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Various Means of Enforcement in International Law

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INTRODUCTION

This essay will examine the various means of enforcement that are available under international law to help secure compliance.[1] Before turning to these various means, this essay will first address the criticism leveled against international law, namely that it does not qualify as law because it lacks sanctions.

I. SANCTIONS AS A FEATURE OF LAW

Most lawyers consider that sanctions distinguish law from other social norms such as morality and religion. Sanctions in this broad sense refer to coercion applied to members of a community to compel their compliance with the law. In municipal law, violations of criminal law are sanctioned by punishment. In civil law, judgments of courts are enforced by writs of execution.

It is often argued that international law is not law because it lacks these kinds of sanctions. A well-known scholar who made this argument is John Austin. In a book published in 1832, he argued that law was a command issued by a sovereign backed up by sanctions in the event of non-compliance.[2] As international law lacked sanctions, he considered it to be law "improperly so called."[3] According to him, describing international law as "positive international morality" would hit its import with perfect precision.[4] On the other hand, some lawyers have maintained that international law is law by denying that sanctions are the distinguishing feature of law. For example, Georg Jellinek contended that the

1. For enforcement of international law, see generally MATH NOORTMANN, ENFORCING INTERNATIONAL LAW: FROM SELF-HELP TO SELF-CONTAINED REGIMES (2005); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW (2008); Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 COLLECTED COURSES HAGUE ACAD. INT'L L. 9 (1997); Tadashi Mori, *Kokusai Hōniokeru Hōno Jitsugen Shuhō* [*Means of Enforcement of Law in International Law*], *in* HŌNO JITSUGEN SHUHŌ [MEANS OF ENFORCEMENT OF LAW] 267 (Yasuo Hasebe et al. eds., 2014).

2. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1832).

3. *Id.* at 146–48.

4. *See id.* at 132, 280, 377.

distinguishing feature of law was not the sanction but the "guarantee." According to him, "[i]t is . . . not the sanction [*Zwang*] but the guarantee . . . that is an essential characteristic [*Merkmal*] of the concept of law."[5] The guarantee is the motivating power of law, and the sanction is a mere sub-category of it. Since there is no higher authority than states, international law lacks the sanction. Nevertheless, international law has the guarantee.[6]

However, most lawyers accept that sanctions are the distinguishing feature of law and argue that international law is law because sanctions *are* available under international law. It is inappropriate to demand that international law must have the same kind of sanctions as in municipal law because that approach assumes the municipal law of modern states to be the only possible form of law. In the pre-modern era, municipal law was enforced by self-help. Lawyers have discussed whether international law qualifies as law despite not having the same kind of sanctions as those available in municipal law.[7] It is well-known that Hans Kelsen considered international law as law because war and reprisals were available as sanctions under international law. He considered war and reprisals as sanctions of a primitive or decentralized legal order.[8] While for Austin, law involved the submission to sovereigns, for Kelsen, law entailed the submission to rules.[9] From the perspective of contemporary international law, which has outlawed the use of force, it seems odd to regard war and reprisals as "sanctions" that allow international law to be characterized as law. However, it is true that before the use of force was outlawed, war and reprisals played certain roles as means of self-help.

A notable feature of international law is that self-help is not excluded. Reprisals which do not involve the use of force, now referred to as countermeasures, are permitted as a means to help enforce international law. In addition, various other means of enforcement are available in international law to help ensure compliance. Thus, international law has sanctions in forms different from those available in municipal law. Accordingly, even when one accepts that

5. Georg Jellinek, Allgemeine Staatslehre 328 (2d ed. 1905) (translation by author).

6. *Id.* at 364–68.

7. *See generally* J. L. Brierly, *Sanctions*, 17 Transactions Grotius Soc'y 67 (1931); Monique Chemillier-Gendreau, *La Notion de Sanction en Droit International* [*The Notion of Sanctions in International Law*], *in* Mélanges en l'Honneur du Professeur Gustav Peiser [Essays in Honor of Professor Gustav Peiser] (Jean-Michel Galabert & Marcel-René Tercinet eds., 1995); Josef L. Kunz, *Sanctions in International Law*, 54 Am. J. Int'l L. 324 (1960).

8. Hans Kelsen, *The Essence of International Law*, *in* The Relevance of International Law: Essays in Honor of Leo Gross 85, 87 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); *see also* Hans Kelsen, Law and Peace in International Relations: The Oliver Wendell Holmes Lectures for 1941-1942 29–55 (1948); Hans Kelsen, Principles of International Law 20–64 (1952).

9. Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 Eur. J. Int'l L. 287, 289 (1998).

sanctions are the distinguishing feature of law, one still can affirm the legal nature of international law.[10]

II. Various Means of Enforcement in International Law

This essay will now address the following seven means available in international law to help secure compliance: the domestic implementation and application of international law; the enforcement actions of the United Nations ("U.N.") Security Council; self-help; the law of state responsibility; international dispute settlement; compliance control; and the enforcement of international criminal law through domestic courts and international criminal courts and tribunals.

A. Domestic Implementation and Application

The domestic implementation and application of international law is the most fundamental and important means of enforcing international law. The "domestic implementation" of international law refers to the enactment of rules by national legislators to fulfill the international obligations of the state. It is the first step needed to give effect to international law domestically. In the following examination, however, focus will be placed on the "domestic application" of international law, in particular, the role of domestic courts in the enforcement of international law.

1. Dédoublement Fonctionnel

Georges Scelle expounded the theory of *dédoublement fonctionnel*, or role splitting, in international law. According to this theory, national organs play a double role: on the one hand, as organs of a state in its national legal order and, on the other hand, as organs of the international community contributing to the formation, implementation, application, and enforcement of international law.[11] In contrast to executive and legislative organs, which tend to prioritize national interests, judicial organs or domestic courts are more likely to serve as true organs of the international community.[12] The important role played by

10. *See generally* Kisaburo Yokota, Kokusai Hōno Hōteki Seishitsu [Legal Nature of International Law] (1944); Anthony D'Amato, *Is International Law Really "Law"?*, 79 Nw. U. L. Rev. 1293 (1985); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

11. Georges Scelle, *Le Phénomène Juridique du Dédoublement Fonctionnel* [*The Legal Phenomenon of Dédoublement Fonctionnel*], *in* Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg zu Seinem 70. Geburtstag [Legal Issues of International Organization: Essays in Honor of H. Wehberg on His 70th Birthday] 324 (Walter Schätzel & Hans-Jürgen Schlochauer eds., 1956); *see also* Antonio Cassese, *Remarks on Scelle's Theory of 'Role Splitting' (Dédoublement Fonctionnel) in International Law*, 1 Eur. J. Int'l L. 210 (1990).

12. For the role of domestic courts in international law, see generally Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 39 Ind. L.J. 429 (1964); The Role of Domestic Courts in Treaty Enforcement: A Comparative Study (David Sloss ed., 2009).

domestic courts in international law is attributable to the decentralized nature of the international legal order.

2. Domestic Application

When a state acts in contravention of its international obligations and injures a non-national, the home state of that individual can bring an international claim. In order for that state to exercise diplomatic protection, the injured individual must have exhausted local remedies.[13] The rule of exhaustion of local remedies gives the responsible state opportunities to rectify the wrongful acts of its national organs through means available in domestic law and thereby helps prevent the problem from escalating into an inter-state dispute. The rule of exhaustion of local remedies attests to the importance of the domestic application of international law.

