MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

EVA DŪDAITĖ
INTERNATIONAL LAW PROGRAMME

COMPLIANCE WITH INTERNATIONAL TREATIES: PROBLEMATIC ASPECTS

Master thesis

Supervisor
Prof. Dr. L. Jakulevičienė

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INTRODUCTION

International treaty is a source of international law. It is clear that international treaties together with international customary law remain primary sources of international public law, which traditionally concerned itself with relations of independent sovereign states and with the rules governing international organizations and the relations between them. Therefore as international treaties construct international law, unstable international treaties or regimes can lead to non-compliance with international treaties and bring instability not only in international law, but also in whole international environment.

The title of this thesis focuses on the role of compliance with international treaties. Disorder in relations between entities of international public law can cause many disputes, that is why to such a great extent it is essential to understand what issues and problems can arise during the compliance or non-compliance with international treaties, because as more comprehensively the topic of compliance will be discussed and analyzed, more likely it will bring more certainty in international law, international relations and hopefully would even reduce the number of international treaty violations and the number of international disputes. It is of significant importance to consider what the main reasons of non-compliance with international treaties are. As well it remains relevant to realize what are permissible legal responses, means and methods selected primarily by the international treaty parties are available and legit to use against defaulting states, which of those means and methods could help to avoid the arising issues and problems of treaty violations and non-compliance, what are the best ways to resolve them and how to ensure and improve the compliance with a treaty between the treaty parties.

Decentralized format of the international order, where all states are in principle juridical equal predispose that there is no superior governmental entity with the authority to prescribe, adjudicate and enforce the law. One major criticism that is regularly directed at international public law in general and the law of treaties in particular is whether international law is able at all to influence the behavior of states, whose primary concern is national self-interest.

Great majority of issues of non-compliance with international treaty provisions arising by weakness of its system of enforcement provided by a treaty itself. Theoretically, the main parties to an agreement should agree to the methods and standards by which the international treaty is to be enforced. However, practically, even when treaty parties do agree on the substantive provisions of an agreement, they may find it difficult to actually enforce the agreement. International treaties made in moments of conciliation may fail, even when made in good faith, because parties are not able to enforce the terms of the agreement. In order to prevent this, enforcement mechanisms or compliance procedures should be built.

Research problem

Over the recent three centuries, international law, insofar as it did exist at all, was regarded as being of minor importance, certainly when compared to the principal ordering factor of the international society of states that is the relative strength of the most powerful states.

Lack of clarity how to achieve a better compliance of treaty parties on treaty provisions and treaty implementation assurance has not developed yet. As there is no perfect choice for every treaty of perfect compliance mechanism. The choice of compliance mechanisms will vary based on the situation and the appropriate scope of mechanisms available. What this means is that certain mechanisms are meaningful and useful in certain situations but inappropriate in others.

Relevance of the topic

An issue of compliance with international treaties is a topic of a broad discussion. As the interrelationship of sovereigns and their sovereign nations increased, it is worth noting that the need of the cooperation among the various members of international community increased with it. As there are numbers of multilateral instruments deposited with the Secretary-General of the United Nations covering a range of subject matters as Environment, Human Rights, Disarmament, Refugees, and Commodities etc. It is obvious and apparent from the number of treaties currently registered and from the rapid growth in the number of treaties that entities of international law are increasingly more and more willing to enter into written agreements in order to formalize their relations with one another. Nevertheless, as the quantity of various international agreements increases, diverse breaches and violations enhance likewise. For instance, Iran is a treaty party to numerous international treaties and as a treaty party is under obligation to observe undertaken commitments by those international treaties, however Iran systematically breached and violated provisions of those international treaties: Treaty on the Non-Proliferation of Nuclear Weapons; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction; Vienna Convention on Diplomatic Relations; International Convention Against the Taking of Hostages and many other international treaties including human rights treaties.[1] Example of Iran shows, that it does not make any difference if a State is a party to a numerous international treaties or

[1] http://www2.unitedagainstnucleariran.com/violation-of-treaties

not, this particular example shows that not necessary the State becomes a party to an international treaty with the aim to obey and observe commitments undertaken by those treaties. Seems, as more obligations and commitments Iran as a State undertakes, the more violations and breaches of those international treaties it commits. The example of Iran demonstrates that imperfections of international treaties and lack of compliance of treaty parties with international treaties should govern more attention.

Novelty of the topic and overview of previous researches

International treaty as an important source of international law still remains as a main instrument, which regulates relations among the international public law subjects. In the times of globalization process formal agreements are generated as cooperation and communication is necessary in all fields of international community interests. Low levels of communication and cooperation can become the conditions most likely to violate the obligations of treaties. An effectiveness of compliance with international agreements could be achieved only after the observation of nowadays arising main issues and problems in this field. Successful compliance with international treaty depends on many different grounds, however research in this field could improve compliance. The topic of compliance raised many debates among legal practitioners and scholars all other the world. The duty to comply and observe international treaties was acknowledged centuries ago by the principle of *pacta sunt servanda.* For instance, Oran Young has been analyzing the issues of compliance and behavior of States in very comprehensive way. Some other famous scholars focused on enforcement aspects and coercive measures, which could be utilized to force States to comply with international law or treaties, others as Professor Abram Chayes and Antonia Handler Chayes (1995) recommended moving from an enforcement model to a management model on improving and assuring compliance. Novelty of the current research is that the author does not adhere to one approach on the topic of compliance introduced by scholars, but rather suggests to combine approaches how to achieve compliance with international treaties and take a look at the topic of compliance from both perspectives, from enforcement approach and from managerial approach.

Significance of the research

The thesis is examining: the legal uncertainty existing in the current legal framework in area of compliance with international treaties; the influence of existing doctrines, which relates to compliance with treaty provisions; detailed explanation of conception and notion of

compliance; explication of compliance mechanism; the making of reservations by a treaty parties, which are incompatible with the object and the purpose of a treaty, the consequences of using this kind of reservation for treaty implementation; clarifications of types of compliance mechanisms currently used by international legal entities; effectiveness of compliance mechanisms; advantages and disadvantages of compliance mechanisms; means and methods permissible to use by international law for treaty parties against defaulting states; legal consequences of non-compliance with international treaties available for international treaty parties. The research will possibly be useful in contribution to finding the most balanced approach to achieving the better compliance with treaty provisions and international treaties as a whole.

Aim of the research

Aim of the research is to analyse the main aspects of compliance with international treaties and to propose how international treaty compliance mechanisms could be applied to maximize their effectiveness.

Objectives

In order to reach the aim the following objectives are set:

1. To analyse general conception of compliance with international treaties and international legal theories related to compliance with diverse perspectives on the issue of compliance.
2. To define what a compliance with international treaties is and clarify what is a compliance mechanism.
3. To assess existing approaches to achieve and improve compliance with international treaties.
4. To examine and evaluate enforcement mechanisms to achieve and improve compliance with international treaties and clarification and identification of advantages and disadvantages of those mechanisms.
5. To examine and evaluate managerial mechanisms to achieve and improve compliance with international treaties by clarification and identification of advantages and disadvantages of those mechanisms.

Research methods

The following methods were used to achieve the aim of the research:

1. Comparative method is applied to examine the difference between various compliance mechanisms and other factors, which encourage compliance with a treaty.
2. Teleological method is used while explaining purposes and essence of normative and customary rules and principles of international treaty law.
3. Critical analysis method is used to evaluate current legal framework and legal gaps in the field of compliance with international treaties.
4. Analytical method is invoked by assessing the content of treaties, customary law and principles and their application in practice.

Thesis structure

The thesis is divided into introduction, three main parts, conclusions, proposals and summary. First main part: deals with general understanding of treaty compliance concept by stressing possible problems and ambiguities, examining its necessity for achieving sustainable compliance with undertaken obligations under international law; discusses the diverse international legal theories with distinct perspectives on the problematic aspects related to compliance; clarifies two main approaches to achieve and improve compliance with international treaties; examines binding nature of international law and particularly binding nature of international treaties, taking into account the rule of *pacta sunt servanda* as the main binding principle of international law. Second part examines enforcement mechanisms to achieve and improve compliance with international treaties, their advantages and disadvantages. Third part deals with the chosen managerial mechanism – monitoring of compliance with international treaties, advantages and disadvantages of monitoring the compliance of treaties. The last part presents concluding remarks, conclusions and proposals of the research on the topic of compliance with international treaties and its related problematic aspects.

1 INTERNATIONAL TREATY COMPLIANCE CONCEPT AND *PACTA SUNT SERVANDA* PRINCIPLE

This chapter focuses on the concept of compliance with international treaties, explains the concept itself and deals with its definition, distinguishing it from the related but distinct concepts of effectiveness and implementation. Chapter discusses the major theories of compliance, mainly the international theories of compliance that observe the behavior of international legal subjects. Besides that the chapter seeks to understand the fountainhead of states behavior concentrating on the main issues of the domain in question, tries to understand the conditions under which international legal subjects behave in accordance with rules and obligations to which they have been committed or in accordance with prevailing norms and rules of international behavior. Furthermore the chapter discusses two possible approaches to achieve compliance, basically the managerial approach to achieve compliance with international treaties and enforcement approach to achieve compliance with international treaties. Moreover the chapter aims to find out an impact and influence made on compliance with international treaties by international recognized customary principles such as *pacta sunt servanda* and the principle of good faith, explaining why observance of these principles is so much important in the research of compliance with international treaties and its issues. Lastly, the end of the chapter will introduce the concluding remarks, which were possible to determinate and establish during the examination of the subject matter in question.

1.1 General understanding of the concept and theories of compliance

Compliance with international law, as well as the compliance with international treaties is a subject of increasing interest. In order for law to be effective it requires compliance. International law subjects, such as States are concerned to maintain compliance with undertaken obligations to ensure they are not affected by non-compliance in the future.

From the author's point of view, the concept of compliance in international law should be understood as a behavior of the subjects of international law in accordance and conformity with undertaken international obligations and commitments. Following that, compliance could be defined as a degree to which legally recognized international entities behavior, in example behavior of States, conforms to what the international treaty proscribes or prescribes. Oran Young (1979) suggested: „Compliance can be said to occur when the actual behavior of a given

subject conforms to prescribed behavior, and noncompliance or violation occurs when actual behavior departs significantly from prescribed behavior.“ [2]

Accordingly the definition suggested by Oran Young acknowledges importance of the behavior of legal subjects of international law, however the differentiation between compliance concept and other closely related concepts must be made. The implementation as a process is particularly of great significance to international treaties[3] and is one of the factors, which affects behavior.[4] Implementation is a conception closely related to the conception of compliance, but comprehensible as the process of putting international commitments into practice, for example: adoption of domestic rules or regulations that are meant to facilitate, but do not in themselves constitute, compliance with international agreements; enforcement of rules; creation of international institutions and creation of domestic institutions. Implementation is the process of elaborating, transmitting, monitoring, adjudicating, and enforcing decisions.[5] Consequently the process of implementation occurs with an action or at least an attempt taken by the government or by the institution authorized by the government. Implementation might be significant and substantial to achieve compliance, but despite this fact compliance can occur without implementation, as, for example it might be unnecessary in some situations. In example: „Sweden has persistently pushed for tougher standards on Baltic Sea pollution, but domestic Swedish standards for water quality have consistently exceeded many standards adopted as part of Baltic Sea accords. [...], the adoption of these standards has in practice required little additional action by Sweden.“[6] For these reasons implementation is not a sufficient condition for compliance.

