MECHANIMS TO ENSURE THE ENFORCEMENT OF INTERNATIONAL LAW

1. GENERAL ASPECTS: ORDINARY APPLICATION AND ENFORCEMENT. 2. UNILATERAL RESPONSES: SELF-PROTECTION MEASURES. 3. INSTITUTIONAL RESPONSES: THEIR MODALITIES.

ORDINARY APPLICATION AND ENFORCEMENT

A. General aspects

B. Spontaneous application of International Law

C. Reaction to non-compliance and enforceability.

D. Consequences of wrongful acts of States

E. Ways to enforce responsibility

A. GENERAL ASPECTS

- Problems raised by the application of IL:
  - Essentially decentralized legal system: neither a judiciary with mandatory competence to determine cases of violation of the rules nor a supranational authority responsible for ensuring their coercive enforcement.
  - States have a wide margin of appreciation of the legal situations that affect them and, consequently, an equally wide margin of action to apply measures of self-protection or self-protection
- In contemporary international society recourse to armed force is prohibited under the terms of Article 2.4 of the UN Charter.
- Generally: IL applied spontaneously but, in exceptional cases where this does not happen, States have recourse to various procedures to ensure compliance with the norms by those who have violated them.

B. SPONTANEOUS APPLICATON OF INTERNATIONAL LAW

- Contemporary arena: ordinary process of spontaneous application of IL, compliance without the need of sanction or enforcement.
- This spontaneous compliance does not result from an idealistic conviction in the goodness of the norms, but from the realistic appreciation that compliance with international law ultimately serves the long-term interests of the States themselves.
- The process is effectively carried out through multiple channels: diplomatic application by foreign ministries, embassies and consulates; institutional application by international organizations; jurisdictional application by the international courts with jurisdiction; national application through the incorporation of international norms into the domestic law of States, etc.

C. REACTION TO NON-COMPLIANCE AND ENFORCEABILITY

- When international norms are not spontaneously complied with it exists resource to a wide range of techniques to defend legal rights and interests against non-compliance.
  - Employment of legal methods of reaction available to them under the international legal order itself, which are effective in many cases: allegations of unenforceability, non-recognition or invalidity of the legal acts of the other State, recourse to diplomatic protection for nationals who have been victims of a violation of international law, the demand for international responsibility of the State responsible for an unlawful act, and the complaint to a competent international body.
  - If the matter is not settled: the situation may give rise to a dispute between the States which must be settled by recourse to the peaceful means of settlement (political and/or jurisdictional) existing in international law.
  - Resort to de facto means of enforcing international norms (legal means employed not satisfactory result or preferable to resort directly to defending their rights by coercive means): IL regulates their exercise, excluding in any case recourse to armed force contrary to the UN Charter.

- Questions of non-compliance do not normally arise in an abstract or ideal framework but in a situational context in which underlying political considerations and interests play an important role and where there has generally been no objective determination of the facts by an impartial authority:
  - Each State assesses on its own whether there has been a breach of an international obligation and decides at its own discretion the response measures it wishes to apply.
  - The more powerful States have a comparative advantage in the application of reactive measures
  - Enforcement measures are only effective when used by powerful States against weaker ones, or perhaps by weaker States against each other.
  - The structural shortcomings of the international system are reflected in the mechanisms for ensuring enforcement, making the enforcement of norms a particularly complex issue.

UNILATERAL RESPONSES: SELF-PROTECTION MEASURES

A. General considerations

B. Retorsion measures

C. Countermeasures.

A. GENERAL CONSIDERATIONS

- Unilateral measures of self-protection are inevitable:
  - Society made up of sovereign and equal States.
  - No superior body that can coercively ensure the application of international law.
- Self-protection measures: Traditional distinction between
  - Retorsion measures and
  - Reprisals or countermeasures

B. RETORSION MEASURES

- Rigorous exercise of a right as a means of compelling another State" to put an end to a harmful situation. They imply:
  - Perform by a State of harmful or unfriendly acts, but lawful from the point of view of international law, in response to harmful acts (lawful or unlawful) previously performed by another State.
  - Their application does not imply the violation of any legal obligation on the part of the State applying them.
- Their purpose is to remove or restrict facilities or benefits granted to another State to make it modify a conduct that the State resorting to retaliation considers harmful.

C. RETALIATION OR COUNTERMEASURES

- Retaliatory measures: insufficient---resort to the application of retaliation or countermeasures: "acts contrary in themselves to international law by which a State responds to (acts) contrary to international law committed against it by another State, in order to compel the latter to cease its injurious activity and repair the damage caused" .
  - Retaliation: concept used in classical international law, particularly in the context of the law of armed conflict (war reprisals).
    - Conditions to the use of retaliation in peacetime, excluding any use of armed force and indicating that they are not admissible in the absence of "a sufficient motive, a warning and an admissible proportion between the alleged offense and the reprisals exercised" and that "reprisals are admissible only against the provoking State" so that the State employing them must always endeavor to avoid or limit as far as possible that they affect the nationals of a third State.
    - Replacement with term of “countermeasures”: more generic.
- Case of interpretation of the air agreement between France and the United States of March 27, 1946. Conditions:

- countermeasures are reactive measures.
- adopted by a State which entail the breach of an international legal obligation, but which in the specific case are justified by the existence of a prior breach of its obligations by the State against which they are directed.
- they are legitimate by reason of their purpose of responding to a prior unlawful act contrary to international law by the other State.

➢ Evolution by ICJ:

- *Case of the military and paramilitary activities of the United States against Nicaragua in 1986*: the use of armed force against Nicaragua by a State other than that which had suffered a prior unlawful act could not be considered as a justified reaction in the light of international law.
- *Judgment of 25 September 1997, concerning the Gabcíkovo-Nagymaros project case (Hungary/Slovakia)*: Conditions that countermeasures must meet, in the light of the work of the United Nations International Law Commission concerning the responsibility of States on this point.