The primary function of a domestic court is to apply international law to the acts of its government and, where such acts are inconsistent with international law, to find them unlawful.[14] International law leaves it to states to decide whether it has legal force in their domestic legal order.[15] Customary international law has domestic legal force in many states.[16] Treaties also have domestic legal force in many states.[17] However, in a considerable number of states, treaties have no force of law.[18] If international law has domestic legal force and is directly applicable, domestic courts can apply it and invalidate inconsistent executive acts.[19] Furthermore, each state determines the rank held by international law in its domestic legal order. In some states, treaties prevail over statutes,[20] while in other states, statutes enacted after a treaty prevail over that treaty.[21]

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13. For the rule of exhaustion of local remedies, see generally Chittharanjan Felix Amerasinghe, Local Remedies in International Law (2d ed. 2004); A. A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law (1983).

14. *See generally* Yuji Iwasawa, Domestic Application of International Law (2022).

15. *See id.* at 4.

16. *See id.*

17. For example, Austria, Belgium, France, Germany, Italy, Japan, Portugal, Switzerland, and the Netherlands. *See id.* at 4–5. In the United States, it is sometimes argued that a non-self-executing treaty does not become part of domestic law. However, a treaty is supreme law of the land whether it is self-executing or not. *See id.* at 4–5, 54–56.

18. For example, the United Kingdom, many states in the Commonwealth, and Scandinavian countries. *See id.* at 5.

19. *See generally id.*

20. For example, France, former French colonies, Greece, Spain, Japan, some Latin American states, and some Eastern European States including Russia. *See* Yuji Iwasawa, Kokusai Hō [International Law] 520 (2d ed. 2023).

21. For example, the United States, Germany, and the Republic of Korea. *See id.*

3. Indirect Application

Even when international law is not directly applicable, it can have various other effects in domestic law. In most states, it is an established principle that courts should interpret national laws in conformity with international law. This is referred to as the principle of consistent interpretation, or the indirect application of international law.[22] Some constitutions contain explicit provisions on the principle.[23] When a state enacts legislation to implement international law domestically, it is evident that the legislation should be interpreted in light of international law. However, the principle should be applied even when national law is enacted prior to the relevant international law.[24]

Human rights treaties can be applied to horizontal relations between private individuals. This effect of human rights on the relations between individuals is referred to as "third-party effect" (*Drittwirkung*). In Japan and Germany, the theory of indirect effect has significant support.[25] For example, Japanese courts have used the International Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention") as an aid in interpreting the concept of "tort" in Japanese law.[26]

The principle of consistent interpretation can be highly effective and can contribute significantly to the domestic enforcement of international law. While domestic courts may be reluctant to endorse the direct application of international law, they may be more willing to use international law indirectly for the consistent interpretation of national law. The authority of the international instrument differs according to its legal character—the stronger its legal character, the greater its authority.

4. External Application

Domestic courts can also enforce international law externally against foreign states. In my previous writings, I have referred to this means of enforcement as the "external application" of international law.[27] This external application can take different forms. First, victims of violations of international human rights law can sue a foreign state or its officials in domestic courts for compensation. Domestic courts may find that a foreign state or its officials acted in violation of international law and award compensation. The plaintiff may be a national

22. *See* Iwasawa, *supra* note 14, at 214–19.

23. *E.g.*, S. Afr. Const., 1996, § 39(1), § 233; C.E., B.O.E. art. 10, ¶ 2, Dec. 29, 1978 (Spain).

24. Iwasawa, *supra* note 14, at 214–15.

25. *See id.* at 216–17; Jost Delbrück, *Third-Party Effects of Fundamental Rights Through Obligations Under International Law?*, 12 Law & Stat. 61 (1975).

26. *E.g.*, Osaka Kōtō Saibansho [Osaka High Ct.] July 8, 2014, 2232 Hanrei Jihō 34, *aff'g* Kyoto Chihō Saibansho [Kyoto Dist. Ct.] Oct. 7, 2013, 2208 Hanrei Jihō 74, 57 Japanese Y.B. Int'l L. 503 (2014) (Japan).

27. Yuji Iwasawa, International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law 92–94 (1998).

of the target state,[28] the forum state,[29] or even a third state.[30] Litigation of this kind flourished in the United States in the 1980s and 1990s.[31] Second, on the basis of the universality principle, domestic courts may prosecute and punish non-nationals who have committed certain international crimes abroad.[32] Third, domestic courts may refer to international law in extradition or deportation cases. Domestic courts can, in light of international law, prohibit their government from extraditing or deporting a person to a state where there is a real risk that the person will be subject to irreparable harm such as an infringement of the right to life and the prohibition of torture or cruel, inhuman, or degrading treatment.[33] Fourth, a domestic court may refuse to apply foreign law or recognize and enforce foreign judgments on account of their inconsistency with international law. Domestic courts may do this for the reason that the foreign law or foreign judgment is contrary to the "public policy" of the forum state, with international law constituting an element of this public policy.[34]

B. Enforcement Actions of the Security Council

The U.N. Security Council can take "enforcement actions" which may have the effect of securing compliance with international law. Under the U.N. Charter,[35] the Security Council can decide to take non-military and military actions, and its decisions are legally binding on U.N. Members.[36] Chapter VII of the Charter is applied to "any threat to the peace, breach of the peace, or act of aggression . . . ."[37] Actions taken by the Security Council under Chapter VII are administrative actions of a U.N. organ that has the primary responsibility for the maintenance of international peace and security with a view to restoring peace.[38] However, acts of states that threaten or breach the peace are often internationally wrongful acts.[39] In those cases, enforcement actions of the

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28. *See generally* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (a suit brought by aliens against a foreign government official); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (a suit brought by an alien against the state of his nationality).

29. *See generally* Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (a suit brought by an American against a foreign state).

30. *See generally* Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985) (a suit brought by an alien against a third state).

31. The U.S. Supreme Court curtailed this trend in subsequent years. *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124 (2013).

32. *See infra* text accompanying footnotes 145–46.

33. *E.g.*, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Apr. 20, 1990, 1344 Hanrei Jihō 35, 34 Japanese Ann. Int'l L. 129 (1991).

34. *E.g.*, Oppenheimer v. Cattermole, [1976] AC 249 (HL) 262 (UK).

35. U.N. Charter arts. 39–42.

36. *See generally* Erika de Wet, The Chapter VII Powers of the United Nations Security Council (2004).

37. U.N. Charter art. 39.

38. *See* U.N. Charter art. 24.

39. *See generally* Stephan Wollbrink, A Violation of International Law as a Necessary Element of a "Threat to the Peace" Under the UN Charter (2014).

Security Council signify collective sanctions against those illegal acts and have the effect of restoring legality as well as peace. They serve as means of enforcing international law.

Even though the Charter uses the term "measures" and not "sanctions" for the measures taken by the Security Council under Chapter VII, the International Law Commission ("ILC") has referred to them as "sanctions."[40] Legal commentators have also referred to them as U.N. "sanctions."[41] Furthermore, the ILC reserved the term "sanction" for a reactive measure applied by an international organization in accordance with its constituent instrument, in particular under Chapter VII of the U.N. Charter.[42]

1. Non-Military Measures

During the Cold War, the Security Council rarely adopted binding decisions to take non-military measures. Before 1989, there were only two such cases, concerning Southern Rhodesia and South Africa.[43] However, since 1989, the Security Council has adopted numerous decisions to take non-military measures, for example, in relation to Iraq in 1990, Somalia, Libya, Yugoslavia, and Liberia in 1992, Haiti and Angola in 1993, Sudan in 1996, and Sierra Leone in 1997.[44] The Security Council often takes non-military measures under article 41 of the Charter in the form of "economic sanctions," such as prohibitions of export and import, arms embargoes, financial sanctions, prohibitions of investments, and asset freezes. Non-military measures taken by the Security Council also include travel prohibitions, restrictions on cultural exchange, banning the entry of airplanes, and interruptions of diplomatic relations.[45]

40. *Int'l Law Comm'n, Rep. on the Work of Its Thirty-First Session*, 2 Y.B. Int'l L. Comm'n 121, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) (1979); *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/56/10, art. 22 ¶ 3 (2001) [hereinafter *ILC Commentaries*].

