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The Concept of Enforcement of an International Treaty and its Elements

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Abstract: *In this article, the concept of enforcement of international treaties is revealed and its elements are pointed out by the author. In addition, the conclusion is made about the influence of the era of modern international law on the current state of international relations by studying several principles of the law of international treaties, detailing statistical data and presenting the opinions of international scientists.*

Keywords: *language of international communication, living organ, peace and order, judicial link, legal status, level of execution, de jure, nature of enforcement, independent actors, consent, contractual obligations, goodwill, national interests, practical advantage, creation and fulfillment of legal obligations.*

"International law is the language of international communication", said the first World Conference on International Law, which gave meaning to international law, held in New York in 1995[1]. As mentioned above, the conference stipulated that international law, interpreted as the language of interstate relations, is the main and only defining instrument of expression and regulation of this type of relations. At this stage, it would be appropriate to look at history to understand that international law is entrusted with this function.

According to a study conducted by our World in DATA (a non-profit organization Global Change Data Lab project, based in the United Kingdom), the absolute number of war victims has been declining since 1946. In recent years, the annual number of victims has generally been less than 100 000[2]. It is noteworthy that the trend towards regression does not relate to 1946 when the Second World War ended, but, on the contrary, is inextricably linked with a new stage of international law – the Era of Modern International Law.

While the State is regarded as a living organ, one chamber of its heart is law specialized to maintain peace and order, the other one is the economy. In this context, we can conclude by considering the nature of the change in international economic relations after the transition to the last section of international law. Also, in this direction, it can be seen that the difference in numbers is by far significant. In particular, the study showcased that the value of all world exports from 1945 to 2014, adjusted for inflation in 1913 (in fixed prices), was more than 40 times higher[3].

[1]Announcement: United Nations Congress on Public International Law (New York, 13-17 March 1995), Information note from the United Nations. Published online by Cambridge University Press
[2]Max Roser, Joe Hasell, Bastian Herre and Bobbie Macdonald (2016) – "War and Peace". Published online at OurWorldInData.org. Retrieved from: https://ourworldindata.org/war-and-peace
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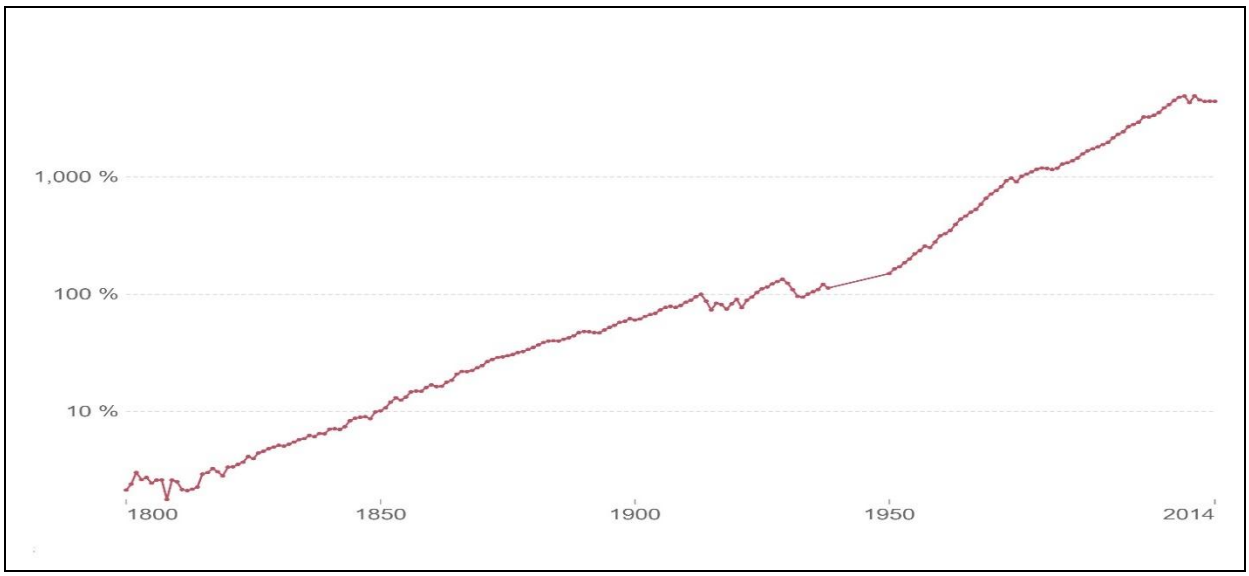

From the above, it can be concluded that it is international law that is the root of the environment that has formed on the current international platform. Therefore, it is he who created and regulates relationships on this platform. After all, on the path traversed by mankind to the stage of reaching the present era, this branch of law has firmly established itself. So, for comparison, when international relations are considered as seawater, international law is expressed in the form of waves that cause the waters in this sea to flow.