Compliance as a concept differs from the concept of effectiveness. „The effectiveness of an international regime depends on the way in which its norms, rules, and institutions directly

[2] Young OR. 1979. Compliance and Public Authority. Baltimore: Johns Hopkins Univ. Press. 172 pp.

[3] Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. 1998. „Introduction and Overview“, in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 1-46.

[4] Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. 1998. „Introduction and Overview“, in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 1-46.

[5] Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. 1998. „Introduction and Overview“, in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 1-46.

[6] Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. 1998. „Introduction and Overview“, in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 1-46.

or indirectly affect societies and the behavior of a wide range of relevant actors."[7] „We define effect as the extent to which the accord causes changes in the behavior of targets that further the goals of the accord."[8] Accordingly the concept of effectiveness is furthermore to a notably large extent related to behavior. The conception of effectiveness could be defined in diverse ways. This conception was comprehensively analyzed by Oran Young, which was trying to find the answer why some international regimes (specifically international environmental regimes) are more successful than others.[9] Oran Young asserts that an effective regime is the one, which has a significant behavioral influence and directs behavior in such a way as to completely remove the problem that led to its creation.[10] While compliance may be necessary for effectiveness, there is no reason to consider it sufficient, rather compliance is a measure to achieve effectiveness.

The compliance as a concept could be analyzed in the field of domestic laws and regulations as well on the level of international laws. In the relevance with the topic in question it would be wise to examine the theories about international compliance. As it important to point out, that the theories about compliance provide accounts of why different subjects of international law comply or do not comply with international laws and obligations. These theories are useful for understanding and viewing behavior related to compliance and possible reasons behind that specific behavior. Theories about international compliance mostly focus on the behavior of states.

International theories of compliance can be grouped into rationalist theories or normative theories. Rationalist theories focus on deterrence and enforcement as a means to prevent and punish non-compliance. Normative theories focus on assistance and cooperation as a means to prevent non-compliance.

1.1.1 Rationalist theories

Most realists are skeptical that international treaties influence state actions in significant way.[11] Even though Hans Morgenthau (1985) allowed the possibility that „during the four

[7] Owen Greene, 1998. „The System for Implementation Review in the Ozone Regime", in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 89-137.

[8] Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. 1998. „Introduction and Overview", in Victor, David G., Raustiala, Kal and Skolnikoff, Eugene B. (eds), The Implementation and Effectiveness of International Environmental Commitments. Cambridge, MA:MIT Press. pp. 1-46.

[9] Young OR. 1994. „The effectiveness of international environmental regimes:casual connections and behavioral mechanisms".

[10] Oran R. Young and Marc A. Levy (with assistance of Gail Osherenko). 1994. „The effectiveness of international environmental regimes" in Young OR. 1994. „The effectiveness of international environmental regimes:casual connections and behavioral mechanisms".

[11] Boyle FA. 1980. The irrelevance of international law. Calif. West. Int. Law J. 10; Bork RH. 1989/90. The limits of .international

hundred years of its existence international law ha[d] in most instances been scrupulously observed", in his idea this could be attributed either to convergent interests or prevailing power relations.[12] He stated expressly that Governments make legal commitments cynically and „are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests" (Morgenthau 1985).[13] Likewise, Hoffmann (1956) asserts the nation state as „a legally sovereign unit in a tenuous net of breakable obligations"[14]. Aron (1981) states: „International law can merely ratify the fate of arms and the arbitration of force".[15]

Realist theories realize compliance with international law as a largely either a result of international power dynamics or a coincidence. Oppenheim considers that international law can barely be made effective through the balance of power (Oppenheim 1912).[16] Aron and other realists have acknowledged, „the domain of legalized interstate relations is increasingly large" but argued that „one does not judge international law by peaceful periods and secondary problems" (Aron 1981).[17]

The rationalist theories, which view international law as having no effect or a little effect are neorealism and realism. In these theories „considerations of power rather than of law determine compliance."[18]

The enforcement theory or political economy theory a variety of institutionalism is accurately described by George Downs, the theory more focuses on the costs end of the cost-benefit compliance calculation.[19]

Liberal international relations theory to a great extent is a rationalist model, except it rejects the assumption that states are properly viewed as unitary rational agents. Liberal international relations theory disaggregates the state and places the focus on domestic political processes. [20]

After examining the ideas of mentioned scholars it is possible to conclude that realist are strongly convinced that obligations undertaken by the states, which are legally binding, have an insignificant impact or influence on behavior of that states, except as provided by a

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law.. Natl. Interest 18:3.10.

[12] Morgenthau HJ. 1985. Politics Among Nations: The Struggle for Power and Peace.
New York: Knopf. 6th ed. 688 pp.

[13] Morgenthau HJ. 1985. Politics Among Nations: The Struggle for Power and Peace. New York: Knopf. 6th ed. 688 pp.

[14] Hoffmann S. 1956. The role of international organization: limits and possibilities. Int. Organ. 10(3):357.72

[15] Aron R. 1981. Peace and War: A Theory of International Relations. Malabar, FL: Robert E Krieger. 820 pp.

[16] Oppenheim, L. 1912. International Law. London: Longmans, Green. 2nd ed.

[17] Aron R. 1981. Peace and War: A Theory of International Relations. Malabar, FL: Robert E Krieger. 820 pp.

[18] Morgenthau HJ.1978. Politics Among Nations: The Struggle for Power and Peace, 299, 5th ed.

[19] Downs GW.1998. Enforcement and the Evolution of Cooperation, 19 Mich. J. Int'l L. 319

[20] Raustalia K. 2000. Compliance & Effectiveness in International Regulatory Cooperation, 32 Case W. Res. J. Int'l L.

coincidence of law and states self-interest. Rationalist theories put forward as a basis for arguments that states act in their self-interest to benefit their actions, these theories claim that states are only concerned by their own self-interest, are motivated by that interest and act disregarding to accepted and undertaken obligations. Realists have been particularly extremely skeptical about the rule of law and legal processes in international relations. The main imperfection of international legal system to realists is the decentralized nature of that system. Lack of restraining power in international treaties is criticized as well by Morgenthau, he emphasizes especially that governments generally retain the right to interpret and apply the provisions of international agreements selectively (Morgenthau 1985).[21] Besides that rationalist theories claim that deterrence and enforcement are the main methods to prevent non-compliance in international law.

1.1.2 Normative theories

Normative theories put forward for consideration to a greater extent cooperative approach in pursuance achievement of compliance with international law. These theories put forward to the center of interest the normative powers of rules, the influence of shared discourse and knowledge on states interest and the persuasive power of ideas and legal obligations. Normative theories do not assume that states are acting irrationally, but rather broaden the focus to include influences that are not as readily reducible to costs and benefits.[22] The concept of „compliance without enforcement“ is thoroughly researched by Oran Young. [23]

1.2 Approaches to achieve compliance

There are two possible approaches to achieve compliance with undertaken international obligations, one approach concentrates on the role of sanctions and punishments – enforcement model and another approach focuses on the positive incentives and negotiations – management model. The two approaches are significantly different, so among the scholars and practitioners the topic of the best ways of compliance with international treaties and enhance that compliance is much disputed. In *The New Sovereignty,* Professor Abram Chayes and Antonia Handler Chayes (1995) recommends moving from an enforcement model to a management model.[24]

[21] Morgenthau HJ. 1985. Politics Among Nations: The Struggle for Power and Peace. New York: Knopf. 6th ed. 688 pp.

[22] Raustalia K. 2000. Compliance & Effectiveness in International Regulatory Cooperation, 32 Case W. Res. J. Int'l L.

[23] Young OR. 1999. Is Enforcement the Achilles' Heel of International Regimes? In Governance in World Affairs 93

[24] Chayes A, Chayes AH. 1995. The New Sovereignty: Compliance with International Regulatory Agreements. Cambridge, MA:

Critics respond that a managerial approach to compliance will only go so far, arguing that deep cooperation - compliance with agreements proscribing behavior that is truly difficult to forswear or prescribing behavior that is costly in the short term - will require some form of enforcement (Downs 1996).[25]

In the view of Abram Chayes, Antonia Handler Chayes and Mitchel an enforcement model of compliance rests on the availability and use of sanctions to deter violations, systematic features of international society severely constrain the use of sanctions. A managerial model of compliance suggests that regimes usually keep noncompliance at acceptable levels by an iterative process of discourse among the parties, the treaty organization, and the wider public.[26]

1.2.1 Enforcement approach to achieve compliance

Therefore enforcement is the existence of some material consequences such as sanctions in the event when noncompliance occurs. „While compliance refers to uncoerced abidance by the law, enforcement denotes the process of coercing the transgressor to compliance. Coercion occurs through „sanctions". It is dubious that in international law sanctions play a vital role and even their very availability has been questioned."[27]

From the authors point of view enforcement approach to achieve compliance focuses on the available legal remedies and measures recognized by international law as legitimate and lawful. These available means, measures or remedies by the author's opinion could be called as enforcement mechanisms to achieve compliance with international law and with international treaties therefore. These enforcement mechanisms could be considered as the main tools of enforcement approach to achieve compliance with international treaties and they could be various, the usage of these mechanisms most probably would differ depending on concrete circumstances of occurred non-compliance with international law or with international treaties. It should be pointed out that the usage of enforcement mechanisms in international law is obtainable only if non-compliance with international law or with international treaties has already occurred; consequently these enforcement mechanisms are used by international law entities as a punishment, for instance because of wrongful conduct or behavior which did not comply with the conduct or behavior established in some international treaty. Basically the

Harvard Univ. Press. 417 pp.

[25] Downs GW, Rocke DM, Barsoom PN. 1996. Is the good news about compliance good news about cooperation? Int. Organ. 50(3):379.406

[26] Chayes AB, Chayes AH, Mitchell RB.1998. „Managing Compliance: A Comparative Perspective" In Engaging Countries: Strengthening Compliance with International Environmental Accords. Editors: Edith Brown Weiss and Harold Jacobson. MIT Press, 1998, 39-62

[27] Carlo Focarelli „International Law as Social Construct: The Struggle for Global Justice", OUP Oxford, 2012-05-24, 632 p.

enforcement approach focuses on the responses to illegal or wrongful behavior. However the means used and proposed to use by enforcement approach could be used not only to make the defaulting state that failed to fulfill an international obligation to stop that wrongful conduct, but also means proposed and used by enforcement approach could for example ensure the defaulting state to pay the damages or compensation. Accordingly the enforcement mechanisms could prevent from non-compliance with international treaties, as if the state would be aware of possible negative consequences of non-compliance with international treaties it would most probably avoid to non-comply with it and act or behave respectively, as to avoid the consequences of non-compliance. From the standpoint of author the position that enforcement mechanism could prevent the legal entities of international law to default would be considered as the possible option only if the negative consequences of wrongful conduct would be unavoidable, otherwise if a state would assume only the probability of that consequences and would be aware of them, but would consider that probability of that consequences is low or avoidable that would not operate or function as any kind of prevention of non-compliance with international treaties or with international law. The concept of enforcement could be understood as an act of compelling observance of or compliance with the international law, international rule, or obligation established under international law. Therefore the aim of enforcement act is to force or to oblige legal entities of international law to do something, in the field of international treaty law the aim is to force or to oblige the state to comply with international treaties.

