds), *From Bilateralism to Community Interest Essays in Honour of Bruno Simma* (Oxford University Press, 2011), pp.379-405; C. Tams even argues that decentralization of enforcement is no longer a second-best (p. 405).

¹⁰⁸ V. article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

¹⁰⁹ V. articles 52 & 53 of the 1969 and 1986 Vienna Convention on the Law of Treaties.

¹¹⁰ On the retorsion as enforcement measures, see gen. L. F. Damrosch, “Enforcing International Law through Non-Forcible Measures”, 269 *Collected Courses* (1998), 9-250.

¹¹¹ A. Guzman, *How International Law Works – A Rational Choice Theory* (Oxford University Press, 2008), p. 33.

¹¹² De Visscher distinguished between techniques institutionnelles, techniques d’autoprotection and techniques spontanées. (Patrick De Visscher, “Cours general de droit international public”, 136 *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,¹¹³ 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-help¹¹⁴ and the aforementioned sophistication of the Security Council's exercise of non-forcible coercive power¹¹⁵ 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 through 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

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.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.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.¹¹⁸ It is true that in practice, as is discussed below¹¹⁹, 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.¹²⁰ Likewise, systematic violations of human rights or humanitarian law have sometimes underpinned findings of a threat to the peace.¹²¹ However, there cannot be any automaticity between the two types of violation, because, as

¹¹⁶ Pellet, *Sanctions*, para. 17. D. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, 2009), at 178; Jean Combacau, *Le pouvoir de sanction de l'ONU. Étude théorique de la coercition non militaire* (Paris, Éditions Pedone), 1974, 9-16; Louis Cavaré, “Les sanctions dans le cadre de l'ONU”, *Collected Courses*, 1951-I, p. 191-291, p. 221; Michel Virally, *L'Organisation Mondiale* (Paris, Armand Colin, 1972) p. 453; M. Roscini, “The United Nations Security Council and the Enforcement of International Humanitarian Law”, 43 *Israel Law Review* (2010), 334.

¹¹⁷ Vera Gowlland Debbas, “Security Council Enforcement Action and Issues of State. Responsibility”, 43 *International and Comparative Quarterly* (1994), p. 74-90; See also Lori Damrosch, “The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq ‘Precedent’?”, 13 *European Journal of International Law* (2002), 305-321. See the criticism of this position by G. Arangio Ruiz, “On the Security Council's ‘law-making’”, 83 *Rivista di diritto internazionale* (2000) 609-725, at 633-634. See also the criticism by Pierre d'Argent, Jean d'Aspremont, Frédéric Dopagne, Raphael van Steenberghe, “Article 39” in J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies – Commentaire article par article* (Paris, Economic, 2005, 3d edition), p. 1139. On this question, see gen. Mathias Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone 2006),

¹¹⁸ Kelsen, *Fundamental Problems* at 294 P.-M. Dupuy, “Sécurité collective et organisation de la paix” 97 *Revue générale de droit international public* (1993), p. 625; D. Bowett, “The Impact of Security Council decisions on dispute settlement procedures”, 5 *European Journal of International Law*, 1994, 84-101; Rosalyn Higgins, “The Legal limits to the use of force by sovereign States: United Nations Practice” 37 *British Yearbook of International Law* (1961), p. 269-319, p. 275; Kammerhofer, *Which Kelsen?* at 245; Gaetano Arangio Ruiz, “On the Security Council's ‘law-making’”, 83 *Rivista di diritto internazionale* (2000) 609-725, at 633; Giorgio Gaja, “Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial”, *Revue générale de droit international public* (1993) p. 306.

¹¹⁹ See *infra* b)

¹²⁰ Cfr *infra* 4b).

¹²¹ For examples on resolutions pertaining to the situation in Kosovo, see S.C. Res. 1160, U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1239, U.N. Doc. S/RES/1239 (May 14, 1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); for the situation in Darfur, see S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); For the situation in Rwanda, see S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994), or for the situation in Somalia, see S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992).