Just as it is impossible to imagine interstate relations without international law, it is not possible to properly restrain the actions of each country on an international platform without the presence of any regulatory framework, which, according to the Montevideo Convention, will have the right to come into contact with the permanent populations, a defined territory, a government, and the capacity to conduct international relations.

And this deterrent function is assigned to international treaties as the main source of international law. Article 38 of the Statute of the International Court of Justice of the United Nations (hereinafter – the UN) stipulates that the court in resolving international disputes must refer to a – a) international treaties and b) international custom. Considering that any problem related to international law is among the legal disputes falling within the competence of this judicial link of the UN, it should be noted that the topic of the agenda also belongs to this category. This means that the decision of the court on this issue is also ipso facto binding and that an international treaty is a priority source. In the lawsuit of Vattenfall AB and other companies against the German Federation, considered by the International Center for Settlement of Investment Disputes, the Arbitration Tribunal noted that "international treaties constitute international law, regardless of whether they are concluded by independent States or between Them"[4]. In other words, the arbitration, by focusing on the international treaty itself, argued that when it was formed in the form of a treaty, States would be the source of international law, regardless of the degree of their influence. Taking into account that judicial decisions may be used as an additional tool for establishing legal norms, reference is made to this arbitration award as a source, and the consolidated norms contained therein (namely the above part relating to an international treaty) reflect international practice. Thus, the Arbitration Tribunal of the International Center for Settlement of Investment Disputes by its decision recognized the norm established by the Statute of the International Court of Justice and, referring to it, indirectly recognized it as the main source.

From the above analysis, it can be learned that the legal status of the subjects of international treaties is called the parties, and their participants are actors of international law. These are the main subjects – states, international organizations, and people fighting for their independence (de jure – unrecognized states).

[4]Vattenfall and Others v. Germany, ICSID Case No. ARB/12/12 – https://www.italaw.com/cases/1654

An international treaty directs its participants to establish, execute, modify or terminate existing rights and obligations that are the object of the treaty. It has two important mandatory elements: a) it must comply with established international practice, and b) it must be at the level of execution.

At the same time, it was emphasized that as an element of the second content, its execution should be to the best of its capabilities. This item goes back to the topic of the agenda – the issue of enforcement of international treaties. After all, the fact that when concluding a contract, its executive ability is also taken into account, in turn, suggests that it embodies the nature of enforcement.

Enforcement of international treaties is understood as a process that occurs after independent actors of international law have assumed obligations under the text of an agreement concluded on an international platform and exercise control (monitoring) over the actions of States on them. In other words, it can be considered as the implementation and control over the extent to which the legal norms established by an international treaty are observed. Hence, starting from the stage of ensuring the execution of an international treaty, the question arises of assuming obligations under the treaty.

Articles 11 of the International Convention on the Law of Treaties and the International Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the 1986 treaty and the 1969 treaty) continuously fix the range of actions of the contracting parties to make the current treaty binding on them:

- consent to the signature (if the contract clearly states that the signature of the representative of the State will be sufficient to declare it a party, or if the contracting States have mutually agreed that the signature is sufficient, the signature of the representative indicates the intention of the State to conclude the contract);
- consent through the exchange of documents stipulates by the treaty (if the States agree that the exchange should be equivalent to consent to the conclusion of the treaty. For example, the Rush-Bogota Treaty between the United Kingdom and the United States on mutual disarmament on the Great Lakes);
- consent by ratification, acceptance, or approval (if the countries participating in the negotiations consider that ratification is equivalent to consent, or if the treaty provides for ratification, in this case, it is an acceptable way to obtain consent to the treaty[5]. The same rule and procedure apply to consent by approval or acceptance);
- consent by accession (if it is stipulated by the treaty or if the countries participating in the negotiations agree on accession).

Thus, after the State agrees to assume its contractual obligations under the treaty, a mechanism is implemented to ensure the fulfillment of obligations assumed under international treaties. It should be noted that this mechanism is a complex legal phenomenon that includes a number of international legal institutions. The fundamental principle of international treaty law, the first element of enforcement of international treaties, is undoubtedly the idea that treaties are binding on their parties and must be executed in good faith. This rule is called pacta sunt servanda and is considered one of the oldest principles of international law. The term itself comes from the Latin dictionary meaning "the contract is binding". That is when entering into a contract, the parties are obliged to respect the terms and circumstances of the contract, which are an expression of the agreement.