1.2.2 Managerial approach to achieve compliance

Managerial approaches presume that international law actors such as states or their governments comply with rules and obligations in regulatory regimes and treaties more effectively on responding to non-coercive tools, such tools on compliance with international treaties could be monitoring or reporting.[28]

Comprehensive studies of international regimes and analyses of problematic aspects of treaty compliance were made by Abram Chayes and Antonia Handler Chayes in the environmental field also in field of arm controls. [29] Abram Chayes and Antonia Handler Chayes

[28] Dinah Shelton „Commitment and Compliance: The Role of Non-binding Norms in the International Legal System“, Oxford University Press, 2003 – 560.

[29] Chayes A., and Chayes, A.H. (1991) Compliance without Enforcement: State Behavior under Regulatory Treaties. Negotiation Journal (7) (3), 311; Chayes, A., and Chayes, A.H. (1993) On Compliance. International Organization (47) (2), 175; Chayes A., and Chayes, A.H. (1990) From Law Enforcement to Dispute Settlement: A new Approach to Arms Control Verification and Compliance, 4 INT'L SECURITY, 147; Chayes A., and Chayes, A.H. (1998) Living Under a Treaty Regime: Compliance, Interpretation, and Adaptation, in DEFENDING DETERRENCE MANAGING THE ABM TREATY REGIME INTO THE 21ST CENTURY (Antonia Handler Chayes & Paul

try to explain why certain treaty regimes succeed and other do not. In 1993 Abram Chayes and Antonia Handler Chayes published a general theory of compliance in *International Organization*.[30] The theory rejected sanctions and other forms of enforcement mechanisms. According to this theory states have a tendency to behave in accordance with their undertaken international commitments, the authors emphasize three main factors why states do comply with treaty rules: national interest, regime norms and efficiency.

Chayes and Chayes (1991; 1993) do not believe that expectations of enforcement are the driving force behind states' respect for their international legal commitments. [31] In the view by the Chayeses states do not obey international rules because they are threatened with sanctions, they suggest that „the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the public.“[32]. For these scholars, a critical starting point is the belief that states have a general propensity to comply. This does not mean that they always do so; nor does it imply that all domestic actors favor compliance. But the fundamental principle that states are bound only by their own consent implies that the rules to which governments commit are generally in their interest. This has a critical implication: from the managerial perspective, compliance problems do not usually result from a deliberate decision to breach an agreement. Rather, failure to abide is generally attributable to agreement ambiguities, capacity limitations, and/or significant social/economic changes over time. In this context, Abram Chayes and Antonia Handler Chayes (1993) argue, enforcement/punishment may be ineffective or even counterproductive. Instead, noncompliance should be „managed“ through more transparent agreement design, dispute resolution, and technical/financial assistance.[33] Accordingly Abram Chayes and Antonia Handler Chayes proposes a managerial model to achieve compliance, this model encourages seeking compliance not through coercion, but through the other methods.

Managerial approach to achieve compliance with international law and international treaties differs from enforcement approach significantly. From the authors standpoint the main aim of the managerial approach is to ensure the compliance and obedience with international treaties through the so-called managerial ways and means. According to the author, these managerial means could be called as managerial mechanisms to achieve compliance with

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Doty eds., 1989), 197.

[30]Chayes, A., and Chayes, A.H. (1993) On Compliance. International Organization (47) (2), 175–205.

[31] Chayes A., and Chayes, A.H. (1991) Compliance without Enforcement: State Behavior under Regulatory Treaties. Negotiation Journal (7) (3), 311–30; Chayes, A., and Chayes, A.H. (1993) On Compliance. International Organization (47) (2), 175–205.

[32] Chayes A, Chayes AH. 1995. The New Sovereignty: Compliance with International Regulatory Agreements. Cambridge, MA: Harvard Univ. Press.

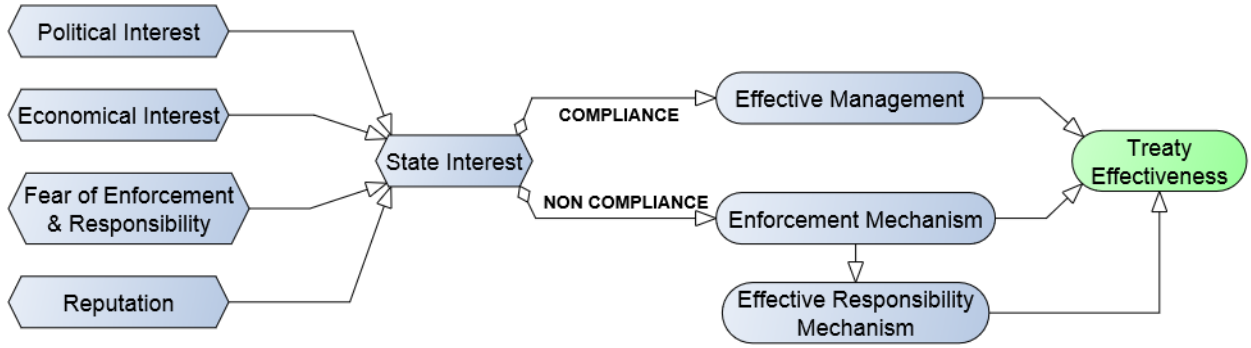
[33] Chayes, A., and Chayes, A.H. (1993) On Compliance. International Organization (47) (2), 175–205.

international law and international treaties. Main aspect of the managerial approach to achieve compliance would be the refusal of any kind of coercion against legal entities of international law; consequently this approach denies any possibility that enforcement mechanisms to achieve compliance are effective or otherwise useful in the process of pursuit of compliance with international treaties.

1.2.3 Proposal model regarding approaches to achieve compliance

As it was mentioned earlier in the thesis, basically scholars support to main approaches to achieve and improve compliance. The proposal by the author is to combine these two different approaches and to apply them not in isolation, but to combine them and for instance, to apply to the same international treaty. The process of both models applicability is presented in picture below. Firstly, the process starts with position of State, which behavior to choose – to comply with prescribed behavior by international law or international law or not to comply with prescribed behavior. The decision of the State mainly depends on State interest and can be influenced by diverse range of factors. As there could be various kinds of influential factors on State interest, the author does not present all of them. The main influential powers on State interest of making the decision to comply or not to comply with international law or international treaty, presented by the author are political interest, economical interest, reputation of the State and fear of enforcement and inevitability of responsibility. Author does not suggests that these influential interest are the main or are the most important, the behavior of the State to make one or another decision regarding international treaties can differ in every case as it can depend on various circumstances, in example the lack of resources to implement the provisions of international treaty, changed geopolitical environment, even international treaty itself could have uncertainties and indeterminations. Nevertheless as there is no certainty that a Sate in becoming party to an international treaty will always comply to that international treaty, that's why, in the authors view, it would be more effective to apply all possible tools to improve compliance with international law and international treaties, be it managerial mechanisms or enforcement mechanisms to achieve compliance. From the standpoint of author till the State has an interest to comply with international law the should be applied managerial mechanisms to achieve compliance. Managerial mechanisms such as transparency, monitoring or reporting should help to prevent non-compliance from occurance, as these managerial mechanisms let to notice on time derogations from international treaties and react to such derogations. Author does not share the view that managerial mechanisms will help to reduce non-compliance with international treaties completely. Because, as it has been mentioned before, State decision to comply or not to

comply with international treaties or international law in general can depend on various grounds, circumstances, facts, or contributors. Therefore author suggests that if managerial tolls would not perform their main function and the State would non-comply with international treaty – enforcement mechanisms should be applied. Fundamentally, autor suggests that applicability of both appoaches should help to improve compliance with international treaties and even make an impact on the effectiveness of the international treaty in whole.



Picture 1

1.3 *Pacta sunt servanda* – international legal obligation

Consequently concluded international treaties are the source of legal obligations. Appropriate explanation of the definition of international obligation is presented in the commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, there International Law Commission clarified that: „[…] international obligations may be established by a customary rule of international law, by a treaty or by general principles applicable within the international legal order. States may assume international obligations by a unilateral act. An international obligation may arise from provisions stipulated in a treaty (a decision of an international organ of an international organization competent on the matter, a judgment given between two States by the International Court of Justice or another tribunal, etc.) […] Moreover these various grounds of obligation interact with each other […] Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on"[34]. Therefore the International Law Commission gave some instances of different sources of international obligations. According to

[34] The Report of the International Law Commission, on its fifty-third Session; 23 April – 1 June and 2 July – August (2001), Chapter IV, „State Responsibility", at 126, General Assembly, Official Records, Fifty-fifth Session, Supplemet No. 10 (UN Doc. A/56/10).

the Article 12 of the International Law Commission's Draft Articles on Responsibility of States the legal origin of an international obligation have no significance and describes existence of a breach of an international obligation, it suggests: „There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character"[35].

1.3.1 Duty to comply with international treaties - *pacta sunt servanda* and good faith principles

According to international law, each international treaty party has a duty to comply with undertaken obligations and behave with accordance with principle of good faith and principle of *pacta sunt servanda*, it proofs the 1969 Vienna Convention on the Law of Treaties and 1986 Vienna Convention on the Law of Treaties.

Pacta sunt servanda and good faith principles play a greatly important role in international law, furthermore these principles are essential in contractual obligations between states, because when international treaty parties disregard and do not obey these principles noncompliance with international treaties occurs. Consequently the principle of *pacta sunt servanda* is closely inherent with the conception of compliance with international treaties and it is highly important to discuss the main concerns of that principle, describe its notion, the origin and impact on noncompliance with international treaties. In this chapter we will try to make it clear what today principle of *pacta sunt servanda* means and we will literally interpret the utterances of two words *pacta* and *servanda*.

1.3.2 Concept of *pacta sunt servanda* principle

Accordingly the conception of *pacta sunt servanda* nowadays is considered as a customary rule of international law, therefore is more authoritative than a general principle of international law, because its role „is to protect the ordering principles of law, including the one of good faith, and thus to solidify and guarantee the foundations of the legal system."[36]

„The statement *pacta sunt servanda* derives it meaning and its value from the definitions given to the word „*pacta*" and to the word „*servanda*" […]. *Pacta* means certain

[35] Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, on 9 August 2001, see Official Records of the United Nations General Assembly, Fifty-sixth Session, Supplement No. 10, and corrigendum (UN Doc.A/56/10 and Corr. I).

[36] Marion Panizzon, (2006) „Good Faith in the Jurisprudence of the WTO", 434.

instruments expressing the will or wills of two more States, satisfying conditions of form and essential validity laid down by international law, and intended to be binding under international law: *servanda* means required by international law to be observed in good faith subject to conditions laid down by international law."[37]

Pacta sunt servanda is the central guiding principle of international law, principles main component is good faith. Nevertheless, good faith oneself has no normative quality. An early reference of the rule of *pacta sunt servanda* can be found in the Fitzmaurice Report I of 1956: „subject to the provisions of the present Code, States are bound to carry out in good faith the obligations they have assumed by the treaty".[38]

The principle of the *pacta sunt servanda* and a principle of good faith is established in the foundational treaty of the intergovernmental organization – United Nations. The Preamble of the United Nations Charter states: „Conditions under which justice and respect for the obligations from treaties…can be maintained"[39] furthermore the Charters Article 2, para. 2 establish: „All Members […] shall fulfill in good faith the obligations assumed by them in accordance with the present Charter"[40]. Either formulation repeat the rule of *pacta sunt servanda*, even if these formulations apply in the first instance to the obligations of members under the Charter itself and merely indirectly concern the validity of treaties.[41]

The reference to the rule of *pacta sunt servanda* is likewise possible to find in the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of The United Nations, which determines: „every State has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law".[42]

This principle is codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties; this provision obliges all States parties to comply with their treaty obligations. Furthermore the principle of *pacta sunt servanda* could be comprehensible as one of the „general principles of law recognized by civilized nations" as suggested in Article 38(1) of the Statute of the International Court of Justice. The principle suggests that international treaties are supported by international law and international treaties must to be observed.

