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Outlawry but with teeth: The problem of enforcing peace through international institutions

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Abstract: If the main merit of *The Internationalists* is to shed light, in a powerful and convincing way, on the transformative power of rules, the role of institutions – and in particular of the United Nations and its collective security system centred around the activity of the Security Council – does not come out of the book as clearly as it might. It is submitted that the decision to concentrate upon the rule – the prohibition to use force – while limiting the attention paid to the institution – the United Nations and its collective security system – is not without consequence, particularly given the strict link existing, in the common perception, between the rule and the institution. This brief comment will focus on certain ambivalences emerging from the book about the contribution of the United Nations, as a peace-enforcing organisation, to fostering the emergence of a New World Order, as well as its continuing relevance for preserving the effectiveness of the principle on non-use of force.

Keywords: international institutions; unilateralism; United Nations; use of force

I. Introduction

The Internationalists is above all the history of the progressive emergence of a rule – the rule prohibiting the use of force – and the transformative power of this rule. Running in parallel to this, one can also detect a different history: the history of the attempts to create an institutional mechanism for dealing with war. Inevitably, the two histories intersect and overlap several times. In particular, the two main peace-enforcement institutions established in the twentieth century – the League of Nations and the United Nations (UN) – have both their due place in the broad historical account of the transformation of the world legal order offered by the book. The League of Nations is depicted as an institution still anchored

in the Old Legal Order. The problem with the League was that it did not eliminate the unilateral right to resort to war. In this respect, '[t]he League of Nations did not herald the end of the Old World Order. The League was its reprieve'.[1] By contrast, the UN is an institution entirely belonging to the New World Order. Hathaway and Shapiro gave an extensive account of the projects and debates leading to the adoption of the Charter, showing the ideal continuity between the 1928 Paris Peace Pact and the 1945 UN Charter, as well as the common promises embodied in them.[2]

Though not absent, these two institutions, and the peace-enforcement machineries they put in place, appear to play a decidedly secondary role in the process leading to the transformation of the international legal landscape. The New Legal Order has been triggered by a change in the substantive rule concerning the use of force and not by the 'move to institutions' for responding to war.[3] In *The Internationalists*' account of this change, rules are prioritised over institutions. The starting point of the New Legal Order is located in the conclusion of the 1928 Peace Pact, a treaty that established a rule without providing any mechanism for enforcing it. In their lively description of the debates preceding the adoption of the Peace Pact, Hathaway and Shapiro point to the existence of two main factions in the peace movement. The first one, led by James Shotwell, supported outlawry 'but with teeth'; the other, led by Salmon Levinson and John Dewey, pressed for outlawing war immediately, 'leaving the consequences of renunciation for another day'.[4] In many respects, the book appears to be a celebration of the latter intuition. The change in law introduced in 1928 brought about a paradigm shift that forced states to rethink their attitude towards the use of force. The 'consequences of renunciation' began to emerge rapidly and almost spontaneously through a process of systemic adaptation of the international legal order to the novelty introduced by the Pact.

If the main merit of the book is to shed light, in a powerful and convincing way, on the transformative power of rules, the role of institutions – and in particular of the United Nations and its collective security system centred around the activity of the Security Council – does not come out of the book as clearly as it might. To be clear, it is entirely understandable that the authors may have preferred not to enter into a detailed examination of

[1] OA Hathaway and SJ Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World* (Allen Lane, London, 2017) 106.

[2] Ibid 193ff.

[3] The reference is to D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841.

[4] Hathaway and Shapiro (n 1) 195.

the powers and practice of the UN Security Council, and of its impact on the maintenance of international peace and security. A certain measure of selection is inevitable, particularly for a book that covers several centuries of legal history and that aims at being accessible to a large audience outside of scholarly circles. Yet, the decision to concentrate upon the rule – the prohibition to use force – while limiting the attention paid to the institution – the United Nations and its collective security system – is not without consequence, particularly given the strict link existing, in the common perception, between the rule and the institution. The brief observations that follow elaborate this point. Their focus will be on certain ambivalences emerging from the book about the contribution of the United Nations, as a peace-enforcing organisation, to fostering the emergence of a New World Order, as well as its continuing relevance for preserving the effectiveness of the principle on non-use of force.

