MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF INTERNATIONAL AND EUROPEAN UNION LAW

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ENFORCEMENT OF INTERNATIONAL TREATY IMPLEMENTATION

Master Thesis

Supervisor
prof. dr. L. Jakulevičienė

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LIST OF ABBREVIATIONS

CBD - Convention on Biological Diversity

ECHR – European Court of Human Rights

FAO - Food and Agriculture Organization of the United Nations

FCCC - Framework Convention on Climate Change

GA - General Assembly

ICC – International Criminal Court

ICJ - International Court of Justice

ILC - International Law Commission

ILC Draft Articles on State Responsibility – ILC Draft Articles on Responsibility of States for International Wrongful Acts, 2001

MDG – Millennium Development Goals

MEA - Multilateral Environmental Agreement

INGO - International non-governmental organization

PCIJ - Permanent Court of International Justice

UN - United Nations

UNTS - United Nations Treaty Series

VCDR – Vienna Convention on Diplomatic Relations

VCLT - Vienna Convention on the Law of Treaties 1969

DEFINITIONS

Implementation[1] as it is used in this thesis means international implementation – a broad process of fulfilling international treaties.

Treaty – "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[2]

Party – "a State which has consented to be bound by the treaty and for which the treaty is in force".[3]

Community interest – a respect for certain fundamental values, which is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States.[4]

Regime - a number closely integrated sets of rules of international law pertaining to particular subject-areas such as human rights, the environment, trade, international crimes, etc.[5]

Primary Rules - rules laying down particular rights and obligations.[6]

Secondary rules - rules about rule-creation and change, responsibility and dispute settlement.[7]

Self-contained regime - a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches that seeks precedence in regard to the general law.[8]

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[1] More about what implementation from the perspective of international law means as it is used in this thesis see section 1.3.
[2] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33, Article 1(a).
[3] Ibid., Article 1(g).
[4] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law.* 2006, 17(3), p. 233. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].
[5] See section 2.2.2 in this thesis.
[6] Koskenniemi M. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"*, UN Doc. ILC (LVI)/SG/FIL/CRD.1/Add.1 (2004), p. 8. Available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf [last visited 10 May 2011].
[7] Ibid.
[8] Ibid., p. 9.

INTRODUCTION

The relevance of the research. At the beginning of the 21st century, the international community is globalizing, integrating, and fragmenting, all at the same time. Accordingly, current world issues more and more bother the whole international community, rendering states unable to achieve desired goods individually. Such growth of more intricate intercourse within international community has established the need for an ever more precise and flexible international law and increased the adoption of international treaties[9], even called the *workhorse* or vehicle *par excellence* of community interest[10] for the creation of new legal standards. Experts generally assert that "effective international treaties are very important since they can facilitate safer inter-state relations, reduce problems of conflicts between states, enhance international cooperation and understanding between states, and most of all, they promote the international rule of law".[11] Unfortunately, notwithstanding that as far back as 1980 the Brandt Commission set particular goals for global development,[12] Summit on the Millennium Development Goals (2010)[13] shows that societies have greatly underachieved in implementing effectively the instruments for solving common problems. Despite existing international treaties, 925 million people are still hungry,[14] citizens in a number of countries live in extremely oppressive environments, with minimal basic rights and repeated persistent human rights violations,[15] a variety of global environmental problems more and more

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[9] The term *"treaty"* as it is used in this thesis refers to Article 1(a) of the VCLT as "<… > an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33.

[10] Simma B. *From Bilateralism to Community Interest in International Law*. Collected Courses of the Hague Academy of International Law. Martinus Nijhoff Publishers [interactive]. 1994, Vol. 250, p. 322-323. Available at Martinus Nijhoff Online http://nijhoffonline.nl/book?id=er250_er250_217-384 [last visited 14 April 2011].

[11] Minega Ch. E. *The Importance of International Trade and Investment Treaties for Mozambique* [interactive]. Available at http://ezinearticles.com/?The-Importance-of-International-Trade-and-Investment-Treaties-for-Mozambique&id=681268 [last visited 14 April 2011].

[12] Later these goals were reintroduced by the Brandt Equation (2002), see e.g. Quilligan J. B. *The Brandt Equation. 21st Century Blueprint for the New Global Economy* [interactive]. Available at http://www.brandt21forum.info/BrandtEquation-19Sept04.pdf [last visited 14 April 2011].

[13] More about the Millennium Development Goals see in a *Gateway to the United Nations System on the Millennium Development Goals* [interactive]. Available at http://www.un.org/millenniumgoals/ [last visited 14 April 2011].

[14] The most recent estimate, released in October 2010 by FAO, says that 925 million people are still undernourished. See publication by FAO. *The State of Food Insecurity in the World*. Available at http://www.fao.org/publications/sofi/en/ [last visited 14 April 2011].

[15] Organisation Freedom House released its annual report, identifying 17 such countries and 3 territories. See Annual Report of Freedom House: *Worst of the Worst 2010: the World's Most Repressive Societies* [interactive]. Available at http://www.freedomhouse.org/uploads/WoW/2010/WorstOfTheWorst2010.pdf [last visited 14 April 2011].

affect our entire world. This supposes an old but true idea that law without action is merely a dead letter, whereas in the words of Hobbes Th., - "covenants, without the sword, are but words and of no strength"[16].

The increasing number of treaties,[17] therefore, should be causing concern; the more treaties that are concluded, the more treaties that will have to be implemented. While not all international treaties are implemented at an acceptable level, indicating that domestic measures are insufficient, the situation necessitates looking for enforcement possibilities under international law. This creates additional difficulties. On the one hand, at the moment, many conventions have serious gaps and failings, many lack appropriate enforcement mechanisms and monitoring provisions for their implementation.[18] On the other hand, more and more different treaty regimes, combining specific primary rules with specific secondary rules that claim self-containment[19] emerge. This increases fragmentation of international law and raises confusion about the interrelation between enforcement mechanisms provided by different sources of international law and possibility to use them. The main convention - Vienna Convention on the Law of Treaties 1969[20] (hereinafter VCLT), that set out general principles applicable to international treaties, does not contain many relevant questions in the context of enforcement of international treaty implementation and, in principle, leave this issue for the parties to international treaties themselves to arrange. In addition, despite the fact, that language matters in law and it is critical that the meaning of core terms is clear from the outset, enforcement of international treaty implementation represents a case where consensual meaning might be expected to be fragile, even lacking; explanations of the issue are usually fragmented.[21] As Yang T. notes, the use of it in the literature on international law has not been consistent;[22] whereas

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[16] Hobbes T. *Leviathan*. - Forgotten Books, 2008 [1651] [interactive], p. 116. Available at http://books.google.lt/books?id=-Q4nPYeps6MC&printsec=frontcover&dq=Leviathan&hl=lt&ei=M4i8TbahCcOfOuDYqN0F&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCkQ6AEwAA#v=onepage&q&f=false [last visited 14 April 2011].

[17] As at 9 April 2010, there were over 500 major multilateral instruments, which cover a range of subject matter (Human Rights, Disarmament, Commodities, Refugees, the Environment, the Law of the Sea, etc.), deposited with the Secretary-General of the UN. These make up only a fraction of the over 40 000 international agreements currently registered with the UN and the number keeps growing steadily. See *United Nations Treaty Collection* [interactive]. Available at http://treaties.un.org/Home.aspx?lang=en [last visited 10 May 2011]; see also Russell A. M, Bratspies R. M. *Progress in International Law*. – Leiden: BRILL, 2008, p.164.

[18] See e.g. *Working for Strong International Laws and Agreements* [interactive]. Available at http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/ [last visited 14 April 2011].

[19] A self-contained regime – a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches that seeks precedence in regard to the general law. See Koskenniemi M. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"*, UN Doc. ILC (LVI)/SG/FIL/CRD.1/Add.1 (2004), p. 9. Available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf [last visited 10 May 2011].

[20] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[21] Usually, scholars analyze only particular aspects of enforcement in international law, sometimes even without any explanations of the concept in general.

[22] Yang T. *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements* [interactive], p. 1133. Available at http://students.law.umich.edu/mjil/article-pdfs/v27n4-yang.pdf [last visited 18 April 2011].

without consensual definition, the problem arise in identifying and restricting the scope of the issue. The situation can create the "Alice-in-Wonderland" quality of the definition of meaning what we want it to mean. Thus, there is a danger of reading too little or too much in what are intended as different authors use different terms while writing about the same thing and *vice versa*.

Therefore, **the object of the research** is the doctrinal conception of enforcement of international treaty and its regulation under modern international law.

The aim of the research is to provide a comprehensive analysis and assessment of enforcement of international treaty implementation and to identify the actual problems in its realization. In order to reach the aim there is a need to implement the following tasks:

1) to ascertain the meaning of enforcement and specify it in relation to international treaty implementation;
2) to determine the main challenges of implementation of international treaties and legal basis of their enforcement;
3) to provide an overview of enforcement mechanisms for implementation of international treaties existing in general international law as well as treaty-based enforcement mechanisms;
4) to analyze the impact of fragmentation of secondary rules of international law on enforcement of international treaties;
5) to analyze the possible intercourse between treaty-based enforcement mechanisms and those provided by general international law.

The hypothesis of the research. Enforcement of international treaty implementation is inconsistently defined and insufficiently regulated on international plane, thus creating additional instability in realizing the possibilities of inducing implementation of international treaty. Therefore, international community should take adequate steps to modify present situation to reflect the need for the clarity and stability of international legal order.

Methodology of the research. Due to particularity of the chosen topic the author employs, mainly, traditional theoretical methods: description, conceptual analysis, comparative analysis, critical evaluation, etc. The research is based on examination of the reports, draft articles, commentaries made by the International Law Commission (hereinafter the ILC), other official international documents, related decisions of international courts and tribunals (mainly the PCIJ, ICJ), as well as respective researches and writings of leading and less known scholars. Conceptual analysis allows understanding the content of certain legal categories (such as enforcement, implementation) and their nature and specify these categories later in the context of international law. Accordingly, in order to reveal the essence of the main

category – enforcement of international treaty implementation - the author, firstly, analyzes its doctrinal conceptions (existing mainly in the textbooks and articles in legal journals[23]) trying to find consensus definition, explores international legal acts possibly indicating it; then, using dictionary definitions, synonyms, antonyms and the mostly used conception in practice determines the generic meaning of the enforcement and specify it in accordance with the features of international law. Description is used to present the factual information concerning respective enforcement mechanisms. The legal texts of treaties, other documents as well as a number of the working documents of the International Law Commission (hereinafter ILC) are analyzed in order to compare the main components of the enforcement mechanisms, their functioning and interrelation. Legal literature is reviewed with the aim of supporting critical evaluation, ideas and arguments with the opinions of scholars and legal experts.

As for **the novelty of the topic**, it should be said that despite the rooted problem of enforcement in international law, it remained generally intractable; there are only a small number of researches which are exclusively concerned with a comprehensive analysis of the enforcement of international treaty implementation; the authors usually focus only on a particular aspects of enforcement and do not provide a broader view. The growing concern about contemporary environmental problems has brought the issue of enforcement to the surface again and attracted much attention of many international law scholars: Sands P., Brunnée J., Victor D. G. et al., Yang T., Crossen T. E., Shihata F. I, Samman A. W., Weiss E.B. and others, however, compliance and enforcement concepts are confined mostly to multilateral environmental agreements (hereinafter MEAs), which are specific in nature. What is more, since perception of the term varies amongst many authors, and a number of international legal documents do not give a clear understanding of the concept itself, most writers provide us only with a fragmented analysis of the particular aspects. Moreover, there is no comprehensive research made in Lithuanian context as well as a fresh look at the issue from the perspective of modern international law, which both moves from bilateralism to community interest[24] and suffers from high fragmentation[25] at the same time, is needed.

The structure of the research. It consists of introduction, two substantiating parts, which is divided into smaller ones, conclusions, bibliography, annotation and summary. The first part is dedicated to the general aspects of enforcement of international treaty implementation. Firstly, review of the main

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[23] See the list in Bibliography.

[24] See e.g. Simma B. *From Bilateralism to Community Interest in International Law*. Collected Courses of the Hague Academy of International Law. Martinus Nijhoff Publishers [interactive]. 1994, Vol. 250, p. 217-384. Available at Martinus Nijhoff Online http://nijhoffonline.nl/book?id=er250_er250_217-384 [last visited 14 April 2011].

[25] See e.g. International Law Commission. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. *Yearbook of the International Law Commission*. 2006, Vol. II, Part Two. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf [last visited 10 May 2011].

difficulties in defining the concepts are presented, while the author makes an overview of enforcement definitions in scholarly writings as well as dictionary definitions in order to reveal the generic meaning of enforcement and trying to specify it in the context of international treaty implementation. After defining the concepts, the main challenges in implementing treaties are provided as well as the question of legal basis for their enforcement is discussed. The second part examines the main mechanisms of international treaty enforcement available under international law and their possible interaction in a highly fragmented system. The concluding part summarizes the findings and delivers proposals on possible definitions and emphasizes the need for ensuring a better understanding of the enforcement of treaties implementation in the international sphere.