[37] H.W.A.Thirlway (1972) „International customary law and codification".

[38] Fitzmaurice Report I, YBILC 1956 II 108, Article 5.

[39] The Charter of the United Nations, Preamble.

[40] The Charter of the United Nations, Article 2, para.2.

[41] Waldock Report VI, YBILC 1966 II 61, para.2.

[42] UN GA Res 2625 (XXV) of 24 October 1970.

1.4 Concluding remarks

The concept of compliance is closely related to the behavior of international legal subjects (for instance – States behavior). When States become parties to international treaties it depends of their behavior if they comply or do not comply with legal obligations and commitments undertaken by international treaties. If a state, being a party to international treaty, acts and behaves in accordance and conformity with that what is prescribed in international treaty – it should be treated as compliance with international treaty. Oppositely, if a state, being a party to international treaty does not act and does not behave in accordance and conformity with that what is prescribed in it – that should be treated as non-compliance with international treaty. As Oran Young suggested, to say that a state do not comply with international treaty, would be possible when the deviation of prescribed behavior in international treaty is significant, consequently – minor departure and deviation from an established and accepted behavior in international treaty would not be considered as non-compliance with international treaty.

The debates rose by the scholars about the managerial model and enforcement model raises many questions. According to scholars, who support the managerial approach to achieve compliance with international treaties, it would be possible to improve compliance by appliance and usage of non-coercive measures and remedies in response to treaty violations and in response to non-compliance with international treaties. Such measures and remedies could be monitoring or reporting. However, besides managerial approach to achieve compliance, there are scholars who support a totally different standpoint on the topic of compliance, these scholars suggest that to achieve compliance with international treaties is possible solely through enforcement approach. The enforcement approach to achieve compliance with international treaties is applicable through the coercive means and methods. Such methods, for instance, could be economic sanctions, military sanctions or countermeasures. As the author notices, the measures to achieve compliance proposed by scholars, which support the managerial model (measures like monitoring or reporting) should be used before non-compliance occurs, consequently these measures could be used as a preventive tools, for example states behavior could be monitored to stop the violation of international treaty or to stop any other breach, or any other form of non-compliance with international treaties from happening or arising. To the contrary, the measures to achieve compliance with international treaties proposed by scholars, which support the enforcement approach (measures like sanctions or countermeasures) should be used when non-compliance has already occurred, these concrete measures works as a punishment for the violation of international treaty.

The author defines compliance mechanisms as enforcement mechanisms or managerial mechanisms utilized by legal subjects of international law, which consist of a variety of types. Principally compliance mechanisms are not only international law assurance tools, consequently also political tools. At the moment, international community has a range of options of compliance mechanisms. Compliance mechanisms could vary from diplomatic measures to international dispute settlement procedures, even to the use of force. Main purpose of compliance mechanisms is to intend to change the behavior of defaulting states and to oblige defaulting states to comply with international treaties, norms and internationally recognized standards.

Nevertheless, the scholar's present two approaches to improve and achieve compliance with international treaties as alternative possibilities. From the standpoint of author, managerial model together with the combination of enforcement model could work perfectly together to promote compliance. Not necessarily the enforcement mechanisms should be applied separately from managerial mechanisms. From author's point of view enforcement mechanisms could be combined with other managerial measures and not applied in isolation, because frequently some of compliance mechanisms could be insufficient to change the behavior of defaulting state or could be even not suitable. The situation of particular non-compliance should be evaluated to choose the best combinations of compliance mechanisms. From the standpoint of author the most effective compliance with international treaty would be when to the particular international treaty would be applied enforcement mechanisms and managerial mechanisms. For instance Compliance review procedures such as monitoring are effective preventive measures of compliance assurance, so that's why it would be most probably more effective to apply the managerial model to the international treaty, as a prevention of stopping or arising from violation of international treaty and only afterwards if the non-compliance, some violation or a breach with international treaty would occur anyway, it would be most probably more effective to apply the enforcement mechanisms, which would constrain or coerce the behavior of defaulting state and enforce that defaulting state to comply and obey the international treaty in question. This way two models could be applied to the same international treaty and compliance with that international treaty would be improved and increased.

2 INTERNATIONAL TREATY ENFORCEMENT MECHANISMS

In the 1968 Louis Henkin firstly published his book *How Nations Behave*. Legal scholar focused on analyzes what is the impact of law on states behavior. Louis Henkin asserted that „almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.“[43] He suggested that nations behave mostly in compliance with international law. Still the questions why the nations obey their commitments and obligations remain one of the most popular questions among legal scholars discussions and researches. The researches in this field hopefully would make some predictability on states behavior and would help to clarify when states will carry out and obey their legal obligations undertaken by international treaties. Presumably there might be many factors, which would influence state behavior, among them states interest, reciprocity, reputation, international coercion, fear of sanctions, behavior of states could be even influenced by political or economical reasons. Moreover the list of these factors is not completed; there could be many other reasons, which could influence states behavior. However it is very obvious, that among mentioned factors, which could influence states behavior on compliance with undertaken obligations by international treaties, there are many factors that could be called enforcement mechanisms. Many scholars ask whether sanctions or other forms of coercion are necessary to achieve compliance. This chapter of the master thesis will mainly focus on enforcement mechanisms that help to achieve a greater compliance with international treaties. Therefore this chapter will examine in the author's opinion the most influential enforcement mechanisms, which are currently used in international relations with the main goal to clarify how these enforcement mechanisms can influence states behavior, which of these enforcement mechanisms can help to improve compliance with international treaties.

2.1 Enforcement mechanism by Vienna Convention on the Law of Treaties

As international law has two main sources of law, mainly customary law and international treaties, there should not be any surprise that mostly international relationship between States and other legally recognized subjects in international law - international organizations, are covered by numerous number of international treaties. For a State to become a party of particular international treaty, that State must to express the consent to be bound by it, in international legal system there are no superior subject of international law, which could force a

[43] Louis Henkin, 1979. How nations behave. 2 ed.

State to become a party to any kind of international treaty and that derives from States sovereignty. As a State chooses by its own will to become bound by one or another international treaty, undertaking commitments and obligations established on those treaties, it would be logical to make a conclusion that international treaties are concluded between subjects of international law with the aim to be obeyed and not with the aim to be breached. However breaches of international treaties occur. In this chapter we will examine what can be considered as a breach of international treaty, what amounts to a breach of international treaty, what possible consequences and responses can arise of international treaty breaches and finally what relevance is between breaches of international treaties and compliance.

The 1969 Vienna Convention on the Law of Treaties and 1986 Vienna Convention on the Law of Treaties are regulating situations when a breach of international treaty occurs. However the Vienna Conventions brings up only two possible options on reaction to a material breach of treaty, it is termination or suspension of the operation of international treaty, established in Article 60 of Vienna Conventions. Notwithstanding, Article 60 of the 1969 Vienna Convention on the Law of Treaties received controversial opinions among scholars, for instance Simma on that subject matter expressed: „[…] Article 60 constitutes one of the provisions of the Vienna Convention with regard to which – aside from the procedural shortcomings – the limited scope of the Vienna Convention on the Law of Treaties will be felt most clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions of breach having their *sedes materiae* in the law of treaties, any examinations of the breach situation limited to an analysis of the rules of the Vienna Convention, due to exclusion of the similar reactions having their *sedes materiae* in the law of international responsibility provide an observer with an incomplete picture“[44].

The entitlement of States to take advantage of the responses to non-compliance with international treaties set by Article 60 – suspension or termination of an international treaty - has been recognized by international judicial authorities. These measures can be executed by an international treaty party, which was harmed by material breach of international treaty. Consequently, the termination or suspension of operation of international treaty is the negative consequence. This negative consequence can arise irrespectively if contracting parties mentioned it in concluded international treaty provisions or not, that confirms the case-law of the International Court of Justice. For example the 1971 Namibia Advisory Opinion. In that specific case the United Nations General Assembly by adopted Resolution 2145 terminated the mandate in respect of Namibia (South-West Africa) conferred by the League of Nations on the United

[44] B. Simma, „Reflection on the Article 60 of the Vienna Convention on the Law of treaties and its Background in General International Law“, 20 OZORV 5, 83 (1970).

Kingdom and exercised on its behalf by the Republic of South Africa. The mandate in question was terminated because South Africa had „failed to fulfill its obligations" under the mandate and had „disavowed the mandate". In this case the International Court of Justice invoked the rules as to material breach of an international treaty, as mandate has been considered the international treaty itself. The International Court of Justice clarified: „The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of a treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded"[45].

The aim of the Article 60 of the Vienna Convention on the Law of Treaties is to establish stable treaty relations between treaty parties and the main principle of that provision is – *inadimpleni non est est adimplendum* principle. The principle in question is a recognized principle of contract law, where the infringement of any kind of contractual agreement by one party possibly liberates the other party from the contractual commitments of the agreement, equal principle is used in the field of international public law, where one party of an international treaty violates and breaches an international treaty, the other party of the same international treaty may invoke that breach as a ground to not perform its undertaken obligations by international treaty in question.[46]

It should be pointed out that Article 60 of the Vienna Convention on the law of International Treaties ascertains three supplementary regulations: 1. Article 60(1) explains that material breaches of bilateral international treaties at all times makes an impact on another party of international bilateral treaty; 2. Article 60(2a) establishes that if in the situation when the breach of the international treaty occurs all the international treaty parties may agree on collective response, of course the State party guilty for the previous material breach of the international treaty is excluded from that possibility; Article 60(5) safeguards that „provisions relating to the protection of the human person contained in the treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties"[47] could not be terminated or suspended.[48]

„Article 60(1), (2)(b) and (2)(c) (ie, those provisions addressing individual responses) expressly provide that the responding State is entitled to invoke the prior breach as a ground for suspension or termination."[49]

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[45] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 16.

[46] Jan Klabbers „International law", Cambridge University Press, 2013-03-28, 166 p.

[47] Vienna Convention on the Law of Treaties, Article 60(5)

[48] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties" 2014, 680.

[49] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties" 2014, 680.