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.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.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,¹²⁴ and accordingly cannot be seen from the standpoint of international law, as constituting enforcement action *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.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 *per se*.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).

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.

¹²³ M. Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone 2006), p. 250

¹²⁴ M. Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone 2006), p. 251.

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.

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 *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

¹²⁷ G. Fitzmaurice, “The Foundations of the Authority of International Law and the Problem of Enforcement”, 19 *Modern Law Review* (1956), p. 5.

¹²⁸ M. Forteau *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone 2006), pp. 328-329.

¹²⁹ See S.C. Res. 326, U.N. Doc. S/RES/326 (Feb. 2, 1973); S.C. Res. 387, U.N. Doc. S/RES/387 (Mar. 31, 1976); S.C. Res. 405, U.N. Doc. S/RES/405 (Apr. 14, 1977); S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985); S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990).

¹³⁰ Resolutions 82, 83, 84 (1950) on the Situation in Korea ; Resolution 598 (1987) on the situation in Irak and Iran ; resolution 660 (1990) on the situation in Koweit ; Resolution 502 (1982) on the situation of the Falklands. For some critical remarks, see P. d'Argent, J. d'Aspremont, Fr. Dopagne, R. van Steenberghe, “Article 39” in J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies – Commentaire article par article* (Paris, Economic, 2005, 3d edition), p. 1151-1153.

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.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.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.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).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

¹³¹ See S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (imposing sanctions on Libya for failing to comply with S.C. Res. 731 (1992) despite the fact that the latter had not been adopted under Chapter VII). See generally S.C. Res. 1737, U.N. Doc. S/RES/1737 (2006) (adopting sanctions against Iran for, *inter alia*, failing to comply with S.C. Res. 1696 (2006)).

¹³² G. Gaja, "Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial", *Revue générale de droit international public* (1993), p. 317. O. Schachter, "United Nations Law", 88 *American Journal of International Law* (1994), p. 12; For some criticisms of the selective and opportunistic decisions by the Security Council in terms of enforcement, see M. Bothe, "Les limites du pouvoir du Conseil de Sécurité" in René-Jean Dupuy (ed.), *The Development of the Role of the Security Council* (Dordrecht, Martinus Nijhoff, 1992); at 227; Marco Roscini, "The United Nations Security Council and the Enforcement of International Humanitarian Law", 43 *Israel Law Review* (2010), p. 353-55; Andrea Bianchi, "Ad-hocism and the Rule of Law", 13 *European Journal of International Law* (2002), 262.

¹³³ P. d'Argent, J. d'Aspremont, Fr. Dopagne, R. van Steenberghe, "Article 39" in J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies – Commentaire article par article* (Paris, Economic, 2005, 3d edition), p. 1146-1164.

¹³⁴ On this finding, see gen. P. d'Argent, J. d'Aspremont, Fr. Dopagne, R. van Steenberghe, "Article 39" in J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies – Commentaire article par article* (Paris, Economic, 2005, 3d edition), 1133-1145; For a recent example, see Declaration by the Security Council that Global warming may constitute threat to the peace. See S/PV.6587; See also Press Release of 20 July 2011, SC/10332, 6587th Meeting, Press release available at: <http://www.un.org/News/Press/docs/2011/sc10332.doc.htm>.

a partial and non-exclusive enforcement regime.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸

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

¹³⁵ See gen. Alain Pillepich, "Article 94", in J.-P. Cot, A. Pellet, M. Forteau (eds), *La Charte des Nations Unies – Commentaire article par article* (Paris, Economic, 2005, 3d edition), p. 1987-1998.

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).