II. The contribution of the UN collective security system to the shaping of the New World Order

In the periodisation Hathaway and Shapiro deploy, the emphasis placed on 1928 – the Peace Pact – has the effect of diminishing the importance attached to 1919 – the Covenant of the League of Nations – and to 1945 – the Charter of the United Nations. Even more surprisingly, the impression one gets from the book is that the Charter has not added much to the revolution triggered by the 1928 Pact. The point here is not so much whether the rule prohibiting the use of force had already crystallised as a rule of general international law before the adoption of the United Nations Charter. The point is that, in the book's narrative, all the major instruments for enforcing that prohibition – the non-recognition of territorial acquisitions gained as a consequence of the use of force, the possibility of having recourse to economic sanctions against an aggressor state, the individual crime of aggression – were already available, and had actually been used by states, when the Charter was adopted. Admittedly, the authors recognise that the main innovation introduced by the Charter was represented by the establishment of a centralised system for enforcing peace. Indeed, in their account, Shotwell's intuition was exactly that: 'write the Pact into a new treaty – and then build an enforcement structure up around it'.[5] However, the centralised system for enforcing peace established by the Charter receives scant attention in the book. In particular, little is said about the expectations that this

[5] Ibid 195.

system generated at the time of its adoption and that, in a certain measure, continues to generate today. In the narrative of the book, as we will see, the role generally assigned to the UN collective security system is almost entirely occupied by a different, and more indefinite, method, the 'outcasting' of an aggressor state. The consequence is that, in the end, it becomes unclear what the real contribution of the Charter to the shaping of the New World Order has been, apart from consolidating the legal revolution brought about by the Peace Pact.

The authors' attempt to shed new light on the importance to be assigned to the Peace Pact is certainly admirable and in many respects convincing. By contrast, the book does not appear to do enough to stress the importance of the San Francisco Conference as an historical turning point. However, it is hard to depart from the idea that the UN Charter, more than any other treaty, represents the foundational treaty of the New Legal Order. Obviously, the UN Charter did not come out of thin air. Behind Article 2(4) there was the Peace Pact; the collective security system established under the Covenant of the League of Nations provided a source of inspiration for the mechanism set forth under Chapter VII of the Charter. But the fact is that it was only with the UN Charter that the rule prohibiting the use of force was associated with a system of international security 'which displayed the highest degree of centralization reached until that time in the history of international law'.[6] In matters of peace and security, the New Legal Order appears to rest on two pillars, and not just one: the prohibition of states to use force *and* the existence of a centralised system of collective security which, with the sole exception of self-defence, confers upon the Security Council the monopoly of the lawful use of force. In scholarly as well as in states' perception, it is this combination of a legal obligation with a centralised procedural mechanism essentially based on the political assessment of states that, for good or bad, characterises the contemporary approach to the problem of war.[7] The UN Charter embodied, and continues to embody, both pillars. The centrality accorded to the Charter in the New Legal Order is reflected in the countless number

[6] H Kelsen, *Collective Security under International Law* (US Government Printing Office, Washington, DC, 1957) 39.

[7] See, among others, CD Gray, *International Law and the Use of Force* (Oxford University Press, Oxford, 2008) 254 ('The aim of the drafters of the UN Charter was not only to prohibit the unilateral use of force by states in Article 2(4) but also to centralize control of the use of force in the Security Council under Chapter VII') and TM Frank, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) 2 ('The Charter text embodies these two radical new concepts: it absolutely prohibits war and prescribes collective action against those who initiate it').

of treaties concluded after 1945 that express forms of deference to it.[8] It is also reflected in the choice made by a number of states to 'internalize' the two pillars of the New Legal Order in their domestic constitutions.[9] True, with the beginning of the Cold War, the great expectations generated by the Charter were rapidly frustrated. States' perspectives over this treaty have changed over the time. The collective security system itself has undergone a process of transformation in order to adapt to changing circumstances. However, the basic coordinates that still dominate the current reflections on the legality of the use of force remain those established by the Charter in 1945.

III. Enforcing peace: Unilateral or centralised response?

As already observed, *The Internationalists* says almost nothing about the powers of the Security Council or about its actual role in enforcing peace. While the book refers to a number of crisis situations that have arisen in the recent practice, the selection does not include situations in which the Security Council appears to have played a major role. From time to time, *The Internationalists* expresses a certain scepticism about the capacity of this organ to deal effectively with international crisis. The authors observe that, in certain instances, the Security Council 'has been hamstrung' by disagreement among its members, and that '[t]he permanent five members have been unable to agree to override the protection against the use of force and authorise intervention in either country'.[10] This scepticism is entirely justified. No doubt, the effectiveness of the collective security system is 'asymmetric':[11] the system may not be able to work properly

[8] Suffice here to mention art XXI of GATT 1947 ('Nothing in this Agreement shall be construed […] (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security').

[9] Thus, art 11 of the Italian Constitution, adopted in 1948, first affirms that Italy 'rejects war as an instrument of aggression' and 'as a means for the settlement of international disputes'; it then adds that 'Italy agrees, on conditions of equality with other states, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations' and 'promotes and encourages international organizations furthering such ends'. Art 24 of the Constitution of the Federal Republic of Germany, adopted in 1949, provides that 'with a view to maintaining peace, the Federation may enter into a system of mutual collective security'.