2.1.1 The definition of material breach

In international customary law a breach of international treaty could be considered any conduct, which is not in accordance with undertaken commitments. Breach of international treaty at the same time is a violation of international treaty provisions, an infringement of international treaty and non-compliance with international treaty. Nevertheless Vienna Convention on the Law of Treaties presents one more notion – material breach, under this Convention not every breach of a treaty amounts to material breach and only material breach gives a right for an innocent international treaty party to terminate or suspend the operation of treaty in question. Consequently as not every breach of a treaty can be considered as a material breach it is of high importance to make clear what kind of breach could be considered as a material. The issue is complicated and already raised by numerous scholars. For instance Lord McNair wrote as follows: „The question is controversial. There are some writers who maintain that it is only the breach of an „essential" or „important" or „material" term of a treaty that entitles the other party to denounce the whole treaty, others hold that the breach of any term justify the other party in denouncing the whole treaty because it is impossible to say whether or not that term was one which induced him to conclude the treaty although he accepted the rest of the treaty with reluctance. In our submission, the balance of common sense, practical convenience, and judicial authority supports the former of those two contrasted views"[50]. Therefore according to Lord McNair not every breach of international treaty enables the other party to denounce entire international treaty, it could be only the breach of an essential, important or material provision of an international treaty[51].

Consequently under Vienna Convention on the Law of Treaties only grave, fundamental and serious breach of international treaty can be qualified as a material breach.

Therefore the International Court of Justice expressed the definition of a breach as follows: States „incompatibility with the obligations"[52]; conduct „contrary to" or „inconsistent with" a given regulation[53]; „failure to comply with treaty obligations"[54].

[50] Lord McNair, „The Law of Treaties" (1961), at 478.

[51] Lord McNair, „The Law of Treaties" (1961), at 478.

[52] United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3, at p. 29, para. 56.

[53] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14, at p. 64, para. 115 and at p. 98, para.186, respectively.

[54] Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, at p. 46, para 57.

2.2 Enforcement mechanism - State responsibility

State's responsibility could be understood as arising consequence for a State. Consequently, the author will consider Sate responsibility as an enforcement mechanism. International responsibility could be considered as a consequence of non-compliance with undertaken obligations or commitments by the international treaties. When the breach of international treaty occurs or the non-performance of an international undertaken commitment occurs the State is under the responsibility to make reparation for injured State or States.

State responsibility could be invoked by any kind of breach of an international obligation, not taking into account of that obligation's source[55] including international treaties as one of the sources. In the Rainbow Warrior case the Arbitral Tribunal in its award suggested that „in the field of international law there is no distinction between contractual and tortious responsibility"[56], same suggestion was made by International Law Commission commentary on Article 12 of draft Articles on States Responsibility – „there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule".[57]

2.2.1 The concept of countermeasures

There is only one provision in Vienna Convention on the Law of Treaties, which establishes responses and consequences to international treaty breaches and international treaty violations. The Article 60 of the Vienna Convention on the Law of Treaties determines possible reactions of treaty parties in the situations when defaulting treaty party fails to fulfill undertaken obligations, defaults international treaty or violates it.

However, the Article 60 of the Vienna Convention on the Law of Treaties is not the only provision in international law, which determines the consequences when non-compliance with international treaty occurs. The reactions of injured international treaty parties presented in the Vienna Convention on the Law of Treaties by Article 60 are not the only accessible measures established in international law. The injured international treaty party may use other permissible remedies, such as: termination of the wrongful behavior; guarantees and assurances of non-repetition; compensation, restitution, satisfaction or reparation. Another possible effective remedy to respond to a breach of international treaty is to take countermeasures.

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[55] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties" 2014, 680.

[56] Rainbow Warrior, at 251, para 75.

[57] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001

Previously, the term countermeasure was not used in international law, before the term used in international law was – „reprisal", at that time reprisals could or could not encompass the use of force and for this reason in case of reprisal containing the use of force the term used was a „belligerent reprisal" and in case of reprisal not containing the use of force - non-forcible reprisal, however currently it is acknowledged worldwide that a reprisal couldn't encompass the use of force, consequently now the term countermeasure is used.[58]

Countermeasures could be defined as an enforcement mechanism to achieve compliance with international treaties, which reacting State can use against target State. The reacting State is able to decide by itself which obligations it aims to omit. Moreover this mechanism is an effective remedy to an internationally wrongful act. However, the mechanism in question does not operate without limitations. As international case practice reveals – „In order to be justifiable, a countermeasure must meet certain conditions".[59] The report of International Court of Justice explains that the countermeasure first of all should be used as a reaction to a former international wrongful act committing or committed by the other State and should be pointed versus that particular State and second of all, the reacting State before starting to use countermeasures should intercommunicate with the State committing or committed the internationally wrongful act with a demand for eligible behavior and compliance or with a demand to pay reparation for internationally wrongful conduct[60]. In the same Report of Gabcikovo case the Court pointed out another condition for the countermeasures to be considered justifiable – the aim of the countermeasure should be to encourage target State to observe its commitments and the remedy used against target State should be reversible.[61] „Despite the fact that they are otherwise internationally wrongful acts themselves, countermeasures are justified and thus responsibility is precluded, by reasons of self-protection, reciprocity and the need to induce the defaulting state to cease the wrongful act, to offer reparation for the injury suffered by the aggrieved state and to secure guarantees for non-repetition in the future."[62]

The International Law Commission made a detail study on the topic of States responsibility and codified it in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. The text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the

[58] Jan Klabbers „International law", Cambridge University Press, 2013-03-28, 168 p.

[59] Gabcikovo case, ICJ Reports 1997, 56 (para.83);

[60] Gabcikovo case, ICJ Reports 1997, 56 (para. 83, para. 84);

[61] Gabcikovo case, ICJ Reports 1997, 56 (para. 87);

[62] „Countermeasures, the Non-Injured State and the Idea of International Community" Elena Katselli Proukaki, Routledge, 2009-12-16 - 360 psl.

work of that session. The report also contains commentaries on the draft articles.[63] Some of the rules codified by International Law Commission nowadays are accepted as customary rules. Articles 22 and 49 to 53 of Articles on the Responsibility of States for Internationally Wrongful Acts establishes the right of injured states to take countermeasures when breaches of international treaties occurs and these countermeasures in international law are recognized as lawful. Accordingly, breaches of international treaties are the form of non-compliance and as well as other international wrongful acts it may be the reason to invoke the states responsibility or bring any other international consequences.

As mentioned before the International Law Commission made a detailed study on States Responsibility (2001) and affirmed the traditional understanding of countermeasures; the concept of countermeasures permits the decentralized use of proportionate coercion against wrongful conduct.[64] Countermeasures can be taken against any internationally wrongful act, including any kind of breach of a treaty; overall there are no establishments of requirement that a breach should be essential, meaning that there is a wide scope of application within the area of international treaty breaches.[65] According to Draft Articles of International Law Commission on International responsibility States enjoy remarkably wide margin of discretion to decide and choose to react and respond to international treaty breaches by using countermeasures and doing that, the aim of the State should be to encourage the wrongdoing State to comply and conform with its undertaken obligations by international treaties and under international law; nevertheless a responding state actions could be considered limited or restricted in the way that the responding state could not use the countermeasures to the non-performance of obligations or commitments under the international treaty in question, however a responding state has a possibility to respond against international treaty breaches first of all by violating its commitments towards targeted state under some other international treaties or even under general international law.[66] Indeed it should be emphasized that a responding state even having plenty of options to react on behavior of wrongdoing state and enjoying the wide margin of discretion in that field cannot act limitless in the way as mentioned above - countermeasures used by responding state should be proportionate.

Proportionality as a principle is widely used not only in the international law, but generally law systems use this notion in one or other way. Consequently as proportionality is that

[63] Responsibility of States for Internationally Wrongful Acts (2001) „Yearbook of the International Law Commission“, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[64] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties“ 2014, 680.

[65] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties“ 2014, 680.

[66] Christian J. Tams, Antonios Tzanakopoulos, Edward Elgar Publishing, „Research Handbook on the Law of Treaties“ 2014, 680.

important in the way to use countermeasures it would be wise to examine and analyze in what way used countermeasures would be considered proportionate and then being proportionate would be considered justifiable. Article 51 of the International Law Commissions Draft Articles on States Responsibility expressly establishes: „Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question"[67]. The term „rights in question" used by ILC in Article 51 has been clarified by the ILC in its commentary of Article 51, which ascertained: „The reference to „the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration." [68] Therefore, according to Sverrison a countermeasure to be considered as used in a proportional way, it must meet essential requirements: „First, when resorting to countermeasures, the injured state shall select the least intrusive measure of the available sufficiently effective measures; second, such measure shall be proportionate to the injury suffered; and third, the extent or scope of the measure taken shall be limited to what is necessary to obtain the objective of the countermeasure"[69].

Therefore Articles on State Responsibility establishes the consequences when an internationally wrongful act occurs. However, in order to use countermeasures there must be determined some conditions. Consequently the rules on State responsibility are differentiated into primary and into secondary rules[70]. As stated International Law Commission primary rules of State responsibility are: „[…] the content of international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most substantive international law, customary and conventional." [71] According to International Law Commission the primary rules are to determine the presence of fundamental rule, which produces the commitment for a State by international law and presumption that a subject matter has emerged as to if that particular State observed that particular commitment. Therefore ILC explains that: „[…] When these primary rules are established, there arise various other secondary rules and conditions: „[…] The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which

[67] Article 51, „Draft Articles on State Responsibility", International Law Commission, 2001.

[68] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.

[69] Hjortur B. Sverrisson „Countermeasures, the International Legal System, and Environmental Violations", Cambria Press, (2008), at 173 p.

[70] YILC (1970), Vol. II, at 306, paragraph 66 (c).

[71] Report of the ILC on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), GAOR Supplement No. 10 (A/56/10), paragraph 77(1).

flow therefrom. […]“[72]. According to ILC secondary rules include: „(a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful; (b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law; (c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State; (d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter; (e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded; (f) Specifying the content of State responsibility, i. e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done; (g) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost; (h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfillment of the obligations of the responsible State under these articles.“[73]

2.2.2 Countermeasures – sanctions

International sanctions could be considered as one more tool used in international law with the aim to achieve compliance with international law and with international treaties. International sanctions, in this master thesis, are considered by the author to be one of the enforcement mechanisms to achieve compliance. In international law, sanctions are imposed in response to an illegal act committed by the legal entity of international law and sanctions have a lot in common with so-called countermeasures, because international sanctions are adopted and used as a consequence of infringements of international law or as a consequence of non-compliance with international law or as a consequence of non-compliance with international treaties. Such non-compliance could be: human rights violations, breaches of democratic principles, threats to international peace and security like support of terrorism or proliferation of weapons of mass destruction, disrespect of the rule of law and response to other breaches of international obligations. International treaties protect those enumerated values and non-compliance with those treaties may bring the negative consequences for states. The main purpose

[72] Report of the ILC on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), GAOR Supplement No. 10 (A/56/10), paragraph 77(1).