➢ Case law+ILC draft articles on responsibility of States for wrongful acts of 2001. Conditions for the admissibility of countermeasures under current IL:

- The purpose of countermeasures should be to induce the State responsible for the wrongful act to comply with its international obligations, so that the countermeasure should be temporary and reversible, and should be suspended if the violation ceases.

- Before taking countermeasures, the injured State must have invited the State committing the wrongful act to cease such conduct or to make reparation for the damage caused and offered it the possibility of consulting on the matter.
- Except in cases of response to armed aggression in the exercise of self-defense in accordance with the UN Charter, countermeasures may not include the use or threat of armed force or affect obligations under peremptory norms of general international law (such as those relating to the protection of fundamental human rights and humanitarian obligations prohibiting reprisals).
- The effects of countermeasures must be proportional to the damage caused, considering the rights affected.

COLLECTIVE RESPONSES: INSTITUTIONAL MECHANISMS

A. General considerations

B. International control measures

C. Institutional sentencing and isolation measures institutional

D. Coercive measures of Chapter VII of the Charter of the UN

E. Punitive measures: repression of international crimes

A. GENERAL CONSIDERATIONS

- Institutionalization of international society: new forms of collective reaction aimed at ensuring compliance with the rules by putting pressure on the offending State.
  - Framework of IO.
  - Certain agreements that establish mechanisms for responding to cases of non-compliance with their obligations.

B. INTERNATIONAL CONTROL MEASURES

- In order to contribute to a more precise and objective detection of cases of non-compliance with the norms and obligations of States: IO and Conventions---collective control mechanisms.
  - International reporting, monitoring and verification procedures aimed at detecting cases of violation and improving compliance with the obligations assumed by States: non-contentious international control mechanisms whose purpose is to verify compliance with obligations through institutional procedures established for this purpose.
  - Several international organizations have established particularly effective control procedures, based on reporting and the possibility of establishing mechanisms for verifying and monitoring compliance with obligations by member states: ILO, the International Atomic Energy Agency (IAEA) ICAO, FAO, WHO and WTO.
  - European Union: administrative control functions by the Commission, independently of the judicial control carried out by the Court of Justice.
  - International conventions have established control mechanisms, generally based on the methodology known as the "reporting system" which States Parties must submit periodically to account for compliance with their commitments.

- Conventions on human rights, disarmament and arms control, economic and trade relations, fisheries and conservation of marine living resources, and environmental protection.

- Some conventions, both bilateral and multilateral, have even established systems of mutual observation and inspection to verify compliance with and observance of obligations by the Parties: in the field of disarmament, consultative Parties to the 1959 Antarctic Treaty, Modern environmental conventions, etc.

- International control procedures: collective instance of verification of compliance which, if not satisfactorily passed, will result in a negative evaluation of the behavior of the State concerned, which may be followed by other admonitory or, more rarely, punitive measures.

C. INSTITUTIONAL SENTENCING AND ISOLATION MEASURES

- Forms of institutional response to non-compliance by member states with their obligations have been established to identify violators and to put pressure on them to ensure compliance with the rules: form of "international sanction" against the offending State.
  - Most elementary: public condemnation.
  - Others: "non-recognition" by the Organization of situations established in violation of international law, also reminding its members of the obligation not to recognize the validity of such situations.
  - A more forceful form: measures aimed at isolating the State that violates its international obligations.
    - non-admission to the Organization,
    - suspension of the exercise of membership rights
    - Expulsion from the Organization in extreme cases.

D. COERCIVE MEASURES OF CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS

- Most radical form of institutional reaction against a State that violates its obligations, endangering the maintenance of international peace and security: "coercive measures" contemplated in Chapter VII of the UN Charter, which appear as the most forceful form of "international sanctions“ (vide unit devoted to international peace and security).
- Specific purpose: maintain collective security in cases where, in the opinion of the Security Council, there has been a threat to the peace, breach of the peace or act of aggression.

E. PUNITIVE MEASURES: REPRESSION OF INTERNATIONAL CRIMES

- Does punitive or criminal sanction measures have a place in current international law as a response to particularly serious violations of the rules protecting the fundamental interests of the international community?. Distinction:
  - Repression of international crimes committed by States themselves
  - Cases involving the prosecution of international crimes committed by individuals.
- International crime of the State.
  - Classic IL: Certain traces of punitive repression of particularly serious violations committed by States, especially in the context of armed conflicts (Peace treaties after WW I & II, or UN Charter).
  - ILC's codification work on international responsibility: possibility that certain particularly serious violations of international law (nature of the rules violated and by very scale of the violation) might constitute a genuine "international crime of the State" to which a particularly aggravated form of responsibility should correspond. Abandon.
    - ILC in 2001 omitted any express reference to the "international crime" of the State.
    - Recent international practice: cases in which a State that has committed serious and massive violations of IL has been subjected to coercive sanctions that reach the level of a certain criminal repression against the State itself.

- Iraq's invasion of Kuwait.
- Afghanistan after the terrorist attacks of September 11, 2001.

- International crimes of individuals
  - Classic IL: crimes *iuris gentium* such as piracy, trafficking in persons, genocide, torture, hijacking of aircraft, etc., which are committed by individuals but have an international dimension because they affect fundamental international interests.
  - Crimes typified in international conventions that States had to incorporate into their domestic criminal law.
  - Repression of certain international crimes directly by tribunals of an international character, established to punish the international crimes of individuals: IMT Nuremberg and Tokyo, *ad hoc* tribunals for the Former Yugoslavia and Rwanda, hybrid tribunals and currently, ICC.