41. *See generally* United Nations Sanctions and International Law (Vera Gowland-Debbas ed., 2001); Research Handbook on UN Sanctions and International Law (Larissa van den Herik ed., 2017).

42. *Int'l Law Comm'n, Rep. on the Work of Its Thirty-First Session*, *supra* note 40, at 121.

43. S.C. Res. 232, ¶ 2 (Dec. 16, 1966) (Southern Rhodesia); S.C. Res. 253, ¶¶ 3–7 (May 29, 1968) (Southern Rhodesia); S.C. Res. 418, ¶¶ 2, 4 (Nov. 4, 1977) (South Africa).

44. S.C. Res. 661, ¶¶ 3–4, 6 (Aug. 6, 1990) (Iraq-Kuwait); S.C. Res. 733, ¶ 5 (Jan. 23, 1992) (Somalia); S.C. Res. 748, ¶¶ 4–6 (Mar. 31, 1992) (Libya); S.C. Res. 757, ¶¶ 4–9 (May 30, 1992) (Yugoslavia); S.C. Res. 788, ¶ 8 (Nov. 19, 1992) (Liberia); S.C. Res. 841, ¶¶ 5–6, 8 (June 16, 1993) (Haiti); S.C. Res. 864, ¶ 19 (Sep. 15, 1993) (Angola); S.C. Res. 1054, ¶ 3 (Apr. 26, 1996) (Sudan); S.C. Res. 1132, ¶¶ 5–6 (Oct. 8, 1997) (Sierra Leone).

45. For non-military sanctions by the U.N., see generally Jean Combacau, Le Pouvoir de Sanction de l'O.N.U.: Etude Théorique de la Coercition Non Militaire [The Sanction Powers of the UN: A Theoretical Study of Non-Military Coercion] (1974). For economic sanctions, see generally Economic Sanctions in International Law and Practice (Masahiko Asada ed., 2020); Economic Sanctions in International Law (Laura Picchio Forlati & Linos-Alexandre Sicilianos eds., 2004); Economic Sanctions and International Law (Matthew Happold & Paul Eden eds., 2016).

Comprehensive economic sanctions have a significant negative impact on the lives of innocent ordinary citizens in the targeted state. Therefore, since the 1990s, the Security Council has started to target specific individuals and entities, including state leaders and terrorists.[46] These sanctions are referred to as "smart sanctions" or "targeted sanctions."[47] The Security Council often establishes a sanctions committee to monitor the implementation of sanctions. These committees compile a list of individuals and entities targeted by the sanctions, which include asset freezes and travel prohibitions. The sanctions committees have listed some individuals without good basis, and international courts have found that states violated the human rights of those individuals by implementing the sanctions.[48]

Non-military measures have not only multiplied but also diversified. In 1993 and 1994, the Security Council created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") through its resolutions.[49] Article 41 of the Charter formed the legal basis for their establishment.[50] The Security Council has taken a variety of other non-military measures under article 41, including by establishing an international commission of inquiry,[51] referring cases to the International Criminal Court ("ICC"),[52] and demanding the destruction of chemical and biological weapons and ballistic missiles.[53] While the Security Council is an administrative organ of the U.N., it has also exercised legislative functions by adopting general rules concerning terrorism through binding resolutions.[54]

2. Military Measures

As the special agreements envisaged under articles 43 to 47 of the U.N. Charter have not been concluded, the Security Council is unable to take military measures under article 42 with binding decisions. Before 1989, the Security Council had only ever "recommended" military measures once, in response to the Korean War in 1950.[55] In 1990, the Security Council began the practice

46. *E.g.*, S.C. Res. 1173, ¶¶ 11–12 (June 12, 1998) (Angola); S.C. Res. 1267, ¶ 4 (Oct. 15, 1999) (Afghanistan).

47. *See generally* Targeted Sanctions: The Impacts and Effectiveness of United Nations Action (Thomas J. Biersteker et al. eds., 2016).

48. *E.g.*, Joined Cases C-402/05 & C-415/05, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, ¶¶ 370–72 2008 E.C.R. I-6351; Hum. Rts. Com., Sayadi & Vinck v. Belgium, ¶ 11 U.N. Doc. A/64/40 (2009); Nada v. Switzerland, ¶ 214, 2012-V Eur. Ct. H.R. 213.

49. S.C. Res. 827, ¶ 2 (May 25, 1993) (ICTY); S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (ICTR).

50. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 36, 40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

51. *E.g.*, S.C. Res. 1564, ¶ 12 (Sep. 18, 2004) (Sudan).

52. *E.g.*, S.C. Res. 1593, ¶ 1 (Mar. 31, 2005) (Sudan).

53. S.C. Res. 687, ¶ 8 (Apr. 3, 1991) (Iraq).

54. *See generally* S.C. Res. 1373 (Sep. 28, 2001); S.C. Res. 1540 (Apr. 28, 2004); S.C. Res. 2178 (Sep. 24, 2014).

55. *See generally* S.C. Res. 83 (June 27, 1950).

of authorizing military actions by U.N. member states. The Security Council authorized member states co-operating with Kuwait to use "all necessary means" to restore international peace and security.[56] It was understood that "all necessary means" included military actions carried out by member states. In the Gulf War, this authorization had the purpose of halting Iraq's unlawful use of force. The Security Council has authorized military actions on many occasions since then. The purpose of authorizing military actions has become more diverse, including humanitarian assistance,[57] peace building,[58] prevention of genocide,[59] support of fair elections,[60] and protection of civilians.[61]

3. Peacekeeping Operations

Peacekeeping operations were invented partly because the Security Council was not in a position to take military measures. More than seventy peacekeeping operations have been deployed so far. Peacekeeping operations are not intended to resolve the relevant dispute, let alone enforce international law. Nonetheless, peacekeeping operations are one of the most successful U.N. activities.[62]

C. Self-Help

A state may resort to non-forcible measures without the authorization of the Security Council in order to induce another state to cease certain conduct. These measures are often referred to as "sanctions."[63] However, some international lawyers avoid referring to them as such because they are unilateral actions taken by a state as a means of self-help.[64]

Besides the United Nations, regional organizations also apply sanctions. The Security Council has both utilized regional organizations for enforcement