[73] Report of the ILC on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), GAOR Supplement No. 10 (A/56/10), paragraph 77(3).

of the international sanctions is the same as of all other available enforcement mechanisms is to enforce and oblige a state or states to comply with international law, in other words to bring a change in policies or activities mentioned above. The international sanctions can be justified the same as other countermeasures, if they are adopted as an act of response to a prior violation or infringement of international law or to a prior breach of international treaty, because of that nature these sanctions could be called countermeasures as well. These countermeasures are usually used against third states and against natural or legal persons and groups or non-state entities. „There are at least three categories of international sanctions in current international law: those taken by individual states against individual states (individual countermeasures and self-defence), those taken individually by two or more states against individual states outside any institutional framework (collective countermeasures and self-defence), and those taken by states collectively or allegedly for a collective purpose within an international organization against individual states (so-called „institutionalized" sanctions)."[74] According to that international sanctions adopted by United Nations (United Nations Security Council) would be so-called „institutionalized" sanctions, because United Nations is an international organization. The same as regarding the international sanctions adopted by the European Union (supranational international organization), even they are officially called restrictive measures, after all the essence of restrictive measures is exactly the same as of international sanctions. Consequently, for these reasons international sanctions could be adopted unilaterally or multilaterally. „Domestically, a sanction usually a means of law enforcement, a reaction to a breach of the law. Internationally, a sanction can also be a means of coercing another state to behave in a particular manner or of punishing another state for conduct which is thought to be a threat to a basic value of the system, albeit not formally unlawful."[75]

When non-compliance with international law or with international treaties occurs there are available ranges of options even having in mind that international law is a decentralized legal system. In these legal system could be determined the lack of central authority, but there is some degree of centralization in international law, because the United Nations Security Council has a primary responsibility over the maintenance of international peace and security. Therefore all member state of the United Nations are under an obligation to respect and enforce the United Nations sanctions, which serve to implement UN Security Council decisions. International sanctions adopted by the United Nations Security Council are not only political tools, but these sanctions are also one of the enforcement mechanisms utilized to achieve and improve compliance with international treaty – Charter of the United Nations.

[74] Carlo Focarelli „International Law as Social Construct: The Struggle for Global Justice", OUP Oxford, 2012-05-24, 632 p.

[75] Carlo Focarelli „International Law as Social Construct: The Struggle for Global Justice", OUP Oxford, 2012-05-24, 632 p.

Above we can see discussed categories of international sanctions, however international sanctions could be devoted to the fields they aim to target. For instance, international sanctions could be segregated into economic sanctions, military sanctions, diplomatic sanctions etc.

The sanctions are increasingly frequent imposed either by United Nations, European Union or by other legal entities of the international law, as by far it is considered as an effective tool against reprehensible behavior and non-compliance. As an international action – use of sanctions - aims to force to comply with international obligations and international treaties, often that use raises many questions and issues of legality.

2.3 The relationship between material breach and countermeasures

The rules established in the Vienna Convention on the Law of Treaties on the matters of non-performance of international treaty obligations and the rules established in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts can be perfectly applied in the same situation to the same range of acts and facts. According to Vienna Convention on the Law of Treaties Article 73 the Convention in question „shall not prejudge any question that may arise in regard to a treaty […] from the international responsibility of a State"[76]. Whereas Article 56 of Draft Articles on Responsibility of States for Internationally Wrongful Acts ascertains questions of State responsibility not regulated by these articles and specifies: „The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles."[77] In commentaries made by International Law Commission clearly determined two main functions of Article 56, first function mentioned in commentaries is that the Article protects and safeguards the applicability of other customary international law rules on questions, which are not encompassed by Draft Articles on Responsibility of States for Internationally Wrongful Acts, but which questions regards the responsibility of States; „A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include [...] the termination of the international obligation violated in the case of a material breach of a bilateral treaty"[78].

[76] Vienna Convention on the Law of Treaties, Article 73.

[77] Responsibility of States for Internationally Wrongful Acts (2001) „Yearbook of the International Law Commission", 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[78] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

It should be pointed out that Article 56 repeats the preambular paragraph of the 1969 Vienna Convention on the Law of Treaties. The Convention states: „the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention"[79].

The view that countermeasures and remedies available by the Vienna Convention on the Law of treaties can be applied in the same situation to the same range of acts and facts is supported among scholars, for example Rosenne said as follows: „Material breach of treaty, which alone has its *sedes materiae* in the law of treaties, may entitle the injured party to take steps to protect interests in the continued performance of the treaty by both parties. Breach by itself, that is breach, is not treated in the law of treaties itself: its *sedes materiae* is to be found elsewhere, in the law of State responsibility"[80].

It was already clarified that to the same situation of non-compliance both enforcement mechanisms can be applied – countermeasures and termination or suspension of a treaty. Consequently, the countermeasure as a general right of international law can be applied to an international treaty disregarding of that if a party to the particular dispute of non-compliance is a party of the Vienna Convention on the Law of Treaties or not. That suggests an international case law. In the Case Concerning the Air Service Agreement of 27 March 1946 (United States v. France), („Air Services case") Award of 9 December 1978, 54 ILR 338 (1979). The 1946 bilateral Agreement between United States and France was based on civil air flights. Under that Agreement States in 1960 Exchanged Notes and agreed to authorize designated the carriers of the United States to fly to Paris the United States of America west coast through London. On 11 July1978 a Compromis of Arbitration was signed between the Government of the United States of America and the Government of the French Republic, where the Parties agreed that there is a dispute regarding change of gauge according to the Air Services Agreement and decided that the dispute should be referred to arbitration. Meanwhile the United States of America and France were not parties to the 1969 Vienna Convention on the Law of Treaties. In the Award the Tribunal acknowledged the lawfulness of countermeasures in accordance with international law and stated: „Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanism created within the framework of international organizations, each State establishes for itself its legal situation *vis-à-vis* other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by general

[79] 1969 Vienna Convention on the Law of Treaties, preambular.

[80] S. Rosenne „Breach of a Treaty" (1985), 24 p.

rules of international law pertaining to the use of armed force, to affirm its rights through „counter-measures“[81].

The purpose of denunciation or suspension of an international treaty and the purpose of countermeasures differs. As for instance Sicilianos indicates: „[…] although in most cases reprisals have a coercive character, denunciation and suspension of the application of a treaty generally have a coercive character, denunciation and suspension of the application of a treaty generally have a corrective aim which is called for by an imbalance caused by the breach in the complex of reciprocal rights and obligations of the parties“[82]. Crawford – Special Repporteur in the „Third Report on State Responsibility“ has analyzed the legal difference between these mechanisms[83]. Crawford suggested: „[…] It is clear that there is a legal difference between the suspension of a treaty (or a severable part of a treaty) and the refusal (whether or not justified) to comply with the treaty. The suspension of a treaty (or of a severable part of a treaty), if its legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation. By contrast, conduct inconsistent with terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts. Countermeasures are no more ground for suspension of treaty than necessity“[84]. Hereinafter Crawford indicates: „[...] There is a clear distinction between action taken within the framework of the law of treaties [...], and conduct raising questions of State responsibility [...]. The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply Vienna Convention rules as to materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to proportionality etc., in dealing with countermeasures“[85].

[81] The Case Concerning the Air Service Agreement of 27 March 1946 (United States v. France), („Air Services case“) Award of 9 December 1978, 54 ILR 338 (1979), paragraph 81.

[82] L.-A. Sicilianos, „The Relationship Between Reprisals and Denunciation or Suspension of a Treaty“, 4 EJIL (1993), at 345.

[83] J. Crawford, „Third Report on State Responsibility“, UN Doc. A/CN.4/507/Add.3 (1999).

[84] J. Crawford, „Third Report on State Responsibility“, UN Doc. A/CN.4/507/Add.3 (1999), paragraph 324.

[85] J. Crawford, „Third Report on State Responsibility“, UN Doc. A/CN.4/507/Add.3 (1999), paragraph 325.

Very clear distinction between countermeasures and treaty compliance remedies available by the Vienna Convention in the Law of Treaties has been indicated by International Law Commission, which stated: „Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. There a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach. Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end whose justification terminates once the end is achieved“[86].

Furthermore, the other scholars observed the remedies available in the situations when non-compliance with international treaties occurs. Remedies available by Article 60 of the Vienna Convention on the Law of Treaties and countermeasures was analyzed by Riphagen in his study „Sate responsibility: New Theories of Obligation in Interstate Relations“ where he clearly identified: „Individual „countermeasures“ in relation to the treaty can go no further than the suspension of the operation of the treaty in relations between the defaulting state and the state „specially affected by the breach.“ Such suspension does of course relate to the obligation to perform the treaty, but (article 72) „does not otherwise affect the legal relations between the parties established by the treat“ and in particular does not release the parties from the obligation „to refrain from acts tending to obstruct the resumption of the treaty“. A state party, not „specially affected by the breach“ may also take the „countermeasure“ of suspension but only „if the treaty is of such character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligation under treaty“[87].

[86] Report of the International Law Commission, 53rd Session (23 April to 1 June; 2 July to 10 August 2001), 56 UNGAOP, Supplement No. 10 (A156/10), Introductory commentary to Part Three, Chapter II, paragraph (4).

[87] W. Riphagen, „State Responsibility: New Theories of Obligation in Interstate Relations“, in R. St. J. Macdonal and D. M. Johnston (eds.); *The structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 581-625, at 601.

2.4 Disadvantages of the Vienna Convention on the Law of Treaties

The 1969 Vienna Convention on the Law of Treaties codified the general law of treaties, this Convention establishes the consequences of the international treaty breaches in very narrow way, as determined in Article 60. According to that Article under certain conditions the breach of a treaty could be a reason for responding state to suspend or terminate the international treaty in question in whole or in part.[88] Consequently, the 1969 Vienna Convention on the Law of Treaties only adjusts the effect of a breach on the treaty relations between the parties. According to Article 60 of Vienna Convention on the Law of Treaties there are only two options how to react in the situation when international treaty has been breached. Article 60 authorizes, under particular circumstances, partial or even complete suspension or termination of the international treaty in question, nevertheless the Article 60 of the Vienna Convention on the Law of Treaties does not mention or permits the termination or suspension of any other international treaty. Therefore the Vienna Convention on the Law of Treaties regulates the situations concerning only that particular treaty in question, which has been breached. For instance, if a state (wrongful state) has breached an international treaty called A, and this breach can be considered as a material breach, another state (injured state), a party to the same international treaty A, under some conditions, can use the enforcement mechanism established by Vienna Convention on the Law of Treaties in Article 60, these enforcement options would be: suspension or termination of the same international treaty A. However, an injured state would not be able to use any other legal remedies under Vienna Convention on the Law of Treaties, an injured state could not suspend or terminate international treaty called B, if in particular situation there was a material breach of international treaty A. So the author considers the options available under Vienna Convention on the Law of Treaties as limited options.

Another disadvantage of the Vienna Convention on the Law of Treaties is that enforcement mechanism determined by Article 60, let's to use the legal remedies only if a material breach has occurred. There is no legal permission for an injured state, under Vienna Convention on the Law of Treaties to use enforcement mechanism of Article 60, if a breach that has occurred is not of material character.

[88] The 1969 Vienna Convention on the Law of Treaties, Article 60

2.5 Advantages of countermeasures

In the view of author, comparing with legal responses to non-compliance established by the Vienna Convention on the Law of Treaties in Article 60, countermeasures are more flexible tools as an enforcement mechanism on compliance with international treaties. Because, as mentioned before the enforcement mechanism established by the Vienna Convention on the Law of Treaties lets to operate and use the suspension or termination only to that international treaty which has been breached. Differently the countermeasure as a flexible enforcement mechanism can be used to any international treaty, if there is a breach of an international treaty. Besides that it is more flexible enforcement mechanism as it can be used not only if there was a breach of international treaty, but also if there were any kind of breach of international law and the origin of that breach would not play any role.