1. GENERAL ASPECTS OF THE ENFORCEMENT OF INTERNATIONAL TREATY IMPLEMENTATION

1.1. Difficulties in defining enforcement in international law.

The problem of enforcement in general and treaty enforcement in particular, has been traced back almost to the rise of international law itself.[26] This could be seen as the result of trying to understand international law as a new phenomenon at that time by drawing a parallel with more familiar system - national law, the hallmark of which is the assumption that law is law because it can be enforced,[27] while enforcement in national legal systems is commonly understood as "the use of institutionally authorized deterrent sanctions to effect compliance with the law".[28] However, following the cases when no formal enforcement actions on international plane were taken against the malefactors, feeding a lingering sense that international community is not able or lack of willingness to meet and react effectively to this kind of challenges, such issues as the vagueness and inadequacy of international law, enforcement and a very popular concept nowadays - compliance - have been explored on numerous occasions. At any rate, the result is paradoxical – not only the problem remained generally intractable, but also additional confusion over the terms used, their limits and interrelation has risen. While reading contemporary legal literature it is easy to get lost in diverse meaning and use of the terms, before continuing to "dig" deeper into the topic, it is essential to explain the meaning of the key term enforcement from the perspective of implementation of international treaty.

First and foremost, the author maintains that the parallel with national legal systems in order reveal the enforcement of international treaties can be misleading because of several reasons. In point of fact, the architecture of international legal system is very different; and most importantly, by contrast to national

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[26] See e.g. Malanczuk P., Akehurst M. B. *Akehurst's Modern Introduction to International Law*. 7th ed. – Canada: Routledge, 1997, p. 5; Yang T. *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements* [interactive], p. 1132. Available at http://students.law.umich.edu/mjil/article-pdfs/v27n4-yang.pdf [last visited 18 April 2011]; Harris A. C. *How Is International Human Rights Enforced?* Lecture. 1998, p. 1400. Available at http://www.law.indiana.edu/ilj/volumes/v74/no4/koh.pdf [last visited 17 April 2011].

[27] See e.g. D'Amato A. Is International Law Really "Law"? *Northwestern Law Review* 1985, 79 (issues 5&6), p. 1293. Available at http://anthonydamato.law.northwestern.edu/Papers-1/A853-really%20law.html [last visited 17 April 2011]; *Characteristics of Law* [interactive]. Available at http://students.law.umich.edu/mjil/article-pdfs/v27n4-yang.pdf [last visited 18 April 2011]; *Wikipedia Online Encyclopedia* [interactive]. Available at http://en.wikipedia.org/wiki/Law [last visited 18 April 2011].

[28] Yang T. *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements* [interactive], p. 1135. Available at http://students.law.umich.edu/mjil/article-pdfs/v27n4-yang.pdf [last visited 18 April 2011].

legal systems there is no central legislative as well as enforcement power on international plane. As Balekjian W. H. emphasizes, a functional necessity in keeping with the decentralized nature of international law, with the diversified background of its subjects and with the dynamics of international and inter-state legal relations determines the difference between the meanings of the same terms used in both domestic and international law systems.[29] Consequently, under the logic of semiotics,[30] the meaning of certain concepts may have different shades within each system and even each field of law. This supposes an idea that despite possible collation of the terms, the meaning of enforcement as it is used in the context of national legal systems does not necessarily correspond to the nature and purpose of international law. The implication is that because of fundamental differences, international law cannot be judged with reference to domestic law as a model, and the concepts used in international law context not necessary have the same meaning as those in domestic legal systems. Hence, specificity of international law can produce specific meanings of the terms used in its context. Therefore, enforcement of international treaty implementation should be explained not from the perspective of domestic law, but in accordance with the very meaning of the term and international legal environment, in which it is used.

Defining it, however, presents some difficulties. Curiously enough, despite the rooted problem of enforcement in international law, it is quite complicated to find a clear, coherent and circumstantial definition of the term. On the one hand, international documents usually lack formal definition of international enforcement[31] or even do not use the term at all; on the other hand, the analysis of articles of scholars in international law as well as international relations was not fruitful enough in order to predicate safely the existence of unquestionable definition of enforcement of international treaty implementation.[32]

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[29] Balekjian W. H. *The Language of International Law. Linguistic Considerations Involved in the Drafting and Interpretation of International Legal Instruments* [interactive], p. 359. Available at http://www.bibliojuridica.org/libros/1/468/35.pdf [last visited 18 April 2011].

[30] The growing importance of semiotics is demonstrated by many scholars. The recent book on the issue represents the basic idea, that *"national legal systems expressed through national languages organize the Law based on their own understanding of reality. International Law becomes, in this context, the meeting point where different legal cultures and different views of world intersect. The diversity of languages and legal systems can enrich the possibilities of understanding and developing international law, but it can also represent an instability and unsafety factor to the international scenario."* See Carvalho E. M. *Semiotics of International Law – Trade and Translation*. - Brazil: Springer, 2010, p. VII.

[31] Some treaties in the field of international environmental law or arms control law use "enforcement" meaning domestic enforcement, see e.g. Tams Ch. J. *Enforcement* [interactive], p. 2. Available at http://ssrn.com/abstract=1413848 [last visited 18 April 2011].

[32] The author analyzed as much available articles related to the securing compliance with international law as possible in order to reveal the consensus definition of enforcement in international law. It seems that majority of international scholars acknowledges that *enforcement* encompasses the *couple diabolique* - *obligation-sanction* or, in simple words, sanctions applicable in case of breach of respective obligation. However, it is possible to find a more detailed definition of enforcement in the literature on international law (especially environmental law), suggesting that a concept of enforcement as imposition of legal deterrent sanctions, or penalties, is unduly narrow. The same conclusion was reached by Professor of Law Brunnee J. See e.g. Brunnee J. *Enforcement Mechanisms in International Law and International Environmental Law* // Ensuring Compliance

The conception of enforcement of international treaties varies from the very narrow, encompassing only an institutional application of negative sanctions in case of breach of respective obligation, to the very broad one, which describes any attempt to secure implementation (sometimes even before actual breach occurs): the efforts to reveal and document failures of compliance, various bilateral interactions designed to promote compliance, private boycotts by nongovernmental organizations, and "managerial", non-punitive efforts designed to persuade and help offending states come back into compliance.[33] In the words of Bacon B. L., "[t]reaty enforcement mechanisms range from mere self-compliance reporting to non-binding recommendations and enforcement to very detailed dispute resolution provisions".[34] The variety of definitions has demonstrated that enforcement is a multi-faceted concept - it embraces a wide spectrum of means for "compelling compliance" with law. No doubt, that such practice creates a situation, where the identity of enforcement, by its very nature, is ambiguous, contestable and, thus, is vulnerable to intellectual and practical attack.

Following-up a literal interpretation of the term, general dictionary definitions of enforcement help in understanding its very meaning. Etymologically, the term is derived from Middle English *enforcen*/Old French *enforcier*, which mean to *exert force, compel*, and from *enforcir, - to strengthen, fortify*.[35] Majority of dictionaries define enforcement of law as ensuring observance of or obedience to the laws.[36] Additional survey of available dictionaries[37] shows, that it is possible to distinguish between several meanings of the term enforcement: from causing carrying out by force to the motive of conviction. Therefore, in a general sense, enforcement can encompass any thing which compels or constrains; any thing which urges that something must be done. According to the data of computed synonyms[38], the term enforcement is usually

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with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia / ed: Beyerlin U., et al. - BRILL, 2006, p. 1.

[33] Yang T. *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements* [interactive], p. 1134 (footnotes omitted).

[34] Bacon B. L. Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading through the Murk. *The Georgetown International Environmental Law Review*. 1999, 12 (issue 1), p. 333. Available at http://heinonline.org/HOL/Page?handle=hein.journals/gintenlr12&div=14&g_sent=1&collection=journals [last visited 15 May 2011].

[35] See e.g. *The Free Dictionary* [interactive]. Available at http://www.thefreedictionary.com/enforcement; Online *Etymology Dictionary* [interactive]. Available at http://www.etymonline.com/index.php?search=enforcement&searchmode=none [last visited 20 April 2011].

[36] See e.g. *The Free Dictionary* [interactive]; *Wiktionary* [interactive]. Available at http://en.wiktionary.org/wiki/enforcement; *Webster's Online Dictionary* [interactive]. Available at http://www.websters-online-dictionary.org/definitions/enforcement?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=enforcement&sa=Search#906; *Dictionary.Reference.com* [interactive]. Available at http://dictionary.reference.com/browse/law+enforcement [last visited 20 April 2011], etc.

[37] See *Webster's Online Dictionary* [interactive]. Available at http://www.websters-online-dictionary.org/definitions/enforcement?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=enforcement&sa=Search#906.

[38] Ibid.

used as a synonym for: *execution, implementation, performance, accomplishment, fulfillment, achievement, application or exercise* on the one hand, and *constraint, compulsion, coercion, force, duress, pressure* on the other hand. The reference to the antonyms of the word[39] suggests that the term embraces a kind of subjective element – intention for achievement of initial goal. The implication is that the term enforcement is usually used as a word for process of putting into effect/action/operation, encompassing some kind of additional factor which stimulates or some kind of a driving force[40] for the purpose of achieving the initial goal. Having a broad picture of the very meaning of enforcement and its use in practice, it is possible to conclude, that **enforcement is an action or process of using additional stimulus in order to cause something to be carried out successfully.**

Nevertheless, using the term in this way, it appears to be far too broad a topic in order to be discussed in a rather short contribution. Indeed, taking into account the complexity of the issue, it hardly needs to be emphasized that it is not possible to elaborate on all its manifold implications in a comprehensive way. Therefore, it would be rational and more fruitful to define more strictly what is meant by enforcement mechanism in the current thesis. In this respect, the above-given generic definition needs to be complemented in two ways. Firstly, "enforcement" here is meant to denote measures available on the international plane; thus, not covering national "enforcement" of international legal rules (e.g. by national courts) within the national legal order. Secondly, the analysis of articles related to the securing compliance with international norms, conducted in order to identify consensus definition of enforcement in international law mentioned above makes the author believe that enforcement is not widely accepted as a common practice in relations between equal sovereign states.[41] This supposes an idea that enforcement is seen as the attempts to ensure the implementation of international treaty in exceptive case – in case of prior defective or absolute non-implementation. Therefore, the definition is supplemented by objective

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[39] The reference is usually made to the words: *exempt, relieve, free, waiver,* meaning that granting relief or an exemption from a rule or requirement constitutes the opposite action to enforcement. See antonyms in ibid.

[40] This interference is made from the use of the terms such as impose, *require, urge, insist on, compel, exact, oblige, constrain, coerce, etc*. in defining enforcement.

[41] Brunnee J. remarks that majority of public international law textbooks has no entries for *enforcement* while many international environmental law textbooks list entries for *compliance*, but not for *enforcement.* See Brunnee J. *Enforcement Mechanisms in International Law and International Environmental Law* // Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia / ed: Beyerlin U., et al. - BRILL, 2006, p. 1.; Moreover, Sand P. H. pursues the matter further by making a quick overview of the terminology used in international (mostly environmental) treaties and concludes that the term sanctions is currently replaced by such words as: *countermeasures, steps and measures to induce compliance, steps for bringing about full compliance, consequences of non-compliance, potential measures, etc*., see Sand P. H. *Sanctions in Case of Non-compliance and State Responsibility: pacta sunt servanda or else?* // Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia / ed: Beyerlin U., et al. - BRILL, 2006, p. 259. These words can appear as being less emphatic and more neutral than the term sanctions. Equally, in approval to Brunnee J. and Sand P. H., the author maintains that the same is generally true for the term *enforcement*, as the authors of many textbooks of international law often avoid its direct use and/or try to replace it by less stringent concepts, such as compliance control.

(prior defective or absolute non-implementation - a breach of *pacta sunt servanda*)[42] as well as subjective (intention to bring back the non-implementing party into compliance with its *pacta sunt servanda* obligation) elements, thus limiting the spectrum of responses available on the international plane. On the one hand, measures of enforcement, therefore, are reactive, in that they respond to a case of defective or absolute non-implementation; on the other hand, such measures should consist of pressure on the defaulting state in order to induce it to alter its illegal behavior in the future, thus encompassing coercive as well as corrective aim. All things considered, **enforcement of international treaty implementation can be defined as the reaction of competent subjects of international law to a defective or absolute non-implementation of international treaty with the aim to induce the non-implementing State back into compliance with its obligation to implement international treaty (*pacta sunt servanda* rule).**

The distinction between domestic implementation and implementation from the perspective of international law[43] there merits a brief clarification. From a domestic perspective *implementing* norms facilitate the putting into effect of the provisions of international treaty; whereas, according to the author of the thesis, from the perspective of international law, implementation encompasses the variety of actions (including adoption of domestic implementing legislation when it is needed) required carrying out the commitments resulting from an international treaty **(the meaning of implementation and its content in relation to the basis for enforcement will be dealt more explicitly in section 1.3.)**. Moreover, the term compliance can have different meanings in different context; while it is used in this thesis as meaning the fulfillment of treaty, which conforms to "implementation"[44], the terms implementation and compliance can be used interchangeably in this thesis.