56. S.C. Res. 678, ¶ 2 (Nov. 29, 1990) (Iraq-Kuwait).
57. *E.g.*, S.C. Res. 770, ¶ 2 (Aug. 13, 1992) (Bosnia & Herzegovina).
58. *E.g.*, S.C. Res. 816, ¶ 4 (Mar. 31, 1993) (Bosnia & Herzegovina).
59. *E.g.*, S.C. Res. 929, ¶ 3 (June 22, 1994) (Rwanda).
60. *E.g.*, S.C. Res. 940, ¶ 4 (July 31, 1994) (Haiti).
61. *E.g.*, S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (Libya).
62. For peacekeeping operations by the United Nations, see generally THE OXFORD HANDBOOK OF UNITED NATIONS PEACEKEEPING OPERATIONS (Joachim A. Koops et al. eds., 2015).
63. *See generally* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS (Charlotte Beaucillon ed., 2021); UNILATERAL SANCTIONS IN INTERNATIONAL LAW (Surya P. Subedi ed., 2021).
64. *E.g.*, PAOLA GAETA ET AL., CASSESE'S INTERNATIONAL LAW 306–09 (3d ed. 2020); George M. Abi-Saab, *The Concept of Sanction in International Law*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 29, 32 (Vera Gowland-Debbas ed., 2001) (arguing that sanctions *stricto sensu* refer to "coercive measures taken in execution of a decision of a competent social organ"); George M. Abi-Saab, *De la Sanction en Droit International: Essai de Clarification* [*On Sanctions in International Law: An Attempt at Clarification*], *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE XXIST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 61, 66–70 (Jerzy Makarczyk ed., 1996); Alain Pellet & Alina Miron, *Sanctions*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 6–9 (Rüdiger Wolfrum ed., 2d ed. 2012); Nigel D. White & Ademola Abass, *Countermeasures and Sanctions*, *in* INTERNATIONAL LAW 521, 537–43 (Malcolm D. Evans ed., 5th ed. 2018).

action under its authority and authorized them to take enforcement actions.[65] The measures taken by member states of a regional organization in such cases belong to the type of organized sanctions explained above, because they are taken in accordance with a resolution of the Security Council.[66] African regional organizations have employed "autonomous" sanctions outside the U.N. framework against *a member state* of the organization.[67] Measures taken by member states of a regional organization pursuant to the organization's decision also belong to the kind of organized sanctions explained above, because they are taken in accordance with a constituent instrument of the organization.

On the other hand, the European Union ("E.U.") has applied autonomous "sanctions" outside the U.N. framework on a *non-member state* of the European Union.[68] Restrictive measures that E.U. member states take to implement the decisions of the European Union are, in legal terms, similar to unilateral actions taken by states without authorization of the Security Council, because in both situations the states concerned cannot rely on a resolution of the Security Council to justify their restrictive measures.

1. Retorsion

One form of self-help is known as "retorsion." A state may take a non-forcible measure in response to an internationally wrongful act of another state. Although the targeted state may consider the measure unfriendly, the distinguishing feature of a retorsion is that it is *not* inconsistent with any international obligations of the acting state. Examples of retorsion include the prohibition or restriction of diplomatic relations or other contacts, and the withdrawal of voluntary aid programs.[69] If a unilateral action of a state qualifies as retorsion, it does not raise issues under international law.

2. Countermeasures

A state may also resort to a non-forcible measure that *is* contrary to its international obligations in response to an internationally wrongful act of another state. However, if the measure qualifies as a countermeasure, its wrongfulness is precluded and it is therefore justified under international law. A countermeasure

65. *E.g.*, S.C. Res. 770, ¶ 2 (Aug. 13, 1992) (Bosnia & Herzegovina) (calling upon States to take "nationally or through regional agencies or arrangements" all measures necessary to facilitate the delivery of humanitarian assistance); S.C. Res. 1031, ¶ 15 (Dec. 15, 1995) (Bosnia & Herzegovina) (authorizing the Member States "acting through or in cooperation with the [NATO]" to effect the implementation of and to ensure compliance with the Dayton Peace Agreement).

66. *See supra* text accompanying notes 40–42.

67. *See* Andrea Charron & Clara Portela, *The Relationship Between United Nations Sanctions and Regional Sanctions Regimes*, *in* TARGETED SANCTIONS, *supra* note 47, at 101, 105–09.

68. *See id.* at 110–11; MIKAEL ERIKSSON, TARGETING PEACE: UNDERSTANDING UN AND EU TARGETED SANCTIONS 193–232 (2011). *See generally* CHARLOTTE BEAUCILLON, LES MESURES RESTRICTIVES DE L'UNION EUROPÉENNE [RESTRICTIVE MEASURES OF THE EUROPEAN UNION] (2013).

69. *ILC Commentaries*, *supra* note 40, at 128 ¶ 3.

is a measure taken in response to another state's internationally wrongful act in order to procure its cessation and to achieve reparation for the injury.[70] Unlike municipal law, international law permits this kind of self-help, and it is often used by states. Under the U.N. Charter, armed reprisals are prohibited.[71] Since the term "reprisals" may suggest armed action, it has become common to use the term "countermeasures" instead to describe this kind of self-help. A countermeasure is an important means of enforcing international law.[72]

A non-forcible measure must meet certain conditions to qualify as a countermeasure. First, a countermeasure is only justified in response to a prior internationally wrongful act of another state in order to procure its cessation and to achieve reparation for the injury.[73] Second, a countermeasure must be commensurate with the injury suffered (proportionality).[74] Proportionality entails the assessment of both the quantitative and qualitative aspects of the injury suffered.[75] The qualitative aspects refer to the gravity of the breach and the importance of the interest safeguarded by the relevant rule.[76] Third, the state must follow certain procedural requirements.[77] For example, the state must call upon the responsible state to fulfill its obligations, and notify the responsible state of its decision to take countermeasures and offer negotiation.[78] Moreover, the state must suspend the countermeasure without undue delay once the wrongful act has ceased and the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties, provided the responsible state does not fail to implement the dispute settlement procedures in good faith.[79] Fourth, countermeasures must not affect certain obligations, including: (i) the obligation to refrain from the threat or use of force; (ii) obligations for the protection of fundamental human rights; (iii) obligations of a humanitarian character prohibiting reprisals; and (iv) other obligations under peremptory norms of general international law.[80]

The issue currently being debated is whether third-party countermeasures are allowed under international law—that is, whether states *not* injured by an internationally wrongful act of another state can resort to countermeasures

70. Responsibility of States for Internationally Wrongful Acts arts. 22, 49–54, 2 Y.B. Int'l L. Comm'n., U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].

71. *See* U.N. Charter art. 2(4); G.A. Res. 2625 (XXV), first principle, ¶ 6 (Oct. 24, 1970).

72. *See generally* Noortmann, *supra* note 1; Elena Katselli Proukaki, The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community (2010).

73. ARSIWA, *supra* note 70, art. 49 ¶ 1.

74. *Id.* art. 51.

75. *ILC Commentaries*, *supra* note 40, at 135 ¶ 6.

76. *Id.*

77. *See generally* Yuji Iwasawa & Naoki Iwatsuki, *Procedural Conditions*, *in* The Law of International Responsibility 1149 (James R. Crawford et al. eds., 2010).

78. ARSIWA, *supra* note 70, art. 52 ¶¶ 1(a)–(b).

79. *Id.* arts. 52 ¶¶ 3–4.

