

Video Transcript

Enforcement Short of Force – Gleider Hernández

Hello, and welcome to our mini-lecture on the structure of Chapter 13 of the book: Enforcement Short of Force.

Now, we've already discussed in previous chapters how sovereign equality and the respect for independence between states requires obligations to be accepted consensually. It means that obligations can't be enforced or imposed on the state without its consent. Now, because international law has traditionally been decentralised, with no centralised enforcement authority, it has meant that, historically, states have taken matters into their own hands. We discussed in the previous chapter how states used to regularly wage war on one another and use force on one another. As that has become prohibited and methods of dispute settlement have arisen, states have also begun to develop a number of non-forcible ways to enforce their interest, some of which have become more-or-less legal, and have been accepted as legal over time, and some of which, although tolerated at the time, would now be considered as unlawful because they're excessive. And international law, in this particular area, has developed very much through practices of states, which have been tested in certain periods of crisis and with situations that had never been faced before. So, over time, those forcible measures have come to be confined and non-forcible measures have come to the fore. By 'non-forcible measures' I mean anything from diplomatic rebukes, to trade blockades, to comprehensive sanctions, to the recall of citizens, to the suspension and freezing of bank accounts; all sorts of measures that fall short of war, but are a way for a state to pressure another state or to induce another state to change its conduct.

So in international law, we have various categories that are used in this respect to try to describe the various potential options available to states. The first one is called reprisal, and a reprisal actually comes from the Law of Armed Conflict. It used to refer to a situation where a state would take a punitive measure against another state in a tit-for-tat retaliation. So, one state would bomb the city of another state, in a reprisal, state B would return the same conduct. Now, armed reprisals are now prohibited because they're considered to be a violation of the law of war—but what about non-forcible reprisals? Well, over time those began to acquire further and further legal refinement until a new category of acts was defined and they're called 'countermeasures'.

Countermeasures are a subset of unarmed reprisals. They are non-forcible acts that aim to induce a state to resume compliance when it is in breach, and they do so through the temporary non-performance of specific obligations. So, reprisals have essentially been shifted out and become obsolete and replaced by this category of countermeasures, which has been recognised by the International Court of Justice as of 1997 in a case called *Gabcikovo-Nagymaros*, which is between Hungary and Slovakia and concerned the construction of a dam between the two states. Countermeasures are subject to a number of conditions, including that they be temporary, that they relate to an international law obligation, but above all (and this is something to remember as we look at the other categories) a countermeasure is an act that would ordinarily be unlawful but for the unlawful conduct of the first state at the beginning. So in essence, a countermeasure, as we discussed in the law on state responsibility, is a defense where circumstance precluding wrongfulness of that act because of the special circumstances in which it's performed. And that possible illegality is what distinguishes a countermeasure from something called an 'active retorsion'.

An active retorsion is an act that is perhaps unfriendly, but that is perfectly lawful. And that's something to remember: a retorsionary act can be undertaken at any time. It is an unfriendly act, like recalling your ambassador, or writing a letter of complaint. It probably doesn't have the same effect as a countermeasure because it's not a suspension of a legal obligation, but it can have very far-reaching consequences and it's important to distinguish countermeasures as normally unlawful but for the breach, from retorsion, which are normally lawful and just merely appearing unfriendly.

Finally, we have the category of sanctions. And sanctions is an often misused term, especially when a state purports to impose sanctions against another state. In international law the term sanction is reserved to what an international organisation decides to do, usually against the member state. And sanctions take on any number of forms, from an economic blockade, to an arms embargo, to the prohibition of transfer of money, or technology, or assistance. And over time, the United Nations, in particular, has developed a number of practices through which its use of sanctions has been refined because there have been instances (for example in relation to Iraq in 1990) where sanctions were so severe that they were causing humanitarian suffering. So over time, the Security Council, and the United Nations as a whole, have developed mechanisms through which sanctions are meant to be targeted, are meant not to be disproportionate, not meant to cause civilian suffering. So you see that there are a number of individual and collective measures that states have at their disposal, should one of the methods of dispute settlement not be entirely successful.

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Thank you.