Moreover the countermeasure as an enforcement mechanism has another important advantage comparing with enforcement mechanisms established by the Vienna Convention on the Law of Treaties (suspension or termination of an international treaty) – countermeasures can be used by injured state not only in the situations when there occurs a material breach of international treaty. This remedy can be used even if a breach of international treaty does not qualify as a material breach.

2.6 Concluding remarks

In this chapter mainly two enforcement mechanisms were analyzed. The enforcement mechanism introduced by the Vienna Convention on the Law of Treaties and the enforcement mechanism suggested by the Draft Articles on the States Responsibility. The enforcement mechanism - suspension or the termination of an international treaty is an enforcement mechanism, which can be applied only to the non-compliance with international treaties. Differently enforcement mechanism – countermeasure can be applied not only to the non-compliance with international treaties, but generally to the non-compliance with international law. Consequently the Law of Treaties should be considered the *lex specialis* due to the general international law on countermeasures.

The 1969 Vienna Convention on the law of Treaties Article 60 ascertains enforcement mechanism, which allows for a treaty party or treaty parties to terminate or suspend an international treaty with the condition that a treaty party or parties have been harmed by a breach of international treaty. The entitlement to take advantage of the provision of Vienna Convention on the law of Treaties regarding the suspension or termination of the treaty prevails without

respect to if contracting parties included that provision in international treaty itself or not. However, this entitlement can be implemented only if infringement of an international treaty was of high importance and amounted to material breach. From the standpoint of author that would be considerable as disadvantage.

Another discussed in the chapter commonly used enforcement mechanism in international relations between international law entities is a State responsibility. This enforcement mechanism is utilized when a particular State non-comply with international law or international treaties. Contrary to the enforcement mechanism suggested by the Vienna Convention on the law of Treaties, this enforcement mechanism can be invoked by any kind of breach of international law or international treaty. Particularly, from the view of author, that makes State responsibility - enforcement mechanism more flexible than suspension or termination of international treaty, as the condition of material breach does not apply.

Countermeasures have some limitations and conditions in order to be applied lawfully. Firstly, countermeasures can be used only as a response to a prior non-compliance by the other State, can be applied only against that State in question. Secondly, prior to applying countermeasures, the defaulting State should be intercommunicated with a demand for compliance or reparation. Thirdly countermeasures must be proportionate: the least intrusive measure should be chosen; countermeasures must be equivalent to the injury suffered, seriousness of the wrongful act and infringed rights should be taken in consideration; the scope of the taken remedy should be restricted by necessity to reach the aim of the countermeasure. Countermeasures are temporary measures, which can be applied till the moment when defaulting party starts to comply with international obligation or some international treaty in question, that's why chosen to apply countermeasures should be of reversible character, because as soon as the non-compliant State stops its wrongful behavior and the aim of countermeasures is achieved, the State, which utilized the enforcement mechanism – countermeasures, should terminate the applicability of countermeasures.

Articles on the Responsibility of States for Internationally Wrongful Acts established the right of countermeasures – the right to use a proportionate coercion against responsible States, which does non-comply with international treaties or international law.

The aim of countermeasures is to encourage the non-complying State to comply. Differently from enforcement mechanism of the Vienna Convention on the law of Treaties, when an injured State uses countermeasures against defaulting State international treaty, which has been breached, continues to apply.

Author considers as a disadvantage of the enforcement mechanism suggested by the Vienna Convention on the Law of Treaties, the limitation of Convention, which does not permit

the termination or suspension of any international treaty, the reacting State is restricted to terminate or to suspend only that particular international treaty, which has been previously violated by the defaulting State. Therefore the Vienna Convention on the Law of Treaties regulates the situations concerning only that particular treaty in question.

The purposes of the enforcement mechanism established by Vienna Convention on the law of Treaties and the purposes of the countermeasures are different. The purpose of the enforcement mechanism of the Vienna Convention of the Law of Treaties – suspension of an international treaty is to stop to apply a legal standard as long as reinstatement action is taken. On the contrary, countermeasure does not have the conditioning of suspension of an international treaty, this international treaty persists to apply and the State, which uses countermeasures, must proceed to substantiate its non-compliance. Main ground of countermeasure is a necessity.

Considerable advantage of enforcement mechanisms – the countermeasures and enforcement mechanism of Vienna Convention on the law of Treaties, is that both of those enforcement mechanisms can be invoked to the same incident of non-compliance.

2.6.1 Main remarks

The general international law on countermeasures complements the law of treaties. Even the Vienna Convention on the Law of Treaties should be considered the *lex specialis* due to the general international law on countermeasures, under ILC Draft Articles and the Vienna Convention on the Law of Treaties, these separate regimes should not contradict with each other, but rather supplement each other and coexist.

Flexibility of countermeasures comparing to the enforcement mechanism of the Vienna Convention on the Law of Treaties is evident for the reason that countermeasures are permissible in the situations of a minor or non-material breach and besides that, admissibility of countermeasures is relevant and appropriate when a material breach occurred. Applicability of countermeasures is permissible as a response against any international treaty, not only as a against the treaty that has been breached previously, contrary to the Vienna Convention on the Law of Treaties, which establishes admissibility of suspension or termination of the treaty only against the treaty which has been breached. Consequently countermeasures could be considered as more flexible enforcement mechanism than suspension or termination of an international treaty.

3 MANAGERIAL MECHANISM TO ACHIEVE COMPLIANCE WITH INTERNATIONAL TREATIES – MONITORING

As mentioned above international treaty compliance can be ensured by various ways and means, not only by enforcement mechanisms, which usually have negative aspects on States, but also compliance can be ensured by managerial ways and means. Managerial approach to achieve compliance with international treaties, discussed in the first chapter of master thesis, can be performed using different means and measures, monitoring of international treaties is one of them. The major goal of monitoring is to ensure and increase international treaty compliance and for this reason, monitoring is closely related to the topic of compliance with international treaties. Consequently the author is considering the monitoring as one of the mechanisms of managerial approach to achieve compliance with international treaties.

International treaty is a set of clauses, which establishes the rights of international treaty parties, in addition to that, international treaty establishes obligations, be it bilateral or multilateral international treaty. Some international treaties encompass clauses, which establishes treaty monitoring procedures. Consequently monitoring mechanisms could be classified into international treaty based monitoring mechanisms and into monitoring mechanisms that are not based on international treaties. „Some monitoring mechanisms are created by treaties, which they monitor compliance with, and therefore treaty-based mechanisms. Others are established by virtue of other legal instruments that give them a broader mandate. They are therefore non-treaty-based mechanisms.“[89] Monitoring is a process performed by so-called „treaty monitoring bodies“, which are established by international treaties.

„In certain areas of international law there is a trend toward assisting the parties with implementing treaty obligations rather than just strictly enforcing the treaty provisions and for treaty monitoring compliance rather than dispute resolution. This is evident in the human rights area and in the environmental field.“[90]

„Some treaties, such as environmental treaties contain complex provisions for monitoring compliance and providing assistance to the parties with a preventative view to

[89] Gauthier De Beco „Human Rights Monitoring Mechanisms of the Council of Europe“, Routledge, 2012 – 243 p.

[90] „Final Clauses of Multilateral Treaties: Handbook“ United Nations. Treaty Section
United Nations Publications, 2003 - 125 p.

avoiding disputes“[91]. Some Multilateral Environmental Agreements establish mechanisms in order to solve the situations when non-compliance with international treaties occurs. [92]

3.1 Main aspects of monitoring

It should be noted that monitoring of international treaties is mostly used in international human rights treaties. Functions of monitoring are carried out by international treaty monitoring bodies, these bodies are usually established in accordance with international treaties (the Committee on Economic, Social and Cultural Rights enjoys an exceptional status among mentioned international human rights treaty monitoring bodies, since the Committee on Economic, Social and Cultural Rights has been not established pursuant the International Covenant on Economic, Social and Cultural Rights). The main function and responsibility of treaty monitoring bodies is to monitor the implementation of international treaties. There are two major objectives of international treaty monitoring bodies: review of reports submitted by international treaty parties; review of communications and review of individual complaints.[93] However, besides provided possibility by some international treaties to submit for consideration individual complaints, some international treaties provide the possibility to submit for consideration collective complaints also, an example of that provided possibility would be collective complaints procedure, which allows to submit collective complaints to Council of Europe Committee of Social Rights, these collective complaints must be related to violations of the Social Charter and Revised Social Charter, the possibility of this procedure is provided under the 3rd Protocol, which entered into force in 1998.[94] Treaty monitoring bodies consists of independent and impartial experts of recognized competence in the field they work. These experts do not represent a particular state party. States parties elect members of treaty monitoring bodies and usually these members operate in their individual competency without instructions from states parties. Moreover independent and impartial experts of treaty monitoring bodies are in capacity to interpret the international treaty. Nevertheless, interpretative pronouncements of treaty monitoring bodies usually are not legally binding on states parties and treaty monitoring bodies do not diminish or deprive the authority of the international treaty parties to interpret the

[91] „Final Clauses of Multilateral Treaties: Handbook“ United Nations. Treaty Section
United Nations Publications, 2003 - 125 p.

[92] Geir Ulfstein „Making Treaties Work: Human Rights, Environment and Arms Control“, Cambridge University Press, 2007-04-12, 427 p.

[93] „State Participation in International Treaty Regimes“ Professor Srini Sitaraman
Ashgate Publishing, Ltd., 2013-03-28 - 346 psl.

[94] About the European Social Charter, www.coe.int

international treaty, generally the pronouncements of treaty monitoring bodies are the guidance for states parties and are of recommendation character. „These treaty monitoring bodies do not have the power to enforce treaty law on the participating states; they could only recommended changes, suggest necessary modifications in municipal law, and motivate states to implement treaty provisions.“[95] Human rights treaty monitoring bodies usually use various procedures to monitor implementation of international treaties, for example a reporting procedure. „When a state becomes party to a convention it assumes the obligation of periodically submitting a report to a treaty monitoring body to demonstrate that it has indeed pursued specific implementation policies to fulfill its treaty obligations.“[96]

To achieve the higher level of compliance with international treaties monitoring as a process can include various procedures and methods. For instance: gathering and collection of different sorts of data and information; examination in detail aggregated and collected data and information; pronouncements of international treaty interpretation; pronouncements of recommendations. The most important method of monitoring would be most probably the pronouncement of recommendations, as this part of monitoring process would help for international treaty parties to achieve better level of compliance with international treaty and undertaken obligations.

Nevertheless, besides treaty monitoring bodies, which derive from human rights treaties, there are treaty monitoring bodies which derive from other international treaties. For instance - the Commission on the Limits of the Continental shelf, which has been adopted 10 December 1082 and entered into force 16 November 1994 (UNCLOS – United Nations Convention on the Law of the Sea).

It should be pointed out that treaty monitoring bodies can be organs of international organizations. These treaty monitoring bodies can have capacity of monitoring the implementation of the international treaties. The pronouncements of treaty monitoring bodies of international organizations are subjects to instructions.

[95] „State Participation in International Treaty Regimes“ Professor Srini Sitaraman Ashgate Publishing, Ltd., 2013-03-28 - 346 psl.

[96] „State Participation in International Treaty Regimes“ Professor Srini Sitaraman Ashgate Publishing, Ltd., 2013-03-28 - 346 psl.