80. *Id.* art. 50 ¶ 1.

to procure its cessation. In 2000, the ILC provisionally took the view that states other than the injured state were entitled to take countermeasures in response to a breach of an obligation *erga omnes* (an obligation owed to the international community as a whole) or an obligation *erga omnes partes* (an obligation owed to a group of states and is established for the protection of a collective interest of the group).[81] However, in view of critical comments submitted by governments,[82] the ILC eventually amended the ARSIWA. The final ARSIWA merely provides that "[t]his chapter does not prejudice the right of any state, entitled under article 48, paragraph 1, to invoke the responsibility of another state, to take lawful measures against that state."[83] The ILC explained that it was "a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law."[84] In the past, it was rare for third states to resort to countermeasures. However, since the 1970s, it has become more common for third states to take countermeasures in reaction to serious acts of other states, such as the unlawful use of force, flagrant violations of human rights, and denials of the right of self-determination. One such example is the general import embargo and the suspension of air services agreements by western states in 1982 in response to Argentina's invasion of the Falkland Islands.[85]

D. Law of State Responsibility

The law of state responsibility is a set of secondary rules dealing with the consequences of internationally wrongful acts. Since the nineteenth century, the law of state responsibility has developed through custom. The ILC adopted the ARSIWA in 2001 after nearly fifty years of intensive work. While the ARSIWA is not legally binding as such, many of its provisions are regarded as reflecting customary international law.[86]

The law of state responsibility not only provides remedies for violations of the rights of injured states, but also restores legality by requiring the cessation of wrongful acts and reparation for injuries. The state responsible for the

81. *Draft Articles on Responsibility of States for Internationally Wrongful Acts Provisionally Adopted by the Drafting Committee on Second Reading* art. 54, 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/55/10 (2000); *see also Statement of Mr. Gaja, the Chairperson of the Drafting Committee*, 1 Y.B. Int'l L. Comm'n 386, 399–400, U.N. Doc. A/CN.4/SER.A/2000 (2000); *Third Report on State Responsibility by Mr. James Crawford*, 2 Y.B. Int'l L. Comm'n 3, 101–06, U.N. Doc. A/CN.4/SER.A/2000/Add.1 (Part 1) (2000).

82. *State Responsibility: Comments and Observations Received from Governments*, 2 Y.B. Int'l L. Comm'n 33, 90–94, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 1) (2001).

83. ARSIWA, *supra* note 70, art. 54.

84. *ILC Commentaries*, *supra* note 40, art. 53 ¶ 6.

85. For other examples, see Martin Dawidowicz, Third-Party Countermeasures in International Law 111–238 (2017); Christian J. Tams, Enforcing Obligations *Erga Omnes* in International Law 207–51 (2005).

86. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 385, 398, 401, 407, 420 (Feb. 26).

internationally wrongful act is under an obligation to cease that act if it is continuing.[87] Although cessation was often regarded as part of reparation, the ARSIWA treats cessation as a consequence arising from the state's primary obligations.[88] Reparation for injuries caused by an internationally wrongful act takes the form of restitution, compensation, and satisfaction.[89] Restitution means the re-establishment of the situation which existed before a wrongful act was committed.[90] Cessation and restitution thus have the effect of restoring legality. In this way, the law of state responsibility serves as a means of enforcing international law.

E. International Dispute Settlement

When a state commits an internationally wrongful act, another state may invoke the responsibility of that state under the law of state responsibility.[91] If this dispute is not settled by negotiations, they can have recourse to other means of dispute settlement. Thus, international dispute settlement plays a role in the enforcement of international law.

Negotiations are the most fundamental means of dispute settlement in international law. Nevertheless, it is also possible to involve third parties in the settlement of an international dispute. The means of third-party dispute settlement available in international law include non-judicial means (good offices, mediation, inquiry, and conciliation) as well as judicial means (arbitration and judicial settlement). As the international community is decentralized, judicial settlement is only possible with the consent of the states concerned. A state cannot initiate judicial proceedings against another state before an international court without the consent of the latter state. States have the freedom to choose the means of dispute settlement, as confirmed in article 33 of the U.N. Charter.

International organizations also engage in the settlement of international disputes. However, the settlement of disputes by international organizations is not a single distinct *method* of dispute settlement. Rather, international organizations utilize various means of dispute settlement available under international law. For example, political bodies of international organizations, such as general assemblies and councils, may contribute to the settlement of international disputes by exercising their political influence over the parties to a dispute. This method of dispute settlement may be regarded as a form of mediation. In contrast, independent bodies consisting of individuals, like committees or commissions, may contribute to the settlement of disputes by utilizing their

87. ARSIWA, *supra* note 70, art. 30.
88. *Id.*
89. *Id.* arts. 35–37.
90. *Id.* art. 35.
91. *Id.* art. 42.

impartiality and expertise. This method of dispute settlement may be regarded as a form of conciliation.[92]

Judicial and non-judicial means of dispute settlement are fundamentally different. Judicial means (arbitration and judicial settlement) seek the settlement of disputes by applying the law. In contrast, non-judicial means of dispute settlement do not limit the applicable standard to the law. In addition, in judicial means, decisions of the third party are binding on the disputing parties. By contrast, in non-judicial means, interventions of the third party (e.g., findings, reports, views, and proposals) are not binding. It is expected that the parties reach a mutually satisfactory solution by making use of the third party's intervention.

With respect to international dispute settlement, the "linear-track model" commands widespread credence.[93] This model assumes that the various means of international dispute settlement form a linear track, with a list that starts with negotiations and followed by good offices, mediation, inquiry, conciliation, arbitration, and judicial settlement. According to this model, the means toward the end of the list are more desirable and, since judicial settlement appears at the end, it is the best method to settle disputes of *all* kinds.

Nevertheless, the "linear-track model" is an inappropriate model to be used for the settlement of international disputes. A more appropriate model is the "multiple-track model," which maintains that different means of dispute settlement should resonate with the nature of the disputes. With respect to disputes in which the states are seeking a solution by proper application of the law, international adjudication is likely the most appropriate means. International courts can apply international law to legal disputes with binding decisions and bring just solutions. The International Court of Justice ("ICJ") undoubtedly has an important role to play in this regard.

As international society lacks a formal legislative body, international law often lags behind societal developments. Gaps between law and reality can emerge more frequently in the international sphere than in the domestic sphere. Such gaps may cause a dispute, for example, where one of the parties is not satisfied with the current state of law and demands that it be changed. International adjudication may not be the best method to settle such a dispute, as the party is seeking an amendment, not an application, of the law. A more effective method of settling such a dispute is where a third-party proposes a fair and

92. *See, e.g.*, the "ad hoc Conciliation Commission" provided for in Article 42 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

93. Yuichi Takano coined the terms "linear-track model" and "multiple-track model", referring to the work of Takeo Sogawa. Yuichi Takano, *Gaikō Kankei Jōyaku to Shihōteki Funsō Kaiketsu Jōkō* [*The Convention on Diplomatic Relations and Clauses on Judicial Settlement of Disputes*], *in* Funsō no Heiwateki Kaiketsu to Kokusai Hō: Minagawa Takeshi Sensei Kanreki Kinen [Peaceful Settlement of Disputes: Essays in Commemoration of the 60th Birthday of Professor Takeshi Minagawa] 319, 339–51 (Toshitaka Morikawa et al. eds., 1981).

equitable solution from the perspectives of justice and equity, by means such as mediation. Thus, non-judicial means of dispute settlement play a more prominent role in international law than in municipal law.[94]

F. Compliance Control

The next means of enforcement goes by different names, such as compliance control, international control, or international supervision.[95] It refers to mechanisms whereby international monitoring bodies supervise the implementation of international obligations by states and urge compliance. These mechanisms have evolved considerably in international law and play a significant role in enforcing it. Indeed, compliance control developed for the enforcement of objective obligations. For such obligations, reciprocity is not effective and compliance cannot be obtained through international dispute settlement which needs to be initiated by an injured state.

Mechanisms of compliance control were first devised in the area of international labor law in 1919.[96] They have since been extended to other areas such as human rights, the environment, the economy, peaceful uses of atomic energy, and arms control.[97] Monitoring bodies may consist of either experts serving

94. Sogawa had argued that "static means of settlement" should be used for "static disputes" and that "dynamic means of settlement" should be employed for "dynamic disputes." He thus perceived the system of international dispute settlement as a complex one consisting of two categories of means of settlement. 4 Takeo Sogawa, Kokusai Hō [International Law] 227–32 (1950). *See also generally* Josef L. Kunz, *The Law of Nations, Static and Dynamic*, 27 Am. J. Int'l L. 630 (1933).