1.2. Consent-based view and international treaties

Following the raise of the positivist idea in the 19th century about the law as an edict of sovereign with power to enforce that law, the widely accepted proposition that international law is a set of binding legal norms regulating the relations between subjects of international law, usually between states, became highly controversial. Since inquiry into the notion of the binding force of international law encompasses an examination of the reasons why states are commanded, permitted or prohibited from undertaking certain actions and how states acquire certain rights, duties, powers or immunities against other states, including those in the field of enforcement, the question of binding nature of international treaties as one

[42] More about a breach of *pacta sunt servanda* as a ground for enforcement see in section 1.3.
[43] In this thesis implementation means implementation from the perspective of international law.
[44] As "implementation" is used in this thesis.

of the most important source of international law, thus require further explanation and justification. A pure normative nature of international treaty without its legal validity does not distinguish it from merely a moral or political request. It is important because without existence of legally binding obligation to implement international treaty, there is no need to raise an issue of legal enforcement at all. Moreover, only violations of legally binding obligations entail responsibility under international law; only unlawful acts entitle victim to countermeasures, as reprisals tend to be called today in accordance with the terminology adopted by the ILC in its codification and progressive development of the Law on State Responsibility.[45] Therefore, in order to talk about the enforcement of international treaty implementation, it is needful to find a legal basis, the nature and essence of obligation to implement international treaty.

A starting point for considering the binding force of international treaties can be the consent-based view, the essence of which is traditionally illustrated by the famous decision rendered by the PCIJ on the 7 September 1927 in *Lotus Case*[46]. In its judgment, the Court set out that the binding force of international law arises from the consent of states: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[47] In expressing their dissent from the general view of the Court on certain issues, the Vice-President of the case Weiss M. as well as Former President Loder M., however, explicitly supported the consent as international law-creating fact. In the words of Weiss M., "In reality the only source of international law is the *consensus omnium*"[48], while Loder M. added that the international law "rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions".[49] It is possible to envisage the confirmation that the consent as law-creating fact can be not only actual, but also tacit, in case of customary rules.[50] Moreover, the general presumption, existing in legal writings,[51] that intent of a

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[45] International Law Commission. *Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries*, 2001. Yearbook of International Law Commission, Vol. II, 1966. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[46] *S.S. Lotus Case (France v. Turkey)* (Judgment) [1927] PCIJ Rep. Series A No. 10. Available at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf [last visited 10 May 2011].

[47] Ibid. para. 44.

[48] *S.S. Lotus Case (France v. Turkey)* (Dissenting opinion by M. Weiss) [1927] PCIJ Rep. Series A No. 10, p. 6-7. Available at http://www.icj-cij.org/pcij/serie_A/A_10/32_Lotus_Opinion_Weiss.pdf [last visited 10 May 2011].

[49] *S.S. Lotus Case (France v. Turkey)* (Dissenting opinion by M. Loder) [1927] PCIJ Rep. Series A No. 10, p. 34. Available at http://www.icj-cij.org/pcij/serie_A/A_10/31_Lotus_Opinion_Loder.pdf [last visited 10 May 2011].

[50] The author maintains that in such cases it is better to call it assent.

party to create legally binding documents is a determinative factor for considering it a treaty under the VCLT indirectly confirms the consent-based view.

Nevertheless, the position in *Lotus Case* was later criticized by some scholars; e.g. Brierly J. stated that *"*consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting."[52] It is worth to mention, that those, who criticize the consent-based theory and deny binding nature of international law, cannot, however, decisively explain, why states conclude international treaties, comply with their provisions and even creates some mechanisms and formal institutions[53] giving them the power to secure implementation of their provisions (enforcement power). It seems logical that if states do not believe that their consent can create binding obligations, they would not engage in the often painstakingly long negotiations to formulate all the details of treaties. Moreover, recent empirical testing shows that not strong enforcement mechanisms decreases treaty participation, but the specificity of obligations tends to have such an effect.[54] The author maintains that this interference confirms that states avoid entering into particular treaties, which they do not want to implement, because they believe in legal validity of their consent to create them obligations of binding nature, not because they fear enforcement mechanisms provided by those treaties.

In addition, the opponents of the consent-based view sometimes criticize it by asking how treaties can purport to bind a party that wishes to withdraw its consent if consent is the basis of treaties.[55] Making no pretension to find an absolute verity, the author does not see much discrepancy between the argument that parties consent not only to the particular terms of a treaty, but also to the general notion that their consent may not be withdrawn without permissible legal ground and the existing regulation under the VCLT. Accordingly, its third preambular paragraph recognizes the universality of the principles of free

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[51] For instance, according to Aust A., the decisive factor for legal effect of international treaty is an intention of negotiating parties to make the instrument to be binding in international law. See Aust A. *Modern Treaty Law and Practice*. 2nd ed.- Cambridge: Cambridge University Press, 2007, p. 23-24; Basically the same conclusion was reached by the ECHR, which in the reservation *v.* interpretative declaration debate concluded that in order to establish the legal character of a document, one must look behind the title given to it and seek to determine the substantive content. See *Bellilos v. Switzerland*, 29 April 1988, § 48-49, ECHR Series A, no. 132; Kllabers J. acknowledges the existence of virtual unanimity among international lawyers that intent is one of the main determinants of international legal rights and obligations. See Kllabers J. *The Concept of Treaty in International Law*. - Martinus Nijhoff Publishers, 1996, p. 65.

[52] Op cit: Capps P. M. *The Binding Force of International Law* [interactive]. Available at http://ivr-enc.info/index.php?title=The_Binding_Force_of_International_Law [last visited 10 May 2011].

[53] The author of the thesis maintains that the most notable examples, for instance, are the creation of the ICJ, ICC etc.

[54] See e.g. Bernauer Th., et al. *Is There a Depth versus Participation Dilemma in International Cooperation.* APSA 2010 Annual Meeting Paper [interactive]. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641748 [last visited 18 April 2011].

[55] Smith E. M. Understanding Dynamic Obligations: Arms Control Agreements. *Southern California Law Review.* 1991, 64(6), p. 1566-67. Available at http://heinonline.org/HOL/Page?handle=hein.journals/scal64&div=44&g_sent=1&collection=journals [last visited 14 April 2011].

consent and of good faith and the *pacta sunt servanda* rule.[56] In addition, the *pacta sunt servanda* rule and the good faith principle are directly enshrined in Article 26,[57] while the principle of free consent, derived from the sovereignty and equality of states[58] is not explicitly mentioned elsewhere in the Convention. However, according to Villiger M. E., Article 52[59] could be seen as an expression of principle of free consent, while reflections can also be found in the principle of good faith as well as Articles 1, 2 (1b), 6, 11-16, under which every state may equally establish consent to be bound by a treaty on the international plane.[60] Systematic analysis of these principles and their appraisals in the provisions of the VCLT confirms that the binding force of international treaty is generally derived from the free will of parties to create and bind themselves by international legal obligations. Thus, in general, once a party gives its consent to be bound[61] by a particular treaty and that treaty enters into force[62], the treaty is obligatory and the party cannot freely renounce it. In the light of these facts, the author maintains that following the codification of the Law of Treaties, the consent-based view on the binding nature of international treaties has been formalized and epitomized in the VCLT.

What is more, all these principles: the principle of free consent, good faith and *pacta sunt servanda* rule, can also serve as a starting point for considering the existence of obligation to implement international treaties, its nature, content as a basis for enforcement and its limits.

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[56] Preamble of VCLT para.3.

[57] It is also enshrined in the Preamble to the Charter of the United Nations, Article 2(2) expressly provides that Members are to *"fulfil in good faith the obligations assumed by them in accordance with the present Charter"*, see Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945). 33 UNTS 993; as well as Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations (adopted 24 October 1970). GA Res. 2625, 25 UN GAOR Supp. 18 122; 65 AJIL 243 (1971).

[58] Henkin L., however, calls it the principle of autonomy. See Henkin L. *International Law – Politics and Values*. - Martinus Nijhoff Publishers, 1995, p.28

[59] Article 52 of the VCLT states: *"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations"*.

[60] Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. – Leiden: BRILL, 2009, p. 48.

[61] See VCLT, in particular Articles 11-16.

[62] VCLT, Article 26. See, however, Article 18, according to which during the time between ratification and entry into force, the state remains partly bound under the same obligations generated by its signature of the treaty.

1.3. Obligation to implement international treaties and its breach as a basis for the enforcement. The meaning of implementation

As justification of binding nature of treaties based on the consent theory shows, the obligation to implement treaties lies at the heart of *pacta sunt servanda* - an undisputable[63] rule of international law. According to Lukashuk I., from the political point of view, it may be seen as the expression of the need perceived by states for an international legal system that can ensure international order and prevent arbitrary behavior and chaos; whereas in the legal sphere, the principle confirms the character of international law as law.[64] Therefore, existence and meaning of the principle to fulfill obligations and its subsidiary rules are determined by the requirements of the international community. Accordingly, Villiger M. E. distinguishes three legal bases of the norm[65]: 1) contractual basis, which means that parties sometimes expressly provide it in a particular treaty or it can be derived from the underlying promise, the principle *do ut des* and the mutual interest which states have in maintaining the relationship of rights and obligations in the treaty; 2) the VCLT itself, which expressly provides it in Article 26; 3) customary rule underlying *pacta sunt servanda.* The origin of *pacta sunt servanda* is interestingly explained by Henkin L., who is widely considered one of the most influential contemporary scholars of international law. He maintains, that it was not created by any treaty; the origin is not even the customary rule, but it is a rule of constitutional nature, which existed simultaneously with or even before the birth of other rules and even state practice; the sense of legal obligation was implicit, inherent, in statehood, in state system.[66] If we accept such constitutional nature of *pacta sunt servanda*, thus, legal bases distinguished by Villiger M. E. could be seen as articulations, confirming its legal validity. Moreover, the facts that most theories of jurisprudence acknowledge the *pacta sunt servanda* rule as the most basic norm of customary law[67], the recognition of its universal acceptance[68] and emphasized importance by all states at the Vienna conference in 1968/1969 only confirms that Article 26 of the VCLT is a formal codification of an older rule.

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[63] No case is known in which a tribunal has repudiated the rule or questioned its validity. See the Commentary, p. 363; moreover, according to many authors, *pacta sunt servanda* is found in all legal systems, in all periods of history, in all cultures, in the judicial orders of all sovereigns, and in all religions, see e.g. Gormley W. P. *The Codification of Pacta Sunt Servanda by the International Law Commission: the Preservation of Classical Norms of Moral Force and Good Faith.* Saint Louis University Law Journal. 14(3), 1970, p. 373; Wehberg H. *Pacta Sunt Servanda.* [interactive] The American Journal of International Law, Vol. 53, No. 4 (Oct., 1959), p. 775-786. Available at http://www.jstor.org/stable/2195750 [last visited 29 April 2011].

[64] Lukashuk I. The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law. *The American Journal of International Law*. 1989, 83(3), p. 513. Available at: http://www.jstor.org/stable/2203309 [last visited 16 June 2010].

[65] Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. – Leiden: BRILL, 2009, p. 366.

[66] Henkin L. *International Law – Politics and Values*. - Martinus Nijhoff Publishers, 1995, p.31-32.

[67] Villiger M. E. *op. cit.*, p. 371-373.

[68] Third preambular paragraph of the VCLT.

Therefore, without denying these three bases, the author still believes that it would be more proper to arrange them in the following sequence: customary rule – contractual basis (including VCLT). According to the author of the thesis, none of them conflict with the rationale of consent-based theory about the binding nature of international law. By contrast, the ultimate conclusion drawn from this analysis is that the ILC has drawn upon and codified an old universally accepted rule. Professor Lissitzen observes that *pacta sunt servanda* is also incorporated into Article 38(1)(a) of the Statute of the ICJ[69], arguing that this provision means that states are bound by the norms of valid and existing treaties which they have expressly accepted.[70] Thus, it is generally accepted that by participating in international legal system, states have agreed, in accordance to one or more legal basis, that they are bound by treaty obligations to which they have given their consent.