There is a hypothetical point of view that the principle of pacta sunt servanda, from the point of view, was used in the written records of Cardinal Hostensis in the thirteenth century BC[6]. It follows that pacta sunt servanda has been considered the center of attention of all legal systems for centuries. At the same time, the principle operated in the form of an uncodified rule until the period established by the London Declaration adopted in 181, that is, until the middle of the XIX century. The 1969

[5]Mehak Jain. The Concept of Treaties in International Law: Article. June 23, 2020 – https://blog.ipleaders.in/concept-treaties-international-law/
[6]Editorial Staff. Pacta Sunt Servanda (Best Overview: Definition And Principle): Article. October 31, 2020 – https://incorporated.zone/pacta-sunt-servanda/

Convention was the first in this sense to explicitly refer to this principle in its preamble: "the principles of free consent and goodwill, emphasizing the universal acceptance of the pacta sunt servanda rule". It also set out in detail in its article 26, fixing it as one of the principles of the treaty.

A striking example of modern treaty practice is the Convention on the Rights of the Child, to which States have made a large number of reservations (on general issues). As a result, a number of States (Iran, Malaysia, Tunisia) have turned from the status of member States of the treaty into just official participants. The main mistake was that, firstly, there was no need to regulate this area by an international treaty, and secondly, the practical benefits of compliance with contractual obligations were not understood. It should be noted that the degree of binding performance of international treaties may indeed directly depend on the interests of States, but the national interests of the State, the practical advantages of the treaty, general patterns of development, and political conditions do not affect the validity of the treaty. That is, along with the condition of compliance with the terms of an international treaty recognized as valid in accordance with the norms of international law, it is quite natural that the intensity of active actions of States to actually fulfill a contractual obligation is differentiated depending on the real interest. It is this vision that embodies the principle of pacta sunt servanda.

A distinctive feature is that this element forms the basis of every international treaty. This means that if there is no minimum confidence that States will fulfill their contractual obligations in good faith, there is no need for any reason why States to accept such obligations with each other. I mean, pacta sunt servanda is naturally launched and used. Consequently, when concluding an international treaty between two States or after agreeing to a multilateral international treaty by certain means, a separate procedure should not be fixed in the text of the treaty so that the parties do not go beyond the norms established by the treaty. According to the 1969 treaty, States will be forced to comply with the treaty, which will lead to the automatic launch through the pacta sunt servanda rule. This means that the principle of pacta sunt servanda is the first aspect of the enforcement of an international treaty and acquires fundamental importance in this reality.

The preamble above, along with pacta sunt servanda, emphasizes another important principle, another element of the issue arising from the agenda – bona fide (goodwill). This is one of the strongest general principles of law, covering the entire legal order. It is this aspect, namely its nature as a basic legal principle, that makes it difficult to define it in an absolute sense[7]. The case on Nuclear Tests considered by the International Court of Justice (Australia and New Zealand v. France) recorded the following considerations on this principle: "One of the basic principles governing the creation and fulfillment of legal obligations in good faith. Certainty and self-confidence are an integral part of international cooperation, especially at a time when this cooperation is becoming increasingly important in many areas. Since pacta sunt servanda itself is based on the bona fide rule, it is considered a mandatory attribute of an international obligation. Thus, interested countries can pay attention and trust unilateral statements and have the right to demand the fulfillment of the obligation created in this way"[8]. Thus, based on bona fide, the International Court of Justice rules that a State can create legal obligations by unilateral action, as a public statement made by a State with the intention to assume obligations.

It should be noted that bona fide implies "a conscientious decision and the desire to be fair with each other, as well as to avoid obtaining an unfair advantage". The significance of this principle in the matter of the execution of international treaties is that defining the norms of the treaty as an obligation to itself, limits the possibility of using the advantages provided for in the text, or possible shortcomings of the treaty, opening the way for an action contrary to the treaty. While a number of World Trade Organization agreements, in particular the international agreement on Trade-Related Aspects of Intellectual Property Rights, establish preferential treatment for States included in a

[7]William Tetley. Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering. Q.C. McGill University Web: (published in (2004) 35 JMLC), 561, 563
[8]Nuclear Tests Case I.C.J. Reports (1974), p. 253 para 46 – https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf

certain category, the bona fide principle imposes responsibility for providing reliable information with a good faith approach at the time of requesting information about inclusion or non-inclusion in this list. This process is directly related to the execution of the contract and directly affects the practical functioning of the pacta sunt servanda principle, ensuring the fulfillment of the obligations assumed when granting consent under the contract.

In order to prevent a reckless clash with the principles of the pacta sunt servanda and bona fide, States have assumed obligations under the treaty element, which enters into force, formulated in the theory of international law and used in practice. This institution of international law is a reservation. According to article 2 of the 1969 treaty, a "reservation" refers to a unilateral statement made or named by a State at the time of signature, ratification, acceptance, approval, or accession to a treaty by which it is intended to exclude or modify the legal consequences of the application of certain provisions of the treaty to that State[9]. In other words, a reservation manifests itself as a unilateral statement that the party does not assume obligations under certain parts of the current treaty, and is issued during the period of ratification, approval, and accession.