[10] Hathaway and Shapiro (n 1) 369.

[11] See J Crawford and R Nicholson, 'The Continued Relevance of Established Rules and Institutions Relating to the Use of Force' in M Weller (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 96, 108 ('If the institutionalized inequality of the collective security system does generate a problem of effectiveness, it is that its effectiveness is asymmetric.').

or at all, if the interests of the permanent members are directly involved. It remains to be seen whether this is the whole story or whether instead, despite all the deficiencies of the Security Council, there is also a more positive story to be told. This, however, is a point that the book does not address.

What the book does address, instead, is the problem whether, in a legal system where recourse to war has been banned, there are tools to replace war as a way of enforcing international law. The authors' response is that these tools do exist and prominently include non-violent outcasting.[12] Space limitations preclude a detailed analysis of the sophisticated theory of law-enforcement through outcasting that Hathaway and Shapiro develop.[13] I limit myself to raising one point, which concerns the relationship between peace-enforcement through the UN collective security system and law-enforcement through outcasting. While in many respects the two mechanisms may be regarded as complementary, one can also detect a fundamental tension. The UN system is based on the centralisation of the function of peace-enforcement. It requires cooperation among states and relies on the possibility of reaching political compromises, primarily among its permanent members. While the need for cooperation enhances the legitimacy of the system, it also imposes high costs in terms of effectiveness when such cooperation is lacking. Outcasting is a more flexible mechanism. While it recognises the importance of institutions or adjudicative bodies in the law-enforcement process, it also admits the possibility of unilateral responses coming from groups of states acting as law-enforcing agents by means of economic sanctions or other tools, the only limitation being that these tools are to be non-violent ones. Outcasting based on unilateral responses from groups of like-minded states may be highly effective in enforcing law. The risk it brings, however, is that of abuse and of further destabilisation of interstate relations. In certain situations, it also risks undermining the authority of the Security Council.

The coexistence between a centralised peace-enforcement mechanism and a decentralised law-enforcement system is a delicate one. They may complement each other or may be regarded as alternative ways by which states can address situations that threaten peace and security. However, one may also take a more radical view and find that these two systems are substantially incompatible given the fundamental tension that affects their relationship and the difficulty of finding adequate mechanisms for

[12] Hathaway and Shapiro (n 1) 371ff.

[13] See also OA Hathaway and SJ Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale Law Journal* 252.

managing their coexistence. The debates surrounding the work on the Articles on State Responsibility show how this issue was highly controversial within the International Law Commission; in fact, it continues to be highly controversial among states. With the progressive recognition that there are fundamental values of the international community and that states are legally entitled to act for the protection of these values, the problem of enforcing compliance with these fundamental values has become central. Several states opposed to the possibility of having recourse to third party non-forcible countermeasures, claiming that a rule admitting this possibility 'has no basis in international law and would be destabilizing' and that 'countermeasures in response to violations of community obligations should be taken through the United Nations, or that at least there should be a reference to Security Council action'.[14] It may be interesting to note that, more recently, Russia and China have also stressed the fact that recourse to unilateral sanctions may undermine the authority of the Security Council.[15]

Admittedly, it would not be correct to regard the emphasis placed by the book on outcasting as a plea in favour of unilateralism. The book simply does not develop this point. For the reasons mentioned above, this decision may be understandable. How to manage the tension between unilateralism in law-enforcement and centralisation in peace-enforcement remains, however, a central issue. Its significance seems to go well beyond the current debate on the permissibility of third-party countermeasures. On a broader perspective, these two approaches appear to point to different modes of development of the international legal system.

IV. The UN and the future of the outlawry of the war

In the concluding chapter of *The Internationalists*, suggestively entitled 'The work of tomorrow', Hathaway and Shapiro warn that 'the postwar

[14] See J Crawford, Fourth Report on State Responsibility, UN Doc A/CN.4/517, 18. For the debate within the International Law Commission about the role of the UN system of collective security as an appropriate framework for dealing with the legal consequences of grave breaches of international law, see M Arcari, 'Parallel Words, Parallel Clauses: Remarks on the Relationship between the Two Sets of ILC Articles on International Responsibility and the UN Charter' in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, Leiden and Boston, MA, 2013) 97.