Accordingly, the *pacta sunt servanda* rule applies without exception to every treaty including its annexes and appendices; however, as it was stated by the commentator of the VCLT, the application has certain limits.[71] It means that there are certain conditions under which obligation to implement international treaty arises for a particular state. *Pacta sunt servanda* "only relates to the fulfillment of existing obligations"[72], which means that the rule is not applied during the phases of the conclusion of the treaty (but good faith has a role to play e.g. under Article 18 of the VCLT) and it ceases to apply once the treaty has been lawfully terminated or is invalid or rendered inoperable in accordance with the provisions of the VCLT. A particular case is that *pacta sunt servanda* also applies to the provisional application of a treaty as in Article 25 of the VCLT.[73]

Since both *pacta sunt servanda* and *good faith* are embodied in the same Article 26 of the VCLT, the relationship between *pacta sunt servanda* and *good faith* is rarely clearly explained. As it was already stated, the rule *pacta sunt servanda* is generally understood as meaning that valid treaties are binding on the parties to them, in other words, it is a command to execute an obligation, however, the content of that obligation is not actually determined.[74] In the context of treaty implementation it means the abstract obligation to give practical effect to treaty provisions. The principle of good faith, on the other hand, as the main component of *pacta sunt servanda* has a broader role. It serves to delimit the contents of the

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[69] Statute of the International Court of Justice (adopted 26 June 1945 as integral part of Charter of the United Nations). 3 UNTS 993.
[70] Gormley W. P. The Codification of Pacta Sunt Servanda by the International Law Commission: the Preservation of Classical Norms of Moral Force and Good Faith. *Saint Louis University Law Journal*. 14(3), 1970, p. 376.
[71] Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. – Leiden: BRILL, 2009, p.365.
[72] *Land and Maritime Boundary (Camerron/Nigeria) Case*, ICJ Reports 1998 301, para. 49.
[73] Villiger M. E. *op. cit.*, p.365.
[74] Kunz J. *The Meaning and Range of the Norm Pacta Sunt Servanda*. The American Journal of International Law, Vol. 39, No. 2 (1945). American Society of International Law, p. 180-182. Available at: http://www.jstor.org/stable/2192340 [last visited 18 April 2011].

obligation, to correct defects of will or formality where fairness demands it, and to enlarge the domain of obligatory acts in international law. Good faith is thus a reconciling principle of law which founds and legitimizes other rules including *pacta sunt servanda, rebus sic stantibus* and others (e.g. it is possible to imagine the intervention of good faith to apply Article 18 of the VCLT and decide whether or not a party's behavior was intended to defeat the object and purpose of a treaty).[75] In simple terms, *pacta sunt servanda* indicates the existence of international legal requirement to fulfill international treaties, whereas the principle of good faith denotes the framework content of that requirement, or the guidance on how it should be implemented. Consequently, the principle of good faith fulfillment of assumed obligations is objectively needed and is called *jus necessarium* by Lukashiuk I.[76] However, since consent is the only way to establish rules that legally bind sovereign states, the principle of good faith fulfillment of obligations derives from, and is kept in force by, the general consent of states. The detailed content of the principle can also be seen to be developing on a consensual basis.

The Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States contains several references to good faith in the context of treaty implementation, including the following: "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' (emphasis added)[77]. More or less the same provision can be found in Article X of the Final Act of the Conference on Security and Co-operation in Europe[78] (1975): "The participating States **will fulfill in good faith** their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those **obligations arising from treaties or other agreements**, in conformity with international law, to which they are parties' (emphasis added). The same Article further details that "In exercising their sovereign rights, including **the right to determine their laws and regulations**, they will conform to their **legal obligations** under international law;" (emphasis added). The latter provision shows that in exercising their sovereign rights, states must conform to their international obligations. In the context of treaty implementation, special attention is paid to the sovereign rights to adopt laws and regulations, recognizing the fact that national legal rules are of crucial importance

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[75] Goodman C. *Acta Sunt Servanda or Else?* A Regime for Unilateral Acts of States at International Level. A paper at the 2005 ANSZIL Conference [interactive], p. 23-24. Available at http://law.anu.edu.au/CIPL/Conferences&SawerLecture/05%20ANZSIL%20Papers/Goodman.pdf [last visited 05 April 2011].
[76] Lukashuk I. The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law. *The American Journal of International Law*. 1989, 83(3), p. 513. Available at: http://www.jstor.org/stable/2203309 [last visited 16 June 2010].
[77] Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970) 124.
[78] Article X. Conference on Security and Co-operation in Europe Final Act, Helsinki (adopted 01 August 1974).

for implementing international obligations. Furthermore, Lukashiuk I. emphasizes that "<…> the accepted formulation is "obligations under international law". In jurisprudence, the term "obligation" is not equivalent to the term "duty", since the former includes not only duties, but also relevant rights."[79] Therefore, rights should be exercised in good faith as well.

The ICJ has interpreted the good faith requirement, provided in Article 26 of the VCLT, as meaning that the "<…> purpose of the Treaty, and the intentions of the Parties in concluding it, …should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."[80] Commentators of the Draft articles on the Law of Treaties with commentaries adopted by the ILC note that the arbitral tribunals basically follow the same approach and quote the decision in the *North Atlantic Coast Fisheries arbitration* as one of many examples.[81] In this case the Tribunal dealing with Great Britain's right to regulate fisheries in Canadian waters in which it had granted certain fishing rights to United States nationals by the Treaty of Ghent, said: "<…> from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty"; the Tribunal also referred expressly to "the principle of international law that treaty obligations are to be executed in perfect good faith".[82] In drafting the VCLT 1969, the Special Rapporteur stated in relation to this provision that the main idea was to create the duty for the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.[83] This suggests that a state may violate the obligation to perform treaties in good faith even if it does not violate the "letter" of the treaty. Thus, if we consider implementation process in its widest sense, the requirement of good faith fulfillment demands not only to fulfill international obligations, but also to refrain from acts that could defeat the object and purpose of such an obligation and from any other acts preventing its implementation. What is more, Article 27 of the

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[79] Lukashuk I. The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law. *The American Journal of International Law*. 1989, 83(3), p. 514. Available at: http://www.jstor.org/stable/2203309 [last visited 16 June 2010].

[80] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*(Judgement) I.C.J. Rep. 1997, p. 7. Available at http://www.icj-cij.org/docket/files/92/7375.pdf [last visited 16 June 2010].

[81] Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. – Leiden: BRILL, 2009, p. 31.

[82] The quotes from (1910) *Reports of International Arbitral Awards*, vol. XI, p. 188, as indicated in International Law Commission, Draft Articles on the Law of Treaties with Commentaries. *Yearbook of the International Law Commission*, 1966, vol. II, p. 31 Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [last visited 10 May 2011].

[83] International Law Commission. *Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 196*. UN Conference on the Law of Treaties. Second session. Vienna, 9 April-22 May 1969. Summary records of the plenary meetings and of the meetings of the Committee of the Whole. New York, 1970. Available at http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/vol/english/2nd_sess.pdf [last visited 10 May 2011].

VCLT as a progressive development of the *pacta sunt servanda* rule and its clarification[84] provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This principle was endorsed by the arbitral award of 14 September 1872 in the *Alabama Claims Arbitration*[85] and has frequently been recalled since the PCIJ put it in its Advisory Opinion in the *Greco-Bulgarian Communities Case* that "<…> it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[86] Again, in the question of the *Treatment of Polish Nationals in Danzig*, the Court concluded: "<…> a state cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[87] This principle was also reiterated in another *Advisory Opinion of April 26, 1988, related to the impending closure by the United States of the PLO Mission to the United Nations in New York*.[88]

The implication is that, the obligation to fulfill the provisions flowing from international treaties and the consequent incurring a responsibility for failure to do so is clearly a matter for international law. As opposed to that, the concrete mechanisms by which States implement international rules is largely left by international law to be regulated by national law. According to this, it is possibly true to say that because the VCLT use the term performance, implementation of international treaties in legal literature is mainly associated with the adoption of national legislative measures through which international treaty provisions are given practical effect on national plane.[89] National legislative measures indeed play a crucial role in

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[84] The principle was not included in the final ILC Draft 1966 on the Law of Treaties on the ground that the point fell within the law of state responsibility rather than the law of treaties. See Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. – Leiden: BRILL, 2009, p. 371; however, in the 1968/1969 Vienna Conference it was introduced by Pakistan as an amendment, the the purpose of which had been to add to the principle *pacta sunt servanda* the additional principle that no party to a treaty might invoke the provisions of its constitution or its laws as an excuse for its failure to perform the international obligation it had undertaken. A number of delegations had agreed that that was a generally recognized principle in international law, and the Committee of the Whole at its 29th meeting had approved the Pakistan amendment by 55 votes to none. The Drafting Committee, however, had recommended that the Pakistan amendment should be embodied in a new article immediately following article which embodies *pacta sunt servanda* rule. See UN Conference on the Law of Treaties. Second session. Vienna, 9 April-22 May 1969. *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*. New York, 1970, p. 53-53. Available at http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/docs_e.html [last visited 11 May 2011].

[85] Arbitral award of 14 September 1872 in the *Alabama Claims Arbitration* between Great Britain and the United States.

[86] *Greco-Bulgarian "Communities" (Advisory opinion)* [1930] PCIJ Series B No. 17, p. 32. Available at http://www.icj-cij.org/pcij/serie_B/B_17/01_Communautes_greco-bulgares_Avis_consultatif.pdf [last visited 08 June 2010].

[87] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory opinion)* [1932] PCIJ Series A/B No. 44, p. 24. Available at http://www.icj-cij.org/pcij/serie_AB/AB_44/01_Traitement_nationaux_polonais_Avis_consultatif.pdf [last visited 08 June 2010].

[88] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) ICJ Rep. 1988, p.34-35. Available at http://www.icj-cij.org/docket/files/77/6729.pdf [last visited 08 June 2010].

[89] See e.g. Scheinin M. International Human Rights Norms in the Nordic and Baltic Countries. Martinus Nijhoff Publishers, 1996, p. 14; Woodward, A. National Implementing Laws for Arms Control and Disarmament Treaties. [interactive], p. 14. Available at http://www.vertic.org/assets/YB03/VY03_Woodward.pdf [last visited 12 June 2010]; Woodward A. *National*

the implementation process, e.g. by enhancing a credibility of state, its international relations in other areas and helping to publicize treaty obligations generally among the public, not least, legislators themselves.[90] However, the author maintains that this is domestic implementation constituting only a small part of performance (fulfillment of one particular obligation) and a precondition to overall implementation in case of non-self executing treaties. Therefore, it is crucial to point out, that the term *implement/implementation* from the perspective of international law is used in a much wider sense.[91] According to Sands Ph., states implement their international commitments in three distinct phases: firstly, by adopting national implementation measures; secondly, by ensuring that national measures are complied with by those subject to their jurisdiction and control; thirdly, by fulfilling obligations to the relevant international organizations, such as reporting the measures taken to give effect to international obligations.[92]

To sum up, substantiation of legally binding *pacta sunt servanda* rule, subsequent analysis of its limits and content on the one hand, and the generic essence of the term *implementation*[93], variety of measures for implementing treaty and description of implementation process given above on the other hand, affords a ground for making several conclusions. Firstly, it gives more comprehensive view of what does the implementation of international treaty from the perspective of international law mean. Accordingly, **obligation to implement an international treaty as it is used in this thesis can generally be defined as the obligation to fulfill the valid international treaty not only by observance of/or compliance with and performance of obligations provided by its provisions *in a reasonable way and in such a manner that its purpose can be realized*, but also by refraining from acts that could defeat**

Implementing Laws for Arms Control and Disarmament Treaties [interactive]. Available at http://www.vertic.org/assets/YB03/VY03_Woodward.pdf [last visited 12 June 2010].

[90] Woodward, A. *op. cit.*, p. 153.

[91] The analysis of various state reports on implementation of treaties suggests that putting international treaties into practice often entails a complex process, encompassing a) conduct a comprehensive review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international treaties to which it is a party; b) monitor progress made in promoting the enjoyment of the rights set forth in the treaties in general; c) identify problems and shortcomings in its approach to the implementation of the treaties; d) assess future needs and goals for more effective implementation of treaties; and e) plan and develop appropriate policies to achieve these goals. While it is required from States Parties to review all the points mentioned above in their reports on treaty implementation, all these activities may be seen as part of the implementation process in its wider sense. See e.g. State reports under core Human Rights treaties.

[92] Sands Ph. *Principles of International Environmental Law.* 2nd ed. - Cambridge University Press, 2003, p. 174.

[93] Etymologically, the term *implement* derives from Late Latin word *implementem*, (the mid 15th. century), which means "a filling up", from Latin *implere* – "to fill". The term survives in Scots law, meaning full performance or "fulfillment" of a contract, agreement, etc., as well as "to carry out, perform", see *Online Etymology Dictionary* [interactive]. Available at http://www.etymonline.com/index.php?search=implementation&searchmode=none [last visited 10 June 2010]. Accordingly, dictionaries traditionally define the term *to implement* as "to put into practical effect; carry out; accomplish", see e.g. *Dictionary.Reference.com* [interactive]. Available at http://dictionary.reference.com/browse/implement [last visited 10 June 2010]; *Wikipedia Online Encyclopedia* [interactive]. Available at http://en.wikipedia.org/wiki/Implement [last visited 10 June 2010], etc. To sum up, the concept *to implement* generally means to give practical effect to and ensure of actual fulfillment by concrete measures that corresponds to the term performance under VCLT.

the object and purpose of such an obligation and from any other acts preventing its implementation.[94] Thus, the author maintains, that from the perspective of international law the terms *implementation* and *performance* of international treaties can be used interchangeably.