95. *See, e.g.*, Pierre-Marie Dupuy & Yann Kerbrat, Droit International Public [Public International Law] 606–15 (16th ed. 2022); Gaeta et al., *supra* note 64, at 291–93; Droit des Organisations Internationales [The Law of International Organizations] 800–18 (Evelyne Lagrange & Jean-Marc Sorel eds., 2013); Rüdiger Wolfrum, Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law 494–584 (2021). *See generally* N. Kaasik, Le Contrôle en Droit International [Control in International Law] (1933); Control over Compliance with International Law (W. E. Butler ed., 1991); Antonio Cassese, Il Controllo internazionale: Contributo alla Teoria delle Funzioni di Organizzazione dell'Ordinamento Internazionale [International Control: Contribution to the Theory of the Organizational Functions of International Law] (1971); Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995); Akio Morita, Kokusai Kontorōru no Riron to Jikkō [International Control: Theory and Practice] (2000).

96. *See generally* E. A. Landy, The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience (1966); Nicolas Valticos, *Un Système de Contrôle International: La Mise en Œuvre des Conventions Internationales du Travail* [*A System of International Control: The Implementation of International Labor Conventions*], 123 Collected Courses Hague Acad. Int'l L. 311 (1968); Nicolas Valticos, *Once More About the ILO System of Supervision: In What Respect Is It Still a Model?*, *in* Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers Vol.1 99 (Niels Blokker & Sam Muller eds., 1994).

97. *See generally* Making Treaties Work: Human Rights, Environment and Arms Control (Geir Ulfstein ed., 2007); Anne Weber, Les Mécanismes de Contrôle Non Contentieux du Respect des Droits de l'Homme [Non-Contentious Mechanisms of Control in Respect of Human Rights] (2008); Nicolas Valticos, *Des Parallèles Qui Devraient Se Rejoindre: Les Méthodes de Contrôle International Concernant les Conventions sur les Droits de l'Homme* [*Parallels That Should Come Together: Methods of International Control Concerning Human Rights Conventions*], *in* Recht Zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt

in their individual capacity or state representatives. Compliance control can be divided into judicial and non-judicial control, depending on the character of the monitoring bodies. Regional human rights courts, the Appellate Body and panels of the World Trade Organization ("WTO"), and investment arbitral tribunals perform judicial control. In contrast, in non-judicial control, the outcomes take non-binding forms such as reports and recommendations. Compliance control can take several forms. Each of them will be examined in turn.

1. Reporting

States may be required by a treaty to submit reports to explain the implementation of the treaty in their respective territories. In 1919, the Constitution of the International Labour Organization ("ILO") established a system of the annual consideration of state reports.[98] The core U.N. human rights treaties have adopted a reporting system modeled on that of the ILO.[99] The Universal Periodic Review carried out by the Human Rights Council is a kind of reporting system.[100] Reporting systems have also been adopted by such treaties as those relating to the environment,[101] the economy,[102] and arms control.[103] Monitoring bodies consider reports submitted by states and, based on an evaluation of the reports, make recommendations with a view to urging states to give full effect to the relevant treaty.

2. Complaints

Complaints are submitted by states or individuals. Monitoring bodies consider complaints and make findings as to whether the respondent state has violated its obligations under the treaty. When the monitoring bodies find violations, they urge compliance with the obligations in question.

[Law Between Change and Preservation: International Law, European Law, Constitutional Law: Essays in Honor of Rudolf Bernhardt] 647 (Ulrich Beyerlin et al. eds., 1995).

98. Constitution of the International Labour Organization art. 22, June 28, 1919, 15 U.N.T.S. 40.

99. *E.g.*, International Covenant on Economic, Social and Cultural Rights arts. 16, 17, Dec. 16, 1966, 993 U.N.T.S. 3; ICCPR, *supra* note 92, art. 40; *see, e.g.*, Ineke Boerefijn, The Reporting Procedure Under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee 12–13 (1999). *See generally* Bernhard Graefrath, *Reporting and Complaint Systems in Universal Human Rights Treaties*, *in* Human Rights in a Changing East/West Perspective 290 (Allan Rosas & Jan Helgesen eds., 1990).

100. G.A. Res. 60/251, ¶ 5(e) (Apr. 3, 2006).

101. *E.g.*, Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VIII ¶¶ 6–7, Mar. 3, 1973, 993 U.N.T.S. 243; Vienna Convention for the Protection of the Ozone Layer art. 5, Mar. 22, 1985, 1513 U.N.T.S. 293; United Nations Framework Convention on Climate Change art. 12, May 9, 1992, 1771 U.N.T.S. 107.

102. *E.g.*, Marrakesh Agreement Establishing the World Trade Organization Annex 3 (Trade Policy Review Mechanism), Apr. 15, 1994, 1867 U.N.T.S. 3.

103. *E.g.*, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction arts. III, VII ¶ 5, Jan. 13, 1993, 1974 U.N.T.S. 317 [hereinafter Chemical Weapons Convention]; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 7, Sep. 18, 1997, 2056 U.N.T.S. 211.

In inter-state complaints, a state party of a treaty submits a complaint against another state party, alleging that the latter is not fulfilling its treaty obligations. Thus, as a matter of form, an inter-state complaint has the appearance of a bilateral dispute settlement. However, as a matter of substance, it has the character of compliance control because the treaty provides for objective obligations and, when the monitoring body finds that the complaint has merit, it urges compliance of the obligations.

Inter-state complaints may be divided into judicial and non-judicial procedures. In judicial inter-state complaint procedures, a state files a case with an international court or tribunal against another state. The European Convention on Human Rights provides for such inter-state procedures.[104] The WTO dispute settlement procedures may be classified as judicial control as well, because reports of the WTO Appellate Body and panels bind the state concerned.[105] The WTO dispute settlement procedures operate as a compliance control mechanism. Maintenance of a free world trade system serves the common interests of the members of the WTO. Accordingly, where one member files a complaint with the WTO alleging that *its* benefits are being nullified or impaired, the complaint serves community interests and has the effect of being brought on behalf of the international community.[106] Contentious proceedings before the ICJ also have an element of judicial control when a state other than an injured state brings a case alleging violations by another state of obligations *erga omnes* or *erga omnes partes* in the form of *actio popularis*.[107]

In contrast, inter-state communications procedures under the U.N. human rights treaties may be classified as non-judicial procedures. For example, under the Racial Discrimination Convention, an ad hoc Conciliation Commission only issues a report containing non-binding recommendations.[108] Non-judicial inter-state procedures also include complaints procedures in the ILO,[109] inter-

104. Convention for the Protection of Human Rights and Fundamental Freedoms art. 33, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], amended by the Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 2061 U.N.T.S. 7. *See generally* Isabella Risini, The Inter-State Application Under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement (2018).

105. Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, ¶¶ 4.3–4.4, WTO Doc. WT/DS8/R et al. (adopted Nov. 1, 1996).

106. Yuji Iwasawa, WTO no Funsō Shori [Dispute Settlement of the WTO] 81–85 (1995); Yuji Iwasawa, *WTO Funsō Shori: Kokusai Hō jōno Igi to Tokushitsu* [*WTO Dispute Settlement: Its Importance and Special Characteristics Under International Law*], *in* Funsō no Kaiketsu [Settlement of Disputes] 215, 228–35 (Japanese Soc'y Int'l L. ed., 2001). *See generally* Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5 J. Int'l Econ. L. 287 (2002).

107. *See* Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep, 422, 449–50 (July 20); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Preliminary Objections, 2022 I.C.J., ¶¶ 106–14 (July 22).