[15] See the 'Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law' of 25 June 2016 ('The adoption of unilateral coercive measures by States in addition to measures adopted by the United Nations Security Council can defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness.').

consensus on the illegality of war is under greater assault today than it has been in seven decades'.[16] It is difficult not to agree with the two authors. States, particularly the United States and its Western allies, have increasingly advanced broad interpretations of the scope of the rule on self-defence; some of them have claimed the existence of an exception to the prohibition to the use of force in cases of grave humanitarian crisis; they have even attempted to dilute the requirement of an authorisation by the Security Council by relying on implausible interpretations of previous authorisations or by pretending that they were acting on the basis of a tacit or implicit authorisation. Against this trend, the authors urge America and its allies to maintain their commitment to the 'rules and institutions' that underlie the New World Order, including by supporting the United Nations.[17]

My last comment relates to this reference to 'rules and institutions'. In particular, it focuses on the relationship between the prohibition to use force and the peace-enforcement mechanism established by the UN. The question is whether, and to what extent, the well-functioning of the UN peace-enforcement mechanism is important for preventing the system from developing new and broader exceptions to the rule prohibiting the use of force. The book is not without its ambivalence on this point. Indeed, if the system is able to work by relying on non-violent outcasting, as suggested by the authors, it may be thought that economic sanctions and other forms of outcasting may well replace a mechanism, such as the one established by the UN Charter, that in so many instances have proved to be ineffective.

The relationship between the UN peace-enforcement mechanism and the prohibition to use force has long been debated in legal literature. Several authors have expressed the view that the effectiveness of the rule is strictly dependent on the effectiveness of the institution. Almost 50 years ago Franck famously announced the death of Article 2(4) of the Charter as a consequence of the fact that the system of collective security established by the Charter was not able to work.[18] This view certainly went too far.

[16] Hathaway and Shapiro (n 1) 415.

[17] Ibid 419. However, the view that 'the United States has served an important – indeed, leading – role in policing the system' and that 'the success of the system depends on the willingness of the United States to continue to play a central role in maintaining the legal order in the face of these many challenges' (ibid 418) can hardly be regarded as an accurate description of the current situation, given the unilateralism that has increasingly (and not only under the present administration) characterised the international action of the United States and of its Western allies on many issues, including on matters related to the use of force. The non-UN-authorised interventions in Kosovo in 1999 and in Iraq in 2003 are the first examples that come to mind.

[18] TM Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 *American Journal of International Law* 809.

There is no such automatic correlation between the functioning of the mechanism and the validity of the rule. At the same time, however, the existence of a certain linkage can hardly be denied. As two authors cautiously put it, 'whenever the system of collective sanctions provided in the UN Charter does not function properly, States might find it difficult to fully comply with Art. 2(4)'.[19] The fact is that the legal regime established by Articles 2(4) and 51 of the Charter sets a very rigid limitation to states. This is not without its side effects.[20] States may be willing to abide by the system as long as the system is perceived to be able to adapt to the changing circumstances and to cope with the new challenges. In this respect, many different reasons may be given to explain why the legal regulation on the use of force set forth by the Charter appears nowadays to be under pressure. Among them, there is no doubt the difficulty of coping adequately with certain new threats to international security, in particular those coming from transnational networks of terrorist groups. One may also detect an endogenous reason, which is linked to the transformation of the international legal order. As was briefly mentioned before, the recognition that there are 'communitarian values' of the international community and that all states may act as law-enforcement agents to protect them on behalf of the international community brings with it great expectations that compliance with these values will be enforced; at the same time, it renders it less acceptable to renounce the undertaking of enforcement measures in the name of maintaining international peace. The debate over the lawfulness of the humanitarian intervention is the clearest illustration of this point.[21]

To be clear, this claim should not be taken as suggesting that the prohibition set forth in Article 2(4) is obsolete or that it must be overcome. To the contrary, I entirely subscribe to the view that it remains a central rule of the international legal system. In my view, however, it is hard to imagine of an effective rule prohibiting the use of force without an effective institution which is capable to respond to new challenges, thereby

[19] O Dörr and A Randelzhofer, 'Article 2(4)' in B Simma, D-E Khan, G Nolte and A Paulus (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press, Oxford, 2012) 218, 233.

[20] Franck (n 7) 2 ('New remedies, as we know from medicine, tend to produce unexpected side effects. Article 2(4) of the Charter seemingly cures the Covenant's normative ambiguities regarding states' "threat or use of force" against each other. It plugs the loopholes. But […] Has the pursuit of perfect justice unintentionally created conditions of grave injustice?').

[21] For a restrictive interpretation of the scope of art 2(4) of the UN Charter, that is based upon the consideration of the emergence of communitarian values, see P Picone, 'La "guerra del Kosovo" e il diritto internazionale generale' (2000) 83 *Rivista italiana di diritto internazionale* 309.

attenuating the 'side effects' deriving from the rule's rigidity. In this respect, it may not be enough to emphasise the importance of the rule, as Hathaway and Shapiro have admirably done. The role of the institution should also be adequately stressed. This link between rule and institution, however, does not emerge as clearly as it might from the book. From my perspective, this is a missed opportunity. The book's central message – a defence of the prohibition on the use force – could have been stronger if it would have been accompanied by a defence of the authority of the United Nations and of its centralised mechanism for enforcing peace.