Secondly, the concept of obligation logically requires the concept of breach. Since the obligation is to implement international treaty, its breach accordingly would be non-implementation or defective implementation. Indeed, when a treaty is not implemented or is implemented inappropriate, "the desired exchange of values is not occurring in accordance with the treaty; the legitimate expectations engendered by the treaty are being thwarted, and the treaty is being breach".[95] Moreover, in line with the principles of State's responsibility, a breach (an internationally wrongful act of a State) may consist of one or more actions or omissions or a combination of both.[96] The interference from the definition of obligation to implement treaty given above is that non-implementation or defect implementation (a breach) of a treaty may occur through an act (activity) as well as omission (passivity) of a party. Any positive action inconsistent with the provisions of a treaty, expressly or in any way at variance with the object and purpose of the treaty, is a breach of both the treaty itself and the *pacta sunt servanda* rule. This can manifest through the enactment of inconsistent national implementing measures (legislation) or undertaking of any other activities that violate the spirit of the treaty, i.e. doing those things which the treaty outlaws; passively, it may occur through the failure to adopt required national implementing measures[97] and create a proper environment for the implementation of treaty provisions. It is irrelevant which organ or agent of the state is engaged in those activities deemed a breach of the treaty, as long as the breach is attributable to the author as an *"Act of State"*. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.[98]

What is more, the *pacta sunt servanda* rule and a principle of good faith together with Article 27 of the VCLT denying possibility to invoke the provisions of internal law to avoid responsibility for the observance of its treaty obligations and in particular to justify its failure to implement it not only place

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[94] The author of the thesis suggests calling observance of/compliance with the provisions of treaty by refraining from certain actions - a passive implementation, while fulfillment of obligations by taking some permissible actions – active implementation (performance).

[95] Chinkin Ch. Non-performance of International Agreements. *Texas International Law Journal.* 1982, 17(3), p. 387. Available at http://heinonline.org/HOL/Page?handle=hein.journals/tilj17&div=25&g_sent=1&collection=journals [last visited 10 April 2011].

[96] International Law Commission, Draft Articles on the Law of Treaties with Commentaries. *Yearbook of the International Law Commission,* 1966, vol. II, p. 32. Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [last visited 10 May 2011]. The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation, see ibid., p. 54.

[97] Ibid., p. 57.

[98] Ibid., p. 54.

legal obligation upon parties to a particular treaty to implement it, but also serves as a basis for enforcement. If the members joined a treaty without coercion and in full knowledge of the terms, they must fulfill the obligations established by those treaties. Breaching them can result in some kind of response.[99]

1.4. Challenges to the implementation of international treaties. Reasons of non-implementation

The analysis of binding nature of international treaties as well as principle that treaties must be fulfilled in good faith shows that treaties generally regulate legal relationships between the parties by creating rights and imposing obligations for them. The famous quote of Henkin L. states, that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"[100]. Contrary to such theoretical assumptions, contemporary global problems show, that states do not take all rules of international law with the same degree of seriousness, either in their adoption or adequate implementation. Indeed, the problem of translating States' legal obligations into action is common to all areas of international law. Since the question how and why states and other actors on the international plane behave in the ways that they do, thus including why States implement or not, international treaties, is usually attributed to international relations[101] and politics; however, these questions should also be important for international law and international lawyers as the relationship between international legal norms and behavior of subjects of international law is reversible and undeniable. It is also necessary for international law to understand why States do not implement treaties or implement them inadequately because this raises important questions of appropriate boundaries of international regulation. Therefore, international law cannot successfully regulate international affairs

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[99] A principle that a breach of international law by a State entails its international responsibility was endorsed in jurisprudence: PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States". The ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case, in the *Military and Paramilitary Activities in and against Nicaragua* case, and in the *Gabcíkovo-Nagymaros Project* case. The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*, and on the *Interpretation of Peace Treaties (Second Phase)*, in which it stated that "refusal to fulfill a treaty obligation involves international responsibility". Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases, in the *Dickson Car Wheel Company* case, in the *International Fisheries Company* case, in the *British Claims in the Spanish Zone of Morocco* case and in the *Armstrong Cork Company* case. In the *"Rainbow Warrior"* case, the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility". See ibid.

[100] Henkin L. *International Law – Politics and Values*. - Martinus Nijhoff Publishers, 1995, p. 47.

[101] Insofar as international law and international relations are considered as distinc disciplines. More about the relationship between International law and International relations, see e.g. Çalı B. *International law for international relations: foundations for interdisciplinary study* [interactive]. Available at http://www.oup.com/uk/orc/bin/9780199558421/cali_ch01.pdf [last visited 15 May 2011].

without understanding how a particular norm came to be accepted in the first place. Each discipline needs to inform the other in order to be successful.[102]

Systematic analysis of the VCLT in relation to implementation of international treaty suggests that international law cares about the result – working treaties; however, it does not provide any concrete methods of their implementation. Moreover, the VCLT as a codification and progressive development of the Law on Treaties unfortunately says little about the enforcement of international treaty in case of non-implementation. Accordingly, while it is obligatory according to *pacta sunt servanda* rule to fulfill all international obligations under valid treaty, so long as they are fulfilled in good faith, methods of fulfillment are of little importance to international law. Theoretically it means that the question of choosing concrete implementation method falls exclusively under each particular state's policy and practice. Since treaties are concluded amongst sovereign states, such kind of discretion can be seen as an effort to keep in harmony with the doctrine of sovereignty. This leads to the application of international treaties in state territories from the viewpoints of their respective theories.[103] The author believes, that this is important in considering challenges to the implementation of international treaties, because, according to Alam M. S., "[t]he concept of giving full freedom to the State Parties to choose their own methods of implementation of treaties is risky and basically flawed".[104] Relying on formal differences between international law and domestic law, many states have attempted to avoid direct application, and have devised their own methods under various theories and doctrines like transformation, specific adoption, implementing legislation etc.; and by so doing have sought to gain more freedom of action on how and to what extent they would apply international law.[105] Therefore, self-created methods as the results of divergent constitutional necessities, state practices may be too many and often lead to taking advantage of the weaknesses of international law with the resultant tendencies of deviation from international commitments.[106] Accordingly, the author of the thesis assents to the idea that the methods of implementation ought to be as far as possible uniform, well known, transparent, and not complicated by widely divergent constitutional concepts, that would guarantee proper and effective implementation of

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[102] See e.g. Çalı B. *International law for international relations: foundations for interdisciplinary study* [interactive]. Available at http://www.oup.com/uk/orc/bin/9780199558421/cali_ch01.pdf [last visited 15 May 2011].
[103] Usually monism and dualism. It should be noted that no country can be identified as totally monist or totally dualist, nor do the states consciously adhere to one or the other view.
[104] Alam M. S. Enforcement of International Human Rights by Domestic Courts: A Theoretical and Practical Study. *Netherlands International Law Review.* 2006, 53(issue 3), p. 411. Available at http://journals.cambridge.org/action/displayFulltext?type=1&fid=586152&jid=NLR&volumeId=53&issueId=03&aid=586148&bodyId=&membershipNumber=&societyETOCSession= [last visited 05 May 2011].
[105] Ibid., p. 409-412.
[106] Ibid.

treaties. What is more, other specific reasons can be identified for the failure to implement international treaties.

First, lack of interest to implement treaty. Sometimes states join treaties not in order to tackle a particular international issue, but because of the pressure to do so and because such action is universality expected. For some states it is simply a matter of joining the queue at UN headquarters on the day the treaty is opened for signature in order to demonstrate their "*bone fides"*. It is admitted that with respect to human rights treaties states sometimes become state parties without any intention of implementation, perhaps in order to appease a domestic or international constituency.[107] Shihata F. I. explains the situation stating that treaties regarding the crucial interest of states, such as financial matters, territory, etc., are discussed with utmost care by the officials concerned in all relevant ministries and are often subject to parliamentary approval. Thus, once they are approved, these treaties are usually honored in practice. Furthermore, according to him, multilateral conventions, by contrast, concerning global issues such as the environment, much like human rights conventions, have been left in many countries to foreign affairs officials who may be more concerned with the public image of the state if it questioned or rejected the rules, rather than about the actual prospects of their application. This phenomenon may be more relevant to the less developed countries which also lack strong internal mechanisms for self-enforcement.[108] Furthermore, as Victor D. G., Raustiala K., Skolnikoff E. B. researches show, in most areas of international law, public interest groups increasingly participate during negotiations to form legal instruments and rush their government to become a party to a particular international treaty, which reflects their interests. However, sometimes, they are surprisingly inactive during the implementation process; it is rare for such groups to serve as "watchdogs" to verify that nations have implemented their international commitments.[109] Moreover, there are some areas of international relations, where the national self-interest of states is perceived as being more important than the needs of international community, e.g. the implementation of treaties prohibiting weapons which these states have never developed or possessed is often of lower priority than the implementation of treaties which directly affect their national - primarily economic - interests. It is not surprising that in such cases states have allowed their implementation activities to lapse immediately after joining a treaty.

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[107] Chayes A., Chayes A. H. *The New Sovereignty – Compliance with International Regulatory Agreements*. - Harvard University Press, 1998, p.187.

[108] Shihata I. F. Implementation, Enforcement, and Compliance with International Environmental Agreements – Practical Suggestions in Light of the World Bank's Experience. *The Georgetown International Environmental Law Review*. 1996, 9(1), p. 39. Available at http://heinonline.org/HOL/Page?handle=hein.journals/gintenlr9&div=8&g_sent=1&collection=journals [last visited 14 April 2011].

[109] Victor D. G., et al. *The Implementation and Effectiveness of International Environmental Commitments – Theory and Practice*. - Cambridge: MIT Press, 1998, p. X.

Second, inability to implement particular treaty. Many states simply lack the capacity to fulfill all their international obligations and some treaties do not offer assistance for capacity building. This is particularly important for small or developing states with small bureaucracies and limited resources. Sometimes they do not take into consideration the fact, that their compatible institutions are weak or even non-existent, before entering into international treaties. Often a country adopts an international accord without a clear plan for putting the commitments into practice.

There are also generic problems which may impede the implementation process in every state. For example, the process of adopting legislation usually necessitates the co-operation of many government departments and agencies in formulating policy and reviewing draft legislation before it is considered for adoption. This requires significant time, effort, resources and political will, any or all of which may be deficient. Also, parliamentary procedures for considering draft legislation, integrating amendments and adopting final legislation can be time-consuming and may compete with other urgent priorities. Using consultants to draft legislation can be problematic, too, as they may not fully appreciate relevant indigenous issues. Their use may also detract from attempts to build legislative drafting capacity among local staff.

Another important reason for treaty failure is the lack of study of arrangements to deal with cases of non-implementation when they are detected. This is presumably because the negotiating states never want themselves to be subject to measures such as sanctions but also because of wishful thinking on the part of treaty-makers that document with its elaborate verification provisions, will automatically be complied with.[110] The reaction to non-implementation thus tends to be *ad hoc*, rather than systematic. This gives no guide to potential violators about what to expect and therefore robs the system of a certain degree of deterrent power. It also causes confusion among those faced with dealing with non-implementation. Moreover, there is no clear regulation under international law, providing what are available measures to be taken in order to secure implementation of a particular treaty. The VCLT focuses mainly on the functioning of international treaties in good faith, providing little guidance about the enforcement of treaty implementation. So the question arises what is to be done about treaties that are not working well and which are suffering non-compliance problems or at risk of doing so. Some of the answer involves amending or adding to existing treaties, always a fraught and slow exercise and some involves supplementing the system with non-treaty mechanisms and arrangements. The author of the thesis focuses

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[110] *Why Treaties Work, Don't Work and What to do About It?* Presentation to Canadian Institute of International Affairs (CIIA), Wednesday, 25 January 2006 [interactive]. Available at http://www2.carleton.ca/cctc/ccms/wp-content/ccms-files/ciia_present_06.pdf [last visited 17 April 2011].

on the opportunities to secure implementation of international treaties through the enforcement mechanisms provided under international law.

To sum up, international legal system with its uniqueness lacking a centralized enforcement body with reliable coercive authority must depend upon politics for its efficacy far more than does any body of domestic legal rules. Thus, the invocation of knowledge provided by international relations and internationally oriented theories of political science of why States implement international treaties or not, and what are the main challenges therein, helps to understand the barriers for effective functioning of international norms and the main problems of existing regulation. One more little point should be made here. The author believes that the overview of reasons of non-implementation of international treaties or their implementation at an unacceptable level also shows that it is possible to distinguish between two types of failure. The first type could be called as an intentional non-implementation/defective implementation of international treaty, whereas the second type – non-intentional failure to implement treaty at an acceptable level, or objective incapacity. Accordingly, it should be taken into account in developing and applying particular enforcement mechanisms, because the cause of non-implementation influences the effectiveness of particular enforcement mechanism. While the best response to objective inability to implement treaty may be entirely “soft” measure, such as dialogue and financial assistance, intentional implementation failures may require “harder” response.