¹³⁷ Kelsen, *Fundamental Problems* at 294 P.-M. Dupuy, "Sécurité collective et organisation de la paix" 97 *Revue générale de droit international public* (1993), p. 625; D. Bowett, "The Impact of Security Council decisions on dispute settlement procedures", 5 *European Journal of International Law*, 1994, 84-101; Rosalyn Higgins, "The Legal limits to the use of force by sovereign States: United Nations Practice" 37 *British Yearbook of International Law* (1961), p. 269-319, p. 275; Kammerhofer, *Which Kelsen?* at 245; Alexandros Kolliopoulos, *La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale* (Paris, L.G.D.J., 2001), p. 61; G. Arangio Ruiz, "On the Security Council's 'law-making'", 83 *Rivista di diritto internazionale* (2000) 609-725, at 633; G. Gaja, "Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial", *Revue générale de droit international public* (1993) p. 306; This is also how legal theorists have read the UN Charter. Hart, *Concept of Law* at 217.

¹³⁸ O. Schachter, "United Nations Law", 88 *American Journal of International Law* (1994), p. 11. For a recent and compelling criticisms of the use of peace-keeping missions as peace-enforcement mechanisms, see J. Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Oxford, Hart Publishing, 2011).

existence of sanction mechanisms.¹³⁹ 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,¹⁴⁰ the adoption of the UN Charter could be seen as depriving international law as a whole of its natural enforcement tool.¹⁴¹ 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.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.

¹⁴¹ G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement", 19 *Modern Law Review* (1956), pp. 4-5

¹⁴² See supra note 106.

¹⁴³ See Resolution 794 (1992) or Resolution 808 (1993).

¹⁴⁴ Resolution 216 (1965) and Resolution 217 (1965) on the situation in Rhodesia.

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

¹⁴⁵ Wolfgang Friedman, *The Changing Structure of International Law* (London, Stevens and Sons, 1964), p. 84; J. Combacau, *Le pouvoir de sanction de l'ONU. Étude théorique de la coercition non militaire* (Paris, Éditions Pedone), p. 133; Michel Virally, *L'Organisation Mondiale* (Paris, Armand Colin, 1972) p. 451; P.-M. Dupuy, "Observations sur le crime international de l'Etat", *Revue générale de droit international public*, 1980, p. 477; M. Kimminich, "article 6", in B. Simma (ed.), *The Charter of the United Nations – A Commentary* (München: Beck, 1994), p. 189; A. Pellet, "Vive le crime!: Remarques sur les Degrés de l'Illicite en Droit International", *International Law on the Eve of the Twenty-First Century : Views from the International Law Commission*, (United Nations publication, 1997), p. 304.; R. Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes – General Course on Public International Law", *Collected Courses*, 1991-V, t. 230, p. 220; O. Schachter, "United Nations Law", 88 *American Journal of International Law* (1994) 1, at 13; See gen. Anthony F. Lang "Punitive Intervention : Enforcing Justice or Generating Conflict?" in Mark Evans (ed.), *Just War Theory : a Reappraisal* (Palgrave MacMillan, New York 2005), 50-70.

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.

¹⁴⁷ Critique par M. Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone 2006), 260-265.

¹⁴⁸ On the UN Charter and the idea of Justice, see M. Koskeniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectical View", 6 *European Journal of International Law* (1995) 325-348.

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.¹⁴⁹ On occasion, claims been made that article 2(4) of the

¹⁴⁹ For an earlier controversy, see the famous debate between Thomas M. Franck and Louis Henkin. See Thomas M. Franck, "Who killed Article 2(4) or: Changing Norms Governing the Use of Force by States", 64 *American Journal of International Law* 809 (1970) (arguing that the prohibition against the use of force has been eroded beyond recognition). But see Louis Henkin, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated", 65 *American Journal of International Law* 544, 544 (1971) (arguing that while Article 2(4) is under assault, it is not dead). Franck has grown even more pessimistic in recent years see Thomas M. Franck, "What Happens Now? The United Nations After Iraq", 97 *American Journal of International Law* 607 (2003).