3.2 Advantages of managerial mechanism to achieve compliance – monitoring

„First, such mechanisms allow compliance issues to be addressed in a multilateral context, rather than through bilateral dispute settlement procedures. Secondly, non-compliance procedures may prevent potential violations rather than waiting for a breach to be established. Finally, non-compliance procedures may promote the resolution of compliance problems in a co-operative, rather than adversarial, manner through procedures designed to facilitate rather than enforce compliance.“[97]

Gauthier De Beco has analyzed monitoring mechanisms of the Council of Europe and clarified the advantages of treaty-based monitoring bodies and non-treaty-based monitoring bodies. As Gauthier De Beco explained the treaty-based mechanisms „[...] role is linked to these treaties, it also gives the impression that they provide pure technical expertise without making political considerations, which further increases the moral legitimacy of their recommendations. In addition to this, the treaties facilitate country monitoring, since they require that member States submit reports on the measures they have taken to give effect to them. [...]“ Further Gauthier De Beco indicated the disadvantage of treaty-based monitoring mechanisms: „[...] these treaties also limit the flexibility of the European human rights monitoring mechanisms.“ Contrarily to disadvantage of treaty-based monitoring mechanisms – non-flexibility, Cauthier De Beco indicated - flexibility as a main advantage of non-treaty-based mechanisms.[98]

The work of UN human rights treaty monitoring mechanisms can impact improvement of international treaties and their explanation in the international juridical system, the fundamental reasoning of human rights treaty monitoring bodies is that these bodies influence preservation of the international treaties at the national level.[99]

3.3 Concluding remarks

From the author’s point of view managerial mechanisms such as monitoring have a lot of advantages. First and the most important – these mechanisms are working as preventive tools from non-compliance with international treaties. Because as the actions or non-actions of

[97] Malgosia Fitzmaurice, David M. Ong, Panos Merkouris „Research Handbook on International Environmental Law“ Edward Elgar Publishing, 2010 - 736 p.

[98] Gauthier De Beco „Human Rights Monitoring Mechanisms of the Council of Europe“, Routledge, 2012 – 243 p.

[99] Helen Keller, Geir Ulfstein, Leena Grover „UN Human Rights Treaty Bodies: Law and Legitimacy“ Cambridge University Press, 2012-04-16, 461 p.

international treaty parties are systematically monitored, from time to time reviewed by treaty monitoring bodies, it should be much easier to detect first derogative behavior from international treaties and improve the non-compliance situation, till there still no major breach or damage occurred. However, from the standpoint of author the biggest disadvantage of monitoring is that treaty monitoring bodies do not adopt the binding decisions for the treaty parties, basically treaty monitoring bodies adopt recommendations, which are only of advisory and consultative character and do not have any legal force. Due to this significant matter this compliance mechanism can seem ineffective.

CONCLUSIONS

1. The concept of compliance is closely related to the behavior of international legal subjects. When States become parties to international treaties it depends of their behavior if they comply or do not comply with legal obligations and commitments undertaken by international treaties. If a state, being a party to international treaty, acts and behaves in accordance and conformity with that what is prescribed in international treaty – it should be treated as compliance with international treaty. Oppositely, if a state, being a party to international treaty does not act and does not behave in accordance and conformity with that what is prescribed in it – that should be treated as non-compliance with international treaty. As Oran Young suggested, to say that a state do not comply with international treaty, would be possible when the deviation of prescribed behavior in international treaty is significant, consequently – minor departure and deviation from an established and accepted behavior in international treaty would not be considered as non-compliance with international treaty.
2. There are two main approaches regarding the issue of compliance: managerial approach and enforcement approach. According to scholars, who support the managerial approach to achieve compliance with international treaties, it would be possible to improve compliance by appliance and usage of non-coercive measures and remedies in response to treaty violations and in response to non-compliance with international treaties. Such measures and remedies could be monitoring or reporting. However, besides managerial approach to achieve compliance, there are scholars who support a totally different standpoint on the topic of compliance, these scholars suggest that to achieve compliance with international treaties is possible solely through enforcement approach. The enforcement approach to achieve compliance with international treaties is applicable through the coercive means and methods. Such methods, for instance, could be economic sanctions, military sanctions or countermeasures. As the author notices, the measures to achieve compliance proposed by scholars, which support the managerial model (measures like monitoring or reporting) should be used before non-compliance occurs, consequently these measures could be used as a preventive tools, for example states behavior could be monitored to stop the violation of international treaty or to stop any other breach, or any other form of non-compliance with international treaties from happening or arising. To the contrary, the measures to achieve compliance with international treaties proposed by scholars, which support the enforcement approach (measures like sanctions or countermeasures) should be used when non-compliance has already occurred, these concrete measures works as a punishment for the violation of international treaty.

3. The author defines compliance mechanisms as enforcement mechanisms or managerial mechanisms utilized by legal subjects of international law, which consist of a variety of types. Principally compliance mechanisms are not only international law assurance tools, but also consequently political tools. At the moment, international community has a range of options of compliance mechanisms. Compliance mechanisms could vary from diplomatic measures to international dispute settlement procedures, even to the use of force. Main purpose of compliance mechanisms is to intend to change the behavior of defaulting states and to oblige defaulting states to comply with international treaties, norms and internationally recognized standards.
4. From the standpoint of author, managerial model together with the combination of enforcement model could work perfectly together to promote compliance. Not necessarily the enforcement mechanisms should be applied separately from managerial mechanisms. From author's point of view enforcement mechanisms could be combined with other managerial measures and not applied in isolation, because frequently some of compliance mechanisms could be insufficient to change the behavior of defaulting state or could be even not suitable. The situation of particular non-compliance should be evaluated to choose the best combinations of compliance mechanisms. From the standpoint of author the most effective compliance with international treaty would be when to the particular international treaty would be applied enforcement mechanisms and managerial mechanisms.
5. The enforcement mechanism - suspension or the termination of an international treaty is an enforcement mechanism, which can be applied only to the non-compliance with international treaties. Differently enforcement mechanism – countermeasure can be applied not only to the non-compliance with international treaties, but generally to the non-compliance with international law. Consequently the Law of Treaties should be considered the *lex specialis* due to the general international law on countermeasures.
6. The 1969 Vienna Convention on the law of Treaties Article 60 ascertains enforcement mechanism, which allows for a treaty party or treaty parties to terminate or suspend an international treaty with the condition that a treaty party or parties have been harmed by a breach of international treaty. The entitlement to take advantage of the provision of Vienna Convention on the law of Treaties regarding the suspension or termination of the treaty prevails without respect to if contracting parties included that provision in international treaty itself or not. However, this entitlement can be implemented only if infringement of an international treaty was of high importance and amounted to material breach. From the standpoint of author that would be considerable as disadvantage.

7. Another commonly used enforcement mechanism in international relations between international law entities is a State responsibility. This enforcement mechanism is utilized when a particular State non-comply with international law or international treaties. Contrary to the enforcement mechanism suggested by the Vienna Convention on the law of Treaties, this enforcement mechanism can be invoked by any kind of breach of international law or international treaty. Particularly, from the view of author, that makes State responsibility - enforcement mechanism more flexible than suspension or termination of international treaty, as the condition of material breach does not apply.
8. The general international law on countermeasures complements the law of treaties. Even the Vienna Convention on the Law of Treaties should be considered the *lex specialis* due to the general international law on countermeasures, under ILC Draft Articles and the Vienna Convention on the Law of Treaties, these separate regimes should not contradict with each other, but rather supplement each other and coexist.
9. Flexibility of countermeasures comparing to the enforcement mechanism of the Vienna Convention on the Law of Treaties is evident for the reason that countermeasures are permissible in the situations of a minor or non-material breach and besides that, admissibility of countermeasures is relevant and appropriate when a material breach occurred. Applicability of countermeasures is permissible as a response against any international treaty, not only as a against the treaty that has been breached previously, contrary to the Vienna Convention on the Law of Treaties, which establishes admissibility of suspension or termination of the treaty only against the treaty which has been breached. Consequently countermeasures could be considered as more flexible enforcement mechanism than suspension or termination of an international treaty.
10. From the author's point of view managerial mechanisms such as monitoring have a lot of advantages. First and the most important – these mechanisms are working as preventive tools from non-compliance with international treaties. Because as the actions or non-actions of international treaty parties are systematically monitored, from time to time reviewed by treaty monitoring bodies, it should be much easier to detect first derogative behavior from international treaties and improve the non-compliance situation, till there still no major breach or damage occurred. However, from the standpoint of author the biggest disadvantage of monitoring is that treaty monitoring bodies do not adopt the binding decisions for the treaty parties, basically treaty monitoring bodies adopt recommendations, which are only of advisory and consultative character and do not have any legal force. Due to this significant matter this compliance mechanism can seem ineffective.

PROPOSALS

The proposal by the author is to combine two different approaches and to apply them not in isolation, but to combine them and for instance, to apply to the same international treaty. As there is no certainty that a Sate in becoming party to an international treaty will always comply to that international treaty, that's why, in the authors view, it would be more effective to apply all possible tools to improve compliance with international law and international treaties, be it managerial mechanisms or enforcement mechanisms to achieve compliance. From the standpoint of author, till the State has an interest to comply with international law the should be applied managerial mechanisms to achieve compliance. Managerial mechanisms should help to prevent non-compliance from occurance, as they let to notice on time derogations from international treaties and react to such derogations. Author does not share the view that managerial mechanisms will help to reduce non-compliance with international treaties completely. Therefore author suggests that if managerial tolls would not perform their main function and the State wold non-comply with international trety – enforcement mechanisms should be applied. Fundamentally, autor suggests that applicability of both appoaches should help to improve compliance with international treaties and even make an impact on the effectiveness of the international treaty in whole.

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ANNOTATION

This research analyses the main aspects of compliance with international treaties and proposes how international treaty compliance mechanisms could be applied in order to maximize their effectiveness. The thesis analyses general conception of compliance with international treaties and international legal theories related to compliance with diverse perspectives on the issue of compliance, defines what is the compliance with international treaties and clarifies what is a compliance mechanism, assesses existing approaches regarding compliance, examines and evaluates compliance mechanisms, clarifies and identifies advantages and disadvantages of those mechanisms.

Key words: compliance, compliance mechanism, enforcement mechanism, international treaties.

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SUMMARY

The aim of the research is to analyse the main aspects of compliance with international treaties and to propose how international treaty compliance mechanisms could be applied to maximize their effectiveness. Master thesis consists of three main parts. First main part deals with: general understanding of treaty compliance concept by stressing possible problems and ambiguities, examining its necessity for achieving sustainable compliance with undertaken obligations under international law; discusses the diverse international legal theories with distinct perspectives on the problematic aspects related to compliance; clarifies two main approaches to achieve and improve compliance with international treaties; examines binding nature of international law and particularly binding nature of international treaties, taking into account the rule of *pacta sunt servanda* as the main binding principle of international law. Second part examines enforcement mechanisms to achieve and improve compliance with international treaties, their advantages and disadvantages. Third part deals with the chosen managerial mechanism – monitoring of compliance with international treaties, advantages and disadvantages of monitoring the compliance of treaties. Finally, the last part presents concluding remarks, conclusions and proposals made by the author during the research on the topic of compliance with international treaties and its related problematic aspects. Author proposes how to combine different approaches and how to apply them as to improve compliance and even make an impact on the effectiveness of the international treaty in whole.

Key words: compliance, compliance mechanism, enforcement mechanism, international treaties.