2. MECHANISMS FOR THE ENFORCEMENT OF INTERNATIONAL TREATY UNDER INTERNATIONAL LAW

2.1. Regulation of enforcement of international treaty implementation

While international law has never been wholly dependent on a system of institutionalized enforcement[111], the questions, what, however, of the methods which international law does possess for enforcing international treaty implementation and where they can be found, arise. Unfortunately, there is no comprehensive regulation in international law already adopted. Specificity of subjects, particularity of sources corresponding to specific origin of bindingness of international law conditions its unique architecture. Balekjian W. H. notes that because of the diverse historical, cultural and ideological backgrounds of its subjects, in the first place states, international law does not have a sufficient degree of internal coherence and homogeneity.[112] The ILC also holds that international law is "inherently a law of a fragmented world"[113]. There is no central legislative body who can adopt legislation binding upon all international community and international law largely rests upon international treaties, which are based on parties consent.[114] The consent-based nature of international law inevitably led to the creation of almost as many treaty regimes, composed of different constellations of states, as there are problems to be dealt with. Accordingly, the whole system has become increasingly fragmented. Furthermore, fragmentation among the various regimes of international procedural law (regimes intended to ensure the observance of primary international law) is even more evident than fragmentation in primary international law. The focus of international law has moved away from the elaboration of substantive law of a general nature towards the creation of special regimes and methods of enforcement.[115] Options to react to the breach of treaty, on this background, are widely located not only in the general international law, but also in the particular treaties themselves. Therefore, considering the nature and sources of international law, it is logical for international lawyer, when thinking about the reaction of non-implementation of international treaty, to

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[111] That is not to say that there are no tribunals or other means of enforcement at all in the international legal system. The author wants to emphasize that there is no overarching compulsory judicial system or coercive penal system in international law.
[112] Balekjian W. H. *The Language of International Law. Linguistic Considerations Involved in the Drafting and Interpretation of International Legal Instruments* [interactive], p. 357-368.
[113] International Law Commission, *Report of the Study Group on Fragmentation of International Law*, 54th Session of the International Law Commission, Geneva, 29 April-7 June and 22 July-16 August 2002, A/CN.4/L.628, para 6.
[114] See section 1.2 of this thesis about the binding nature of international treaties.
[115] Hafner G. *Pros and Cons Ensuing from Fragmentation of International Law.* [interactive], p. 857. Available at http://students.law.umich.edu/mjil/article-pdfs/v25n4-hafner.pdf [last visited 12 May 2011].

think primarily in terms of combination of those contained in international law relating to treaties, primarily the VCLT, and that defect from an international norm and those defined by the provisions of a particular treaty. Accordingly they can be classified, at first, into two main categories: 1) mechanisms provided in general international law; and 2) treaty-based mechanisms.

2.1.1. Mechanisms provided in general international law

The definition of general international law given by Malanczuk P., Akehurst M. B. is invoked in this thesis. General international law, according to them "refers to rules and principles that are applicable to a large number of states, on the basis of either customary international law or multilateral treaties".[116] Thus, the mechanisms provided in general international law in this thesis refer to those mechanisms which are embodied in either customary international law or specific multilateral treaties (such as VCLT) and which can theoretically be invoked for the enforcement of any international treaty. By contrast, treaty-based mechanisms are those mechanisms, which are provided by a particular treaty, designed to enforce its provisions. While treaty-based mechanisms vary from treaty to treaty, mechanisms, provided in general international law, are quite limited in number. Geir Ulfstein et al. envisage two types of such mechanisms: 1) suspension or termination of treaty according to Article 60 of the VCLT; and 2) claiming reparation for injury and applying countermeasures against a state violating its international obligations under the Law of State Responsibility.[117]

Enforcement under the VCLT. Since the VCLT is considered as codification and progressive development of the Law of Treaties[118], it is reasonable to look firstly at it in determining the possible reaction to a breach of a treaty in order to enforce it. Unfortunately, the author could not find provisions in the VCLT providing expressly for the specific enforcement mechanisms. An analysis of its provisions supposes an idea that the central to the making of any treaty is the hope that the parties will be in conformity with the binding principle of *pacta sunt servanda*. This would explain the focus on validity and operation of treaties and lack of attention to the methods of implementation and enforcement of treaty provisions. However, forasmuch as Article 60 of the VCLT expressly denotes possible reaction in case of

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[116] Malanczuk P., Akehurst M. B. *Akehurst's Modern Introduction to International Law*. 7th ed. – Canada: Routledge, 1997, p. 5.
[117] Ulfstein G. et al. *Making Treaties Work: Human Rights, Environment and Arms Control*. – Cambridge: Cambridge University Press, 2007, p. 5.
[118] Seventh preambular paragraph of the VCLT.

a breach of treaty, together with reference made by Geir Ulfstein et al.,[119] the author maintains that this article merits consideration when analyzing enforcement of international treaty implementation.

Since other articles of VCLT mainly deal with the conclusion, operation and valid grounds for the end of the treaty, Article 60 is the only provision which deals with a case of reaction to a breach. This article has been considered as codification of existing customary law by the ICJ.[120] However, it is applicable only to situations of a "material breach" of a particular treaty, and suspension or termination of the obligation reaches both the injured and the responsible state in relation with the same treaty.[121] The solution to include "material breach" instead of formulating the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach, according to the commentaries on the ILC Draft Articles on the Law of Treaties[122], was determined by the fact that drafters of the VCLT wanted to avoid embarrassing risk of alleging a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty. Thus, finally the ILC, while recognizing the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended.[123] Moreover, according to Villiger M. E.,[124] Article 60 of the VCLT not only entitles to invoke the breach as a ground for suspending or terminating the treaty; conversely, the innocent party may equally allow the treaty to continue in force and to assert its right to perform of a treaty. The options of suspension or termination of a treaty avert the danger of defaulting state enforcing the treaty against the innocent party while itself violating it. However, the innocent party may choose to demand resumption of performance of a treaty from the defaulting party which cannot therefore by its breach force the termination or suspension of a treaty. Therefore, Article 60 of the VCLT, in the opinion of the author of the thesis can be seen as falling under the enforcement definition provided in section 1.1,

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[119] Ulfstein G. et al. *Making Treaties Work: Human Rights, Environment and Arms Control*. – Cambridge: Cambridge University Press, 2007, p. 5.

[120] See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory opinion)* I.C.J. Rep. 1971, p. 16, at p. 47, para. 95; *Case concerning the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, ICJ Reports 1972, p. 46, at p. 67, para. 38; *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, at p. 38, para. 46.

[121] The ICJ stated in *Gabčíkovo-Nagymaros Project* case: "the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties", see *Gabčíkovo-Nagymaros Project*, *ibid.*, at p.65, para. 106.

[122] International Law Commission. Draft Articles on the Law of Treaties with Commentaries. *Yearbook of International Law Commission*, Vol. II, 1966**.** Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [last visited 10 May 2011].

[123] Ibid., p. 253-255.

[124] Villiger M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties.* – Leiden: BRILL, 2009, p. 738-739.

as meeting both criteria. Firstly, it is reactive measure: the possibility to invoke termination or suspension of a treaty under Article 60 of the VCLT becomes operative in reaction to another state's material breach. Secondly, since the provision does not automatically suspend or terminate treaty in case of material breach, Article 60 "<…> aims at restoring the contractual balance. The principles stated therein follow from the reciprocity of the rights and duties of States and correspond to the rule *pacta sunt servanda*".[125] This means that although termination and suspension of the application of a treaty does not have a strong coercive effect, as most countermeasures generally aims to have, however, it generally have a corrective aim, which is also important for securing implementation of treaty provisions. This view is reflected in international practice as well, e.g. the arbitral tribunal in the *United States - France Air Services Agreement* case decided that the countermeasures of the Civil Aeronautics Board against Air France were of a corrective nature in so far as they aimed to restore equality between the contracting parties.[126] This measure ensures that violating state does not continue to receive the benefits of cooperation without having to pay the costs. Thus, the author infers Article 60 of the VCLT as embodying enforcement through reciprocity[127] – which is considered as one of "natural deterrents" or non-legal factors operating to minimize the extent to which states seek to breach international law and at the same time encourage them to implement provisions set out in those international instruments. However, because of its specific aim, it is a very limited mechanism for enforcement of international treaty.

State Responsibility. Another option of reaction to the breach of international treaty is envisaged in the ILC Draft Articles on State Responsibility (hereinafter Draft Articles on State Responsibility).[128] According to Nissel A., the project on State Responsibility sought to ensure the bindingness of international law, or, in other words, to provide for its enforcement without an international policing force.[129] The same as in case of termination or suspension of international treaty under the VCLT, countermeasures[130] in accordance with the Law on State Responsibility**[131]** are lawful only when viewed in

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[125] Ibid., p. 738.

[126] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France (Decision of 9 December 1978).* UNRIAA, Vol. XVIII, p. 444-445 para. 90.

[127] More about reciprocity as "natural deterrent" see e.g. Barker J. C. *Mechanisms to Create and Support Conventions, Treaties, and other Responses* [interactive]. Available at: http://www.eolss.net/EolssSampleChapters/C14/E1-44-01/E1-44-01-TXT-02.aspx [last visited 12 May 2011]. About reciprocity as one of the methods for sanctioning behavior see Russell A. M, Bratspies R. M. *Progress in International Law*. – Leiden: BRILL, 2008, p. 202, 58.

[128] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[129] Nissel A. *The ILC Articles on State Responsibility: between self-help and Solidarity* [interactive], p. 356. Available at http://ecmappdlv03.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__journal_of_international_law_and_politics/documents/documents/ecm_dlv_015057.pdf [last visited 14 April 2011].

[130] According to the commentary, attached to Draft Articles in the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the

connection with the wrongful act that provokes them and along with the concurrence of other conditions[132]. In other words, the prior wrongful act functions as a circumstance precluding wrongfulness in both cases. In the *Gabcíkovo-Nagymaros Project* case, for instance, the ICJ accepted that countermeasures might justify otherwise unlawful conduct, when meeting certain criteria: "[i]n the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. <...>. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it".[133] The rule that countermeasures meeting certain substantive and procedural conditions may be legitimate is also accepted in certain cases of arbitral decisions.[134] Where countermeasures are taken in accordance with Article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, Chapter II, to which Article 22 refers.[135] Furthermore, as in case of Article 60 of the VCLT, countermeasures taken in accordance with article 22 of Draft Articles on State Responsibility as a response to internationally wrongful conduct of another State, may be justified only in relation to that State.[136] In case of belligerent reprisals[137], the tribunal stressed that: "[o]nly reprisals taken against the

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more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". However, since the *Air Service Agreement* arbitration, the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles. See *Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries*, 2001. Yearbook of International Law Commission, Vol. II, 1966, p. 75. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[131] It should be noted that the recognition of countermeasures in international law is an aspect of a decentralized system that to some degree accepts the possibility of States resorting to unilateral acts provided that some conditions are fulfilled. These conditions are established in customary international law, through State practice, international case law, and in treaty law, all of which acknowledge some restrictions to unilateral acts. Moreover, in August 2001, the International Law Commission (ILC) adopted its "Draft Articles on the Responsibility of States for Internationally Wrongful Acts", which also deals with the issue of countermeasures.

[132] Article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides: *"The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three".* See Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission,* Vol. II, 1966. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[133] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgement) ICJ Rep. 1997, p. 7. Available at http://www.icj-cij.org/docket/files/92/7375.pdf [last visited 16 June 2010], p. 55, para. 83-84.

[134] See International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 75. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[135] Ibid.

[136] This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. See ibid.

[137] The Draft Articles on State Responsibility covers "countermeasures" and makes difference between them and belligerent reprisals, whereas questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. See Draft Articles on Responsibility of States for International Wrongful Acts with

provoking State are permissible. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavours to avoid or to limit as far as possible."[138] The application of the same principle to countermeasures in sense of Article 22 of Draft Articles on State Responsibility was confirmed by the ICJ in the *Gabcíkovo-Nagymaros Project* case when it stressed that the measure in question must be directed against the responsible State.[139] Other conditions are dealt with in Part Three, chapter II of Draft Articles.[140] Accordingly, it is possible to distinguish the following requirements for countermeasures. Firstly, the countermeasures must be non-forcible (Article 50, para. 1 (*a*)). Secondly, countermeasures must be directed at the responsible State and not at third parties (Article 49, paras. 1 and 2). Thirdly, because the aim of the countermeasures is to induce the responsible State to comply with its obligations under Part Two (to procure cessation of and reparation for the internationally wrongful act and not to punish[141]), they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (Articles 49, paras. 2 and 3, and 53). Fourthly, they must be proportionate (Articles 51). Fifthly, they must not involve departure from provided basic obligations (Articles 50, para. 1). According to the commentators, "[a]rticle 22 covers any action which qualifies as a countermeasure in accordance with these conditions".[142]

In sum, it is possible to envisage that there are significant similarities between the measures provided in Article 60 of the VCLT in case of material breach and countermeasures under the Law on State Responsibility. A common feature is that there must be a prior international wrongful act as a legal

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Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 128. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011]; moreover, it should be noted that resorting to the use of force was definitely prohibited in 1945 by the United Nations Charter. Article 2(4) of the Charter bans all member States from the threat or use of force against the territorial integrity or political independence of a state. As a result, nowadays force is legitimate only when it is exercised in self-defense and under certain conditions. See UN Charter Article 2.