108. International Convention on the Elimination of All Forms of Racial Discrimination art. 13, Dec. 21, 1965, 660 U.N.T.S. 195.

109. Constitution of the International Labour Organization, *supra* note 98, art. 26.

state communication procedures under the American Convention on Human Rights,[110] and complaint procedures under some disarmament treaties such as the Biological Weapons Convention.[111] It is rare for states to submit an inter-state complaint, except under the WTO Agreement and the European Convention on Human Rights.[112]

Complaints submitted by individuals may also be divided into judicial and non-judicial procedures. Examples of judicial procedures include individual applications to the European Court of Human Rights[113] and investor-state arbitration.[114] In contrast, individual communications procedures under the U.N. human rights treaties are a type of non-judicial procedure because views and decisions issued by the relevant committees are not legally binding.[115] If a committee finds violations of the treaty when dealing with a particular communication, it not only indicates specific remedies for the individual but also often recommends a revision of the law to prevent further violations of the treaty.[116] Non-judicial procedures also include representations made by an industrial association of employers or workers in the ILO,[117] complaint procedures before the ILO Committee on Freedom of Association,[118] the complaint procedure of the Human Rights Council,[119] individual petitions submitted to the Inter-American Commission on Human Rights,[120] and complaints submitted to inspection panels in international financial institutions (such as the World Bank).[121]

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110. American Convention on Human Rights art. 45, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

111. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. 6, Apr. 10, 1972, 1015 U.N.T.S. 163.

112. *See generally* Petros C. Mavroidis, The WTO Dispute Settlement System: How, Why and Where? (2022); Risini, *supra* note 104.

113. ECHR, *supra* note 104, art. 34, amended by the Protocol No. 11 to the ECHR, Restructuring the Control Machinery Established Thereby, May 11, 1994, 2061 U.N.T.S. 7. *See generally* Linos-Alexandre Sicilianos & Maria-Andriani Kostopoulou, The Individual Application Under the European Convention on Human Rights: Procedural Guide (2019).

114. *See generally* Borzu Sabahi et al., Investor-State arbitration (2d ed. 2019).

115. *See* Hum. Rts. Comm., General Comment No. 33: Obligations of State Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/GC33 (adopted Oct. 28, 2008).

116. *See* Tina Stavrinaki, Le Régime des Procédures de Communications Individuelles dans le Système des Traités des Nations Unies Relatifs aux Droits de l'Homme [The Regime of Individual Communications Procedures in the United Nations Human Rights Treaty System] 417–18 (2016).

117. Constitution of the International Labour Organization, *supra* note 98, arts. 24, 26.

118. *See generally* Eric Gravel et al., The Committee on Freedom of Association: Its Impact over 50 Years (2001).

119. Hum. Rts. Council, Res. 5/1, Institution-Building of the United Nations Human Rights Council, ¶¶ 85–109, U.N. Doc. A/HRC/5/1 (June 18, 2007).

120. ACHR, *supra* note 110, art. 44.

121. *See generally* Ibrahim F. I. Shihata, The World Bank Inspection Panel: In Practice (2d ed. 2000).

We have witnessed a dramatic increase in cases brought before regional human rights courts and investment arbitral tribunals, as well as complaints submitted to non-judicial procedures.[122]

3. Fact-Finding

Fact-finding is a procedure by which an international body finds facts and submits a report. Fact-finding may be requested by states or commenced at the initiative of an international organization. It is often used in the area of human rights and includes commissions of inquiry established by the Human Rights Council.[123] Fact-finding is also carried out in the context of special procedures in the Human Rights Council[124] and inquiry procedures laid down in some U.N. human rights treaties.

In accordance with the First Additional Protocol to the Geneva Conventions, a state party to the Protocol may allege a grave breach by another state of the Geneva Conventions or the Protocol before the International Humanitarian Fact-Finding Commission established under the Protocol.[125] A Chamber consisting of seven members undertakes an inquiry. The Commission submits to the parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate (Article 90).[126] This procedure may be regarded as an institutionalized form of an "inquiry," a traditional means of dispute settlement. While this procedure has an element of dispute settlement because it may be initiated at the request of a state alleging a breach by another state, it has the character of compliance control because its aim is to monitor the states parties' implementation of their obligations.

4. Inspection

Inspection is a procedure where representatives of states or international organizations conduct an on-site visit to verify whether a state's acts, facilities, or situations comply with its obligations under a treaty.[127] Mutual inspection

122. For example, more than 65,000 applications were submitted by individuals to the European Court of Human Rights in 2013. *The ECHR in Facts and Figures* 2021, Council of Europe, at 4 (Feb. 2022).

123. *See generally* Commissions of Inquiry: Problems and Prospects (Christian Henderson ed., 2017).

124. *See generally* The United Nations Special Procedures System (Aoife Nolan et al. eds., 2017).

125. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 90, June 8, 1977, 1125 U.N.T.S. 3.

126. Upon request by the Organization for Security and Co-Operation in Europe, the Commission conducted an investigation for the first time in relation to the incident that had occurred in Eastern Ukraine on 23 April 2017. *See OSCE Special Monitoring Mission Was Not Targeted, Concludes Independent Forensic Investigation into Tragic Incident of 23 April 2017*, Int'l Humanitarian Fact-Finding Comm'n, https://www.ihffc.org/index.asp?Language=EN&mode=shownews&ID=831 [https://perma.cc/FCZ8-75YS].

127. L'Inspection Internationale: Quinze Etudes de la Pratique des Etats et des Organisations Internationales [International Inspections: Fifteen Studies of the Practice of

by states is set out, for example, in the 1959 Antarctic Treaty,[128] the 1967 Outer Space Treaty,[129] the 1971 Seabed Arms Control Treaty,[130] and some regional and bilateral disarmament agreements.[131] The safeguards of the International Atomic Energy Agency ("IAEA") are a typical example and a good model of inspection administered by an international organization.[132] Some other treaties also utilize the IAEA safeguards as a verification tool, such as the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, nuclear-weapon-freezone treaties, and bilateral treaties on peaceful uses of nuclear energy.[133] The Organisation for the Prohibition of Chemical Weapons ("OPCW") also conducts inspections.[134] In addition to normal inspections, the 1993 Chemical Weapons Convention introduced the "challenge inspection" procedure. Under that procedure, a state party can request an on-site challenge inspection of any facility of another state party for the purpose of clarifying any questions concerning possible non-compliance with the Convention.[135] The OPCW then carries out the inspection.[136] While this procedure resembles international dispute settlement in that the inspection is requested by a state alleging another state's non-compliance, it has the character of compliance control.

5. Non-Compliance Procedures

Many multilateral environmental agreements provide for "non-compliance procedures."[137] Such procedures were first introduced in the 1992 Montreal Protocol to the Convention for the Protection of the Ozone Layer.[138] They have served as a model for non-compliance procedures found in other environmental

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States and International Organizations] 7 (Georges Fischer & Daniel Vignes eds., 1976). *See generally* International Inspections (Anne-Laure Chaumette & Christian J. Tams eds., 2022).

128. Antarctic Treaty art. VII, Dec. 1, 1959, 402 U.N.T.S. 71.

129. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. XII, Jan. 27, 1967, 610 U.N.T.S. 205.

130. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof art. 3, Feb. 11, 1971, 955 U.N.T.S. 115.

131. *E.g.*, Treaty on Conventional Armed Forces in Europe art. XIV, Nov. 19, 1990, 2441 U.N.T.S. 285; Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., art. XI, Dec. 8, 1987, 1657 U.N.T.S. 2.