Charter is clinically dead¹⁵⁰, 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 intervention¹⁵⁴ 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 authorizations¹⁵⁶ and the concept of self-

¹⁵⁰ See generally Anthony C. Arend, *Legal Rules and International Society* (Oxford University Press 1999), at 75; Michael J. Glennon, “The Collapse of Consent: Is a Legalist Use-of-Force Regime Possible?”, in Beth A. Simmons (ed.), *International Law* (London, Sage Publications, 2008), at 220; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* 132, 198 (Oxford University Press 2005); Michael J. Glennon, “Rise and Fall of the U.N. Charter’s Use of Force Rules”, 27 *Hastings International and Comparative Law Review* 497, 508 (2003–2004).

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).

¹⁵⁴ C. Gray, *International Law and the Use of Force* (Oxford, OUP, 3d ed., 2008) 51; Olivier Corten, *Le droit contre la guerre* (Paris, Pedone 2008), at 792. (Corten, *Le droit contre la guerre*). See also J. d’Aspremont and J. de Hemptinne, *Droit international humanitaire* (Paris, Pedone, 2013), Chapter 12.

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

defense¹⁵⁷, especially in cases of armed attack by and against non-state actors.¹⁵⁸ Notwithstanding such a liberalization, we have witnessed a continued vindication of the prohibition on the use of force and the existing system¹⁵⁹ 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.¹⁶¹

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

and Commonwealth Office (U.K.), Attorney General Clarifies Legal Basis for Use of Force Against Iraq, Mar. 18 2003, http://www.fco.gov.uk/resources/en/news/2003/03/fco_not_180303_legaladvice; see also UK Materials on International Law, 64 *British Yearbook of International Law*, 736–40 (1993). See also Sean D. Murphy, "Contemporary Practice of the United States", 97 *American Journal of International Law*, 419, 427 (2003).

¹⁵⁷ d'Aspremont, *Mapping the Concepts* at 127–131.

¹⁵⁸ Nicholas Tsagourias, "Non-state Actors and the Use of Force" in J. d'Aspremont, (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, Oxford, 2011), pp. 326–341; see also d'Aspremont, *Mapping the Concepts*, at 131–140; Christian Tams, "Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case", 16 *European Journal of International Law* 963 (2005); Lindsay Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Oxford, Hart Publishing, 2010). The extension of self-defense to situations of indirect attacks—namely cases of harbouring terrorists or supporting them—has received an implied espousal in the 2005 African Union Non-Aggression and Common Defence Pact. Art. 1(c)(xi) states:

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

African Union, Non-Aggression and Common Defence Pact art. 1(c)(xi), Jan. 31, 2005, <http://www.africa-union.org/root/AU/Documents/Treaties/text/Non>

%20Aggression%20Common%20Defence%20Pact.pdf. On the relationship between the African Union Defence Pact and the U.N. Charter, see Raphaël van Steenberghe, "Le Pacte de non-agression et de défense commune de l'Union africaine: entre unilatéralisme et responsabilité collective", 113 *Revue générale de droit international public* (2009) at 125. On the specificities of the African Union Non-Aggression and Common Defence Pact, see Marco Roscini, *Neighbourhood Watch? The African Great Lakes Pact and ius ad bellum*, 69 *ZAÖRV* 931 (2009).

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.

¹⁶¹ ICJ, *Military and Paramilitary Activities*, 1986 I.C.J. Rep 14, 95, para. 186 (June 27).

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.

¹⁶³ ICJ, *Military and Paramilitary Activities (Nicaragua. v. U.S.)*, 1986 I.C.J. 14, 99–100 (June 27); see also Tom J. Farer, "The Prospect for International Law and Order in the Wake of Iraq", 97 *American Journal of International Law* 621, 622 (2003).

¹⁶⁴ Jane E. Stromseth, "Law and Force After Iraq: A Transitional Moment", 97 *American Journal of International Law* (2008) 628, 631–33 (reflecting the belief that the core of Article 2(4) – that wars of territorial expansion and conquest are unlawful – is still alive).

¹⁶⁵ On this question see generally Andreas Bianchi, "The International Regulation of the Use of Force: The Politics of Interpretive Method", 22 *Leiden Journal of International Law* 651 (2009).

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.