[138] *"Cysne"* case, p. 1056–1057. As indicated in Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 76. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[139] See footnote 101.

[140] Conditions for legitimacy of countermeasures have also been expressly provided by the ICJ in the "*Case concerning the Gabcikovo Nagymaros Project", where* the Court has enumerated the requirements for a lawful countermeasure: (i) the countermeasure must be taken in response to an unlawful act; (ii) it must be preceded by a request of compliance by the injured State (iii) the countermeasure must be proportionate, i.e. "commensurate with the injury suffered, taking account of the rights in question" (iv) the purpose (and thus the limit to the scope of a countermeasure) has to be the inducement of "the wrongdoing State to comply with its obligations under international law." It must be reversible. See First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility, para. 45.

[141] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 129. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[142] Ibid., p. 76.

basis for applying countermeasures and for termination or suspension of the treaty according to Article 60 of the VCLT. Therefore, generally, if there is no internationally wrongful act, both mechanisms are contrary to the rules of international law. The common is also principle that such reactions can only be directed against the responsible state or states. Both have subsidiary character; both are subjected to some limitations, including in particular the principle of proportionality[143]. But besides these similarities there are some differences between these measures: regulation under Article 60 of the VCLT comprises only treaty obligations, it is applicable only to situations of a "material breach", and the suspension or termination of the obligation reaches both the injured and the responsible state in relation with the same treaty. On the other hand, countermeasures are related with the implementation of state responsibility in general, are applicable to all international wrongful acts (without making a distinction between the source of the obligation), and on principle do not affect the substantive legal obligations of states parties that remain valid. Moreover, the authors of the commentary on Draft Articles on State Responsibility also draw attention to the issue that despite the fact that Article 22 of the Draft Articles does not cover measures taken by third states which are not themselves individually injured by the internationally wrongful act in question[144], although they are owed the obligation which has been breached, it does not exclude that possibility. Moreover, Article 54 of Draft Articles on State Responsibility leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured state.[145]

2.1.2. VCLT Article 60 *v.* State responsibility

Since the relevant VCLT provisions as well as sections of the ILC Draft Articles on State Responsibility both sets of rules applying in the case of a breached treaty, the next challenge is to figure out the relationship between them. According to *Sicilianos L. A.,* "[i]n the theory of international law opinions on the relationship between reprisals and denunciation or suspension of the application of an international treaty due to its breach (Article 60 of the Vienna Convention on the law of treaties) appear to

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[143] Despite the fact that Article 60 of the VCLT does not expressly refer to the proportionality principle the author is of the opinion, that material breach requirement as envisaged in Article 60 para. 1, 2, 3, implies that the proportionality principle is recognized by Article 60. See Arangio-Ruiz G. Third Report on State Responsibility. *Yearbook of the International Law Commission.* Vol. II, Part 1, 1991. Document A/CN.4/440 and Add., at para. 74. Available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p1_e.pdf [last visited 10 May 2011].

[144] For example, in the case of an obligation owed to the international community as a whole when all States have a legal interest in compliance.

[145] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission,* Vol. II, 1966, p. 76. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

be diametrically opposed".[146] In the prevailing view, according to him, the termination and suspension of a treaty as a consequence of its breach and countermeasures (he calls them reprisals) are examined from totally different perspectives, thus, giving the impression that the Law of Treaties and the Law of State Responsibility have no contact point, and are irrevocably separated.[147] However, "[a]ccording to the opposite view – which has been maintained in the past and was recently revived – termination or suspension of the operation of a breached treaty constitutes a form of reprisal. Reprisals are the genus; denunciation and suspension are the species".[148] Mr. Gaetano Arangio-Ruiz, Special Rapporteur on State Responsibility, when talking about the relation between Article 60 of the VCLT and the countermeasures also stressed that "issues connected with the relationship between the law of treaties and the law of State responsibility - will require further study".[149] The ILC Draft Articles on State Responsibility tends to differentiate between countermeasures and termination or suspension of a treaty. As indicated in the commentary,[150] 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 VCLT. Where 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.[151]

The interaction and interdependence of these two forms of response to a wrongful act becomes obvious in the well-known *Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, 1978.[152] In this case, the parties to the dispute simultaneously used arguments from the theory of reprisals and the law of treaties. According to Sicilianos L.-A., the tribunal avoided the stumbling block of this dual approach by the use of the broader term "countermeasures". This

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[146] Sicilianos L.-A. The Relationship between Reprisals and Denunciation or Suspension of a Treaty. *European Journal of International Law. 1993, 4(3), p.* 341-342. Available at http://www.ejil.org/pdfs/4/1/1206.pdf [last visited 10 May 2011].
[147] Ibid.
[148] Ibid., p. 342.
[149] Arangio-Ruiz G. Third Report on State Responsibility. *Yearbook of the International Law Commission*. Vol. II, Part 1, 1991. Document A/CN.4/440 and Add., at para. 35. Available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1991_v2_p1_e.pdf [last visited 10 May 2011].
[150] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 128-129. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].
[151] Ibid.
[152] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (Decision of 9 December 1978). UNRIAA, Vol. XVIII, p. 417-493.

award seems to reject the extreme positions of either total differentiation or identification of reprisals and denunciation or suspension of the operation of a treaty. Nothing is mentioned therein, however, regarding the particular features of these institutions.[153]

After a comprehensive analysis, *Sicilianos L. A.* concludes, that "neither of the two diametrically opposed views maintained in regard to the relation between reprisals and denunciation or suspension of a breached treaty fully reflects reality. The one which differentiates the two institutions in an absolute manner clearly overlooks their significant similarities. The other while identifying them, does not take their differences into account".[154] Thus, the author of the thesis maintains, that in accepting such view, it should be stressed that Article 60 is a special kind of countermeasure possessing special requirements for its application.

2.1.3. Pertinence of enforcement mechanisms provided in general international law

The root cause of the enforcement problem, as it was mentioned, lies in the nature of international system. Traditional international law, in the words of Simma B., was bilateral meaning that it "was left entirely in the hands of sovereign States, predicated on their bilateral legal relations, on the intrinsically bilateral character of legal accountability;"[155] He further explains that, the way of bilateral international law, in which international legal obligations "run" between States, is the absence of general obligation for States to adopt a certain conduct in the absolute, but only in relation to the particular State or States (or other international legal persons) to which a specific obligation under treaty or customary law is owed.[156] The same is valid for the traditional patterns of responsibility and enforcement attached to the primary rules: the principle is that it is up to each state to protect its own rights. As it is possible to see from the description of bilateral international law, given by Simma B., enforcement mechanisms provided in general international law, were more or less satisfactory in traditional international law. Thus, it is not strange that international law had been primarily enforced by confrontational means, in a decentralized way by individual states or groups of states.

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[153] Sicilianos L.-A. The Relationship between Reprisals and Denunciation or Suspension of a Treaty. *European Journal of International Law.* 1993, 4(3), p. 358-359. Available at http://www.ejil.org/pdfs/4/1/1206.pdf [last visited 10 May 2011].
[154] Ibid., p. 359.
[155] Simma B. *From Bilateralism to Community Interest in International Law*. Collected Courses of the Hague Academy of International Law. Martinus Nijhoff Publishers [interactive]. 1994, Vol. 250, p. 229. Available at Martinus Nijhoff Online http://nijhoffonline.nl/book?id=er250_er250_217-384 [last visited 14 April 2011].
[156] Ibid., p. 230.

However, since the existence of international law is not its purpose *per se*, but it has been created in order to serve for some particular purposes, it is not and cannot be merely a stagnant system of rules. It has to be flexible and respond to changing needs of international community as well as to changing circumstances. Following globalization process, the concept of global governance has emerged, which is characterized, amongst other things, by the changes in international law system. Considering the scope of this thesis, the author will focus only to those changes, which are the most closely related to the enforcement issue.

The first important change is the emergence of collective (community) interest[157] idea. The concept was properly analyzed and exemplified by Simma B.[158] This author defines it as "respect for certain fundamental values which is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States"[159], the components of which are the following: international peace and security, respect for human rights, solidarity between developed and developing countries, protection of the environment, the "common heritage" concept and international concern with human rights.[160] Nowadays, a rising awareness of the common interests of the international community is permeating the body of international law and directs the change of international law from bilateralism to a much more socially conscious legal order. Moreover, the growing acceptance of the concept of community interest and its interrelation with international law can be endorsed and demonstrated by the quote from Mary Ellen O'Connell's book's short review[161]: "[i]nternational law supports order in the world and the attainment of humanity's fundamental goals of peace, prosperity, respect for human rights, and protection of the natural environment. The author argues that these goals can best be realized through international law". The consequence is that the relations between subjects of international law become more and more complex. As Simma B. notes, "community elements are nowadays overlapping, superseding and sometimes even abolishing the old fashioned

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[157] Community interest is defined as "respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States See more about the collective interest in Simma B. *From Bilateralism to Community Interest in International Law.* Collected Courses of the Hague Academy of International Law. Martinus Nijhoff Publishers [interactive]. 1994, Vol. 250, p. 233-249. Available at Martinus Nijhoff Online http://nijhoffonline.nl/book?id=er250_er250_217-384 [last visited 14 April 2011].

[158] Ibid.

[159] Ibid., p. 233.

[160] Ibid., p. 236-249.

[161] Annotation of the O'Connell M. E. book "The Power and Purpose of International Law: insights from the theory and practice of enforcement". Available at http://books.google.lt/books?id=vwYmAQAAIAAJ&q=The+Power+and+Purpose+of+International+Law:+insights+from+the+theory+and+practice+of+enforcement&dq=The+Power+and+Purpose+of+International+Law:+insights+from+the+theory+and+practice+of+enforcement&hl=lt&ei=NbjOTav-DsSYOsLFkJgN&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCkQ6AEwAA [last visited 14 April 2011].

bilateralist structures".[162] Furthermore, all these changes determine that traditional mechanisms provided by general international law become insufficient to enforce international treaties, embodying community interest. Unfortunately, as Ulfstein G. et al. emphasize, invocation of Article 60 of the VCLT, allowing states to suspend or terminate a treaty if it is violated, is very restricted. It is confined only to specific material breach cases as well as the use of this mechanism requires additional conditions to be met.[163] Furthermore, only States parties to a treaty can invoke the instrument concerned. As Sicilianos L. A. notes, Article 60 paragraph 1 of the VCLT (bilateral treaties) and paragraph 2(b) of the same Article (multilateral treaties) embodies the principle according to which a delict creates, as a rule, bilateral relations.[164] This form of bilateral relations suffered a serious blow with the introduction in international law of the concepts of *jus cogens*, obligations *erga omnes* and international crimes,[165] because "the commission of an international crime or the violation of *erga omnes* obligations affect not only the state directly injured, but all the members of the international community, which are, in principle, entitled to react".[166] Finally, these remedies are not available at all in relation to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.[167] Thus, it is clear why Ulfstein G. et al. as well as Sicilianos L. A. question the availability to use this mechanism in case of protecting collective interests.

Another enforcement mechanism provided in general international law - possibility to invoke the Law on State Responsibility to claim reparation for injury and apply countermeasures against a State violating its international obligations - traditionally was restricted to the injured states. Consequently, in the words of the ICJ in its *Reparation for Injuries Opinion*, "<…> only the party to whom an international obligation is due can bring a claim in respect of its breach"[168]. Nonetheless, in contemporary international law the range of potential enforcers of international law has grown. According to Brunnée J., nowadays international law encompasses some obligations that are owed *erga omnes*, which entitle all states to take

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[162] Simma B. *From Bilateralism to Community Interest in International Law*. Collected Courses of the Hague Academy of International Law. Martinus Nijhoff Publishers [interactive]. 1994, Vol. 250, p. 234. Available at Martinus Nijhoff Online http://nijhoffonline.nl/book?id=er250_er250_217-384 [last visited 14 April 2011].

[163] Ulfstein G. et al. *Making Treaties Work: Human Rights, Environment and Arms Control*. – Cambridge: Cambridge University Press, 2007, p. 5.

[164] Sicilianos L.-A. The Relationship between Reprisals and Denunciation or Suspension of a Treaty. *European Journal of International Law.* 1993, 4(3), p. 346. Available at http://www.ejil.org/pdfs/4/1/1206.pdf [last visited 10 May 2011].

[165] Ibid.

[166] Ibid.

[167] Article 60(5) of the VCLT.