As long as the State is a full-fledged independent member of international law if the State is satisfied with most of the terms of the treaty but dissatisfied with certain provisions, it has the right in certain cases to express its desire to refuse to accept such provisions or not to be bound to them, agreeing with the rest of the treaty (the sovereign equality of States follows from the norm of just cogens). At the same time, excluding certain provisions, States may agree to a contractual obligation for them, otherwise, they may completely abandon it. However, there are some treaties, in particular, the Treaty on the Establishment of the Eurasian Economic Union between the Commonwealth of Independent States, and the Rome Statute on the International Criminal Court (article 120), which do not allow filing a lawsuit. But on the other hand, of course, allowing the treaty to be overloaded with the reservations of a number of countries, the agreement may jeopardize the intended attitude, the whole measure. That is, it seriously undermines the whole purpose of the treaty and leads to some complicated relations between the countries. Therefore, the main requirement formulated in international practice for a reservation is that it does not contradict the purposes and principles of the treaty and does not change its main content.

The established general rule was that a reservation is allowed only with the consent of all other States participating in the process. Thus, it was intended to maintain as much unity of approach as possible in order to ensure the success of the international agreement and minimize deviations from the text of the treaty. This, in turn, reflected the contractual point of view on the nature of the treaty, and the League of Nations supports this concept. This is to say, the State wishing to negotiate must obtain the consent of all other parties to the treaty and is considered binding. If the procedure cannot be implemented, the State wishing to make a reservation may be a party (of course, without a reservation) to the original text of the treaty or not be a party at all. However, this restrictive approach has not been adopted by the UN Dispute Resolution Commission. After States made reservations to the Convention on the Prevention and Punishment of Crimes of Genocide in cases of inadmissibility of reservations, the General Assembly requested this advisory opinion from the International Court of Justice. According to the Court:

A State to which only one or more parties to the Convention object, which has submitted a reservation and has left the reservation in force, can be considered a party to the Convention if the reservation corresponds to the object and purpose of the Convention[10].

[9]International Convention on the Law of Treaties by UN International Law Commission, Vienna, signed 1969, Article 2: "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State – https://www.treatylaw.org/vienna-convention-law-treaties-1969./

[10] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion: I.C.J. Reports 1951, p.15 – https://www.icj-cij.org/sites/default/files/case-related/12/012-19519528-ADV-01-00-EN.pdf

In addition, the impact of Era of Modern International law on this current state of international relations is concluded by exploring a several principles of international treaty law, detailing in statistics and providing thoughts of international scholars.

It follows from this that the practice of reservation in existing international treaties originates in this advisory opinion. Consequently, the fact that this opinion has been comprehensively analyzed and correctly summarized and differs from the point of view of the League of Nations is justified in accordance with international law.

Analyzing the above, it can be concluded that at present both the state of world peace, the number of victims is less than 100 000 people per year, and the trajectory of trade relations, growing revenues from annual exports and imports, as well as the fact that after 1945, the main factor contributing to development was the Modern International Law. That can be recognized both internationally and domestically. At the same time, the reality that has always meant that ensuring prosperity and tranquility in foreign policy without interaction between States is not a matter of possibility is also the Second World War. In other words, the current state of the rhythm is directly related to the catastrophic years of 1939-1945 and to International Law. And, also, the main root of international law, one can see the manifestation of international treaties through the statute of the International Court of Justice of the United Nations and judicial practice considered by the International Center for Settlement of Investment Disputes (in the case of Vattenfall and other companies against Germany). This source of direct international law is an expression of the will expressed directly by State-Independent actors of international law and peoples (de-facto States) fighting for their independence. It is this aspect that has shaped it as the main resource that can be referenced. International treaties are considered dependent on the following criteria: the number of subjects (bilateral and multilateral); type (can be signed by any subject of international law) and closed (bilateral treaties; third-party accession is allowed only with the permission of the subjects of the treaty – semi-open, for example, the North Atlantic Treaty Organization of 1949). Since international treaties reflect the actions of States and their will in a written document, the issue of enforcement was considered a very sensitive element in this branch of international law. This is explained by the sovereign equality of States. In turn, enforcement of international treaties is a complex legal phenomenon that acts as a mechanism by which movement begins after States consent to the fulfillment of contractual obligations. In a certain sense, it implies control (monitoring) of the state of compliance with contracts. The main three elements of this mechanism are the institutes –pacta sunt servanda, bona fide, and reservation. While the two at the beginning were somehow implemented as a result of the 1969 treaty and established international practice, the reservation was left to the discretion of each country. Its preferred feature is explained in multilateral treaties precisely by the fact that as many States as possible join the proposed treaty. At the same time, the reservation is a means of promoting harmony between States with different social, economic, and political systems by focusing on the main issues that have been agreed upon and accepting disagreements on the same other issues.

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