132. International Atomic Energy Agency Statute art. III(A) ¶ 5, Oct. 26, 1956, 276 U.N.T.S. 3.

133. *E.g.*, Treaty on the Non-Proliferation of Nuclear Weapons art. 3, July 1, 1968, 729 U.N.T.S. 161; Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean arts. 12, 13, 16, Feb. 14, 1967, 634 U.N.T.S. 325.

134. Chemical Weapons Convention, *supra* note 103, arts. IV-V.

135. *Id.* art. IX(8)–(25); *see* Masahiko Asada, *The Challenge Inspection System of the Chemical Weapons Convention: Problems and Prospects*, *in* The Chemical Weapons Convention: Implementation, Challenges and Opportunities 75 (Ramesh Chandra Thakur & Ere Haru eds., 2006).

136. *See* Chemical Weapons Convention, *supra* note 103, art. IX(8)–(25).

137. *See generally* Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements (Tullio Treves et al. eds., 2009).

138. Montreal Protocol on Substances that Deplete the Ozone Layer, Meeting of the Parties Decision IV/5 on Non-Compliance Procedure, at 13, and Annex IV at 44, Doc. UNEP/OzL.Pro.4/15 (Nov. 25, 1992).

agreements, although they differ in their modalities. In general, a state party, the secretariat, or an implementation committee established under such an agreement may initiate a non-compliance procedure when there is doubt about a certain state's compliance. While implementation committees consist mostly of state representatives (e.g., the Montreal Protocol),[139] they may also comprise persons serving in their personal capacity (e.g., the Kyoto Protocol to the United Nations Framework Convention on Climate Change).[140] After considering the information and observations submitted by states concerned and the secretariat, the implementation committee reports to the meeting of the parties, including any recommendations it considers appropriate. On the basis of the proposals made by the implementation committee, the meeting of the parties may take appropriate measures.

Non-compliance with obligations under international environmental law often stems from a state's lack of financial, administrative, or technical capacities. Therefore, the term "non-compliance" is used instead of "violations." The procedures address not only violations of a state's obligations under an agreement, but also acts that may not constitute violations of the agreement, such as acts not in accordance with the agreement's object and purpose. Responsive measures to non-compliance are mostly facilitative rather than punitive, consisting of advice and assistance. A non-complying state submits programs designed to achieve full compliance and the implementation committee monitors its implementation. The Meeting of the Parties to the Montreal Protocol adopted the following indicative list of measures: (a) appropriate assistance, including technical assistance, technology transfer, and financial assistance; (b) issuing cautions; and (c) suspension of specific rights and privileges under the Protocol.[141] A meeting of the parties rarely takes enforcement measures such as the suspension of rights and privileges. Unlike an adversarial dispute settlement procedure, non-compliance procedures are a non-confrontational, mutually supportive mechanism.

The unique feature of this procedure is that even a non-complying state itself can initiate it.[142] While the procedure may be triggered by other states, it is rarely required for the complainant state to have been affected by the non-compliance of another state. In other words, the procedure can be triggered by non-injured states. Thus, it is particularly suited for controlling compliance with obligations *erga omnes partes* contained in multilateral environmental agreements.

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139. *Id.*

140. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 8, Dec. 11, 1997, 2303 U.N.T.S. 162.

141. *E.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Meeting of the Parties Decision IV/5, *supra* note 138, Annex V at 46.

142. *E.g.*, *id.* at ¶ 4. There have been many self-trigger cases under this Protocol. *See* Treves et al., *supra* note 137, at 21.

6. Compliance Control and Dispute Settlement

Various forms of compliance control have thus far been described. This section will stress the need to distinguish such compliance control from dispute settlement. Although compliance control resembles international dispute settlement when it takes the form of an inter-state procedure, the two are distinct. First, their purposes differ. While compliance control has the purpose of ensuring compliance with objective obligations which are based on the common interests of the community, dispute settlement aims at settling a dispute bilaterally. Second, compliance control is not necessarily initiated by an injured state. It may be initiated by a third state, individuals, or a monitoring body. In the case of non-compliance procedures under multilateral environmental agreements, it may even be commenced by the non-complying state itself.[143] On the other hand, dispute settlement is usually commenced by an injured state invoking the international responsibility of another state which has committed an internationally wrongful act. Third, compliance control is generally an ex-ante procedure, whereas dispute settlement occurs ex-post. Compliance control aims at preventing violations of international obligations, while dispute settlement requires the existence of a dispute and seeks to secure reparation after violations have taken place.

G. Enforcement of International Criminal Law

Punishment of transnational and international crimes by domestic courts and international criminal courts and tribunals contributes to the enforcement of international criminal law. Such punishment has a deterrent effect and helps prevent such crimes from being committed.

1. Domestic Courts

Crimes are in principle punished by domestic courts. For transnational crimes such as terrorism, slavery, and the narcotics trade, international treaties require the states parties to establish their jurisdiction over the crime so that it may be punished by any party to the treaty. They also provide for the obligation to extradite or prosecute (*aut dedere aut judicare*).[144] Universal jurisdiction applies to war crimes, crimes of genocide, and crimes against humanity. Any state can try an offender of these crimes, no matter where the crime was

143. *See* Treves et al., *supra* note 137, at 21.

144. *E.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation art. 7, Sep. 23, 1971, 974 U.N.T.S. 177; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7 ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85. *See generally* Neil Boister, An Introduction to Transnational Criminal Law (2d ed. 2018); M. Cherif Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995).

committed.[145] Some states have exercised universal jurisdiction over these crimes and have tried offenders in their domestic courts.[146]

2. International Criminal Courts and Tribunals

It was truly epoch-making that the Statute of the International Criminal Court ("ICC") was adopted in 1998, and that the ICC was established in 2003.[147] The jurisdiction of the ICC extends to crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.[148] The ICC may exercise its jurisdiction if one or more of the following states have accepted its jurisdiction: the state on the territory of which the crime was committed, or the state of which the accused is a national.[149]

In addition to the ICC, a number of international criminal tribunals have been established. After World War II, international criminal tribunals were set up in Nuremberg and Tokyo. In the 1990s, the Security Council established, by means of its resolutions, the ICTY and the ICTR.[150] From the 2000s onwards, a number of mixed or hybrid criminal tribunals have been established, for example, to address crimes committed in Timor-Leste (2000), Kosovo (2000), Sierra Leone (2002), Cambodia (2003), Bosnia and Herzegovina (2003), and Lebanon (2007). The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia are closer than other mixed tribunals to international criminal tribunals in terms of their structures and the law they apply. These international and mixed criminal tribunals also merit attention.[151]

Conclusion

International law possesses various means of enforcement to help secure compliance. The ICJ has an important role to play in the enforcement of international law. However, international adjudication is but one means of enforcement, and not necessarily the best way of settling an international dispute. To strengthen compliance with international law, it is necessary to improve each of the means of enforcement and to utilize them appropriately to ensure that states act in conformity with their international obligations.

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145. *See generally* Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law (Stephen Macedo ed., 2006); Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (2003).

146. *E.g.*, Judgment of May 29, 1962, Sup. Ct., 36 I.L.R. 277, 298–304 (Adolf Eichmann) (Isr.); *see* Reydams, *supra* note 145, at 81–219.

147. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

148. *Id.* art. 5.

149. *Id.* art. 12 ¶ 2.

150. S.C. Res. 827, ¶ 2 (May 25, 1993) (ICTY); S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (ICTR).

151. Literature on the ICC is voluminous. For the other international criminal tribunals, see generally William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006).