[168] *Reparations for Injuries suffered in the service of the United Nations (Advisory Opinion)* ICJ Rep. 1949, p. 174. Available at http://www.icj-cij.org/docket/files/4/1835.pdf [last visited 15 May 2011].

certain measures in response to a violation.[169] It is important, because multilateral international treaties become the most important tool for regulating the biggest contemporary problems which are of a global nature. Thus, it seems that this mechanism could be more helpful in protecting collective interest. However, the field of responsibility of states is not developed sufficiently and does not provide a clear system by which states could act in protecting collective interest.[170]

What is more, Nowrot K. maintains that the concept of global governance forwarded a growing variety of the law-enforcement processes in the international system.[171] At least several trends are mentioned. Firstly, more and more international treaty regimes with specific enforcement mechanisms emerge showing an increasing reliance on non-confrontational, cooperative enforcement mechanisms,[172] among which is the approach of seeking compliance by providing incentives to adhere to international norms as well as other co-operative mechanisms - notification and reporting requirements, monitoring systems, capacity building and technical assistance.[173] Furthermore, as the author notes, a tendency has evolved to enforce international law by invoking respective violations in civil and administrative law cases before domestic courts, for instance in the field of human rights. Last but not least, according to Nowrot K., there are clear indications that "the idea of an institutionalized judiciary as an instrument of international law enforcement has gained momentum". Rather, the establishment of various new international judicial bodies such as the International Criminal Court, the International Tribunal on the Law of the Sea, the Dispute Settlement Body of the WTO, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for Sierra Leone, leaving aside similar developments at the regional level in the areas of human rights as well as economic integration.[174]

In conclusion, it is true to say that the ability of mechanisms provided in general international law for enforcement of international treaty implementation is too limited in the context of current stage of international law which faces the challenge to protect collective interests of the whole international community by coping with global problems. Therefore, there is a need to look for other possibilities.

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[169] Brunnee J. *Enforcement Mechanisms in International Law and International Environmental Law* // Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia / ed: Beyerlin U., et al. - BRILL, 2006, p. 5.

[170] Ulfstein G. et al. *Making Treaties Work: Human Rights, Environment and Arms Control*. – Cambridge: Cambridge University Press, 2007, p. 5.

[171] Nowrot K. *Global Governance and International Law* [interactive], p. 8-10. Available at http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft33.pdf [last visited 18 April 2011].

[172] The Kyoto Protocol to the United Nations Framework Convention on Climate Change (hereinafter Kyoto Protocol) includes nearly all of these just mentioned compliance mechanisms. See Ibid.

[173] They for instance can be found in various areas of international law such as international human rights law, international environmental law, and international economic law.

[174] Ibid.

2.2. From self-help to self-contained regimes: treaty-based mechanisms

2.2.1. Overview of treaty-based mechanisms

Because of diversification and expansion of international treaties, the system has become increasingly fragmented.[175] Moreover, since the foremost function of treaties has been to establish the substantive obligations of the parties, which are now increasingly become more and more specific in nature, thereby influencing its specialization, the predictability of the system tends to decrease. Possibly in order to obviate uncertainties incumbent on enforcement mechanisms provided by general international law, the parties to a particular treaty are increasingly design mechanisms to induce implementation of its provisions in the same treaty or its related documents (e.g. additional protocols). Regrettably, because of diversification of international treaties forwarding the variation of treaty-based enforcement mechanisms from treaty to treaty it is impossible to overview such mechanisms comprehensively in a rather short contribution. However, it is possible to provide a generalized view by identifying principal enforcement mechanisms mostly introduced into treaties.

Firstly, persuasion is probably one of the oldest means of enforcement, the aim of which is to persuade or, in other words, to reason, convince the norm addressee to comply with its legal obligations even though it may not be inclined to do so.[176] Generally, persuasion is considered as encompassing transparency which is achieved through reporting system to the international institutions in regular intervals, serving as indication whether States implement international treaty. If applicable, the international institution may issue recommendations for any steps needed to be taken to bring the State into compliance, and it may follow up on these recommendations through various means. Despite the softness of the mechanism, its potential rests in the loss of prestige for the States that the international institution can bring about by making its findings public.[177] Since the author of the thesis has limited the scope of enforcement by introducing objective and subjective elements, enforcement by persuasion still encompass recommendations issued by monitoring body.[178] It can be found in most multilateral treaties,

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[175] A wide range of different treaty regimes and courts and tribunals exist.

[176] See e.g. International Law Commission. *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf [last visited 10 May 2011].

[177] Röben V. The Enforcement Authority of International Institutions. *German Law Review*. 2008, 09(11), p. 1968. Available at http://www.germanlawjournal.com/article.php?id=1050 [last visited 15 May 2011].

[178] The author maintains that if the monitoring body finds that implementation is not at an acceptable level and publicizes the fact by issuing recommendations, default State may loose its reputation and face a credibility gap in international arena. Such possibility may operate as deterrent from non-implementation in the first place.

which provide reporting system and usually set up respective institution; it is pervasive in Human Rights treaties. Implementation of the seven core human rights treaties is monitored by the seven human rights treaty-monitoring bodies.[179] The new core treaties: the Convention on the Rights of Persons with Disabilities as well as the International Convention for the Protection of All Persons from Enforced Disappearance also envisages the creation of respective Committees for their monitoring and reporting system.[180] Moreover, other examples for the use of the reporting technique and, thus persuasion, as an enforcement mechanism can also be found in other fields of international law. Most MEAs, for instance, oblige parties to provide the secretariat with annual reports that the parties themselves prepare on their national implementation. These may involve details on the development of national programs, policies and measures.[181] While developed and honed to maturity in the human rights context, persuasion has now become a standard means of enforcement in all areas where States are under an international obligation to take complex implementing action in their national legal system.[182]

The next enforcement mechanisms can be called incentives and disincentives, both as non-implementation response measures. Incentives serve by removing the causes for non-implementation of treaty's provisions, e.g. through technical, economic and other assistance, which is normally administered by an international institution.[183] A kind of incentives can be found in several MEAs, e.g. the Non-

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[179] Office of the United Nations High Commissioner for Human Rights. *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*. Fact Sheet No. 30 [interactive]. Available at http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf [last visited 14 May 2011], p. 24 et seq: 1) The Committee on the Elimination of Racial Discrimination (CERD), the first treaty body to be established, has monitored implementation of the International Convention on the Elimination of All Forms of Racial Discrimination since 1969; 2) The Committee on Economic, Social and Cultural Rights (CESCR) was created in 1987 to carry out the monitoring mandate of the Economic and Social Council (ECOSOC) under the International Covenant on Economic, Social and Cultural Rights; 3) The Human Rights Committee (HRC) was created in 1976 to monitor implementation of the International Covenant on Civil and Political Rights. 4) The Committee on the Elimination of Discrimination against Women (CEDAW) has monitored implementation of the Convention on the Elimination of All Forms of Discrimination against Women by its States parties since 1982. 5) The Committee against Torture (CAT), created in 1987, monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 6) The Committee on the Rights of the Child (CRC), since 1990, has monitored implementation of the Convention on the Rights of the Child by its States parties, as well as two Optional Protocols to the CRC on child soldiers and child exploitation. 7) The Committee on Migrant Workers (CMW) held its first session in March 2004 and will monitor implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[180] Office of the United Nations High Commissioner for Human Rights. *The New Core International Human Rights Treaties* [interactive]. New York and Geneva, 2007. Available at http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf [last visited 14 April 2011].

[181] See United Nations Environmental Programme Report. *Compliance Mechanisms under Selected Multilateral Environmental Agreements* [interactive]. Nairobi, 2005, p. 9 et seq. Available at: http://www.unep.org/pdf/delc/Compliance_Mechanism_final.pdf [last visited 10 May 2011].

[182] Röben V. The Enforcement Authority of International Institutions. *German Law Review*. 2008, 09(11), p. 1968. Available at http://www.germanlawjournal.com/article.php?id=1050 [last visited 15 May 2011].

[183] Brunnee J. *Enforcement Mechanisms in International Law and International Environmental Law* // Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia / ed: Beyerlin U., et al. - BRILL, 2006: ("non-complying parties are most likely to be states with genuine capacity limitations.")

Compliance Procedure under the Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer.[184] This procedure allows parties to apply to the Implementation Committee for technical and financial support in the fulfillment of their treaty obligations. The Kyoto Protocol on Climate Change essentially copies this procedure. The Facilitative Branch of the Kyoto Protocol Compliance Committee is competent for handling cases where a party requires and requests international compliance assistance of a technical or financial nature.[185] Thus, it seems that because of specific aim - protection of public interest such as coping with climate change or ozone depletion problems, some MEAs embodied flexibility in their enforcement possibilities. They do not ignore the cohesion between the reasons of non-implementation of international treaties, thus leaving a possibility to identify the particular causes of party's failure in order to adopt tailor-sized financial and technical assistance measures to induce the party to regain full implementation. Since such mechanisms cannot be called hard enforcement, however, it shows that analysis of the causes of non-implementation of particular treaty plays an important role in their effective enforcement. Indeed, as it was already stated, there are many occasions when parties do not implement international treaty not because they do not wish so, but because they lack capacity. In such cases incentives can help to reach the implementation. Such soft enforcement mechanism requiring strong cooperation between the parties is accepted in case of dealing with global concern such as climate change, etc. that bothers the whole international community and requires immediate global response is accepted. The author maintains that such enforcement mechanism, however, may not necessarily be accepted in other cases. The important thing, however, is the emergence of flexibility, which allows choosing the most suitable enforcement mechanism in accordance with the particular non-implementation causes.

Disincentives are reactions, aiming at bringing back the violating party to treaty implementation and functioning as deterrents from later non-implementation.[186] They not only provide remedies for injured party; the availability of specific concrete kinds of negative responses creates certain expectation of non-escape from liability, thus serving as a disincentive to violating the norm in the first place. In general international countermeasures (State responsibility) functions as this kind of enforcement mechanism. Röben V., analyzing possibilities to enforce international treaties by international institutions, distinguishes sanctions as a separate kind of enforcement mechanisms. He emphasizes that sanctions can be twofold: putting violating party under additional substantive obligations or removal of certain of the

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[184] Montreal Protocol on Substances that Deplete the Ozone Layer, (opened for signature 16 September 1987) U.K.T.S. 19.

[185] Röben V. The Enforcement Authority of International Institutions. *German Law Review*. 2008, 09(11), p. 1971. Available at http://www.germanlawjournal.com/article.php?id=1050 [last visited 15 May 2011].

[186] General international law provides for damages through the law of state responsibility.

concerned party's rights and privileges.[187] However, such description, according to the author of the thesis, affords to ascribe sanctions to disincentives. An example of sanctions as treaty-based enforcement mechanism, according to Röben V., "is now being realized as part of the international climate change regime, which is based on the UN Framework Convention and the Kyoto Protocol (KP)…rules implementing the KP's provisions…so-called Marrakech Accords not only flesh out the emission trading provisions of the Protocol but more importantly, they also stipulate an innovative enforcement mechanism including sanctions of both types identified above. The Accords provide for an autonomous administrative-law style procedure conducted by a newly created Enforcement Branch leading to binding decisions".[188]

What is more, since for more than a decade, international lawyers and international relations scholars have been witnessing an ever-increasing number of international courts and tribunals, (quasi-)judicial dispute settlement can also be seen as a separate possibility of inducing implementation of international treaty. The central enforcement effect here lies in the finding of a breach of international law by a court, resulting in a considerable loss of prestige as well as the obligation to correct the illegal behavior. Although there is no overarching compulsory judicial system or coercive penal system in international law, however, international law system has seen a proliferation of (quasi-)judicial dispute settlement bodies. For example, the Charter of the United Nations established the International Court of Justice, the principal judicial organ of the United Nations, as a means by which Member States may settle their disputes peacefully, in accordance with international law. The Court can also give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. Member States of the United Nations, in cases to which they are parties, are obliged to abide by the Court's decisions. However, before a case can go before the Court, a State must have accepted the jurisdiction of the Court, either in general or in relation to a specific case. A State that has not accepted the Court's jurisdiction cannot be forced to appear before the International Court of Justice. States may also entrust the settlement of specific disagreements to other international dispute resolution mechanisms established by treaties such as the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration and the dispute settlement bodies of the World Trade Organization, among others.

In conclusion, a few general notes should be presented. Firstly, the author does not seek to provide a comprehensive overview of treaty-based mechanisms and their particularities. It is certainly true, that the categorization of treaty-based mechanisms given above is not definitive and unquestionable, but

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[187] Röben V. The Enforcement Authority of International Institutions. *German Law Review.* 2008, 09(11), p. 1972-1973. Available at http://www.germanlawjournal.com/article.php?id=1050 [last visited 15 May 2011].
[188] Ibid., p. 1972-1973 (footnote ommitted).

only an illustrative, in order to show possible examples. What is more, since the author was unable to find an absolute prohibition in international law to agree on specific enforcement mechanisms in international treaty, still some general limitations can be inferred, at least, they should not contradict to peremptory norms of international law (*ius cogens*), including the principle prohibiting use of force in international relations as well as peaceful settlement of international disputes.[189]

2.2.2. Self-contained (special) regime *v.* general international law

In accordance with the emergence of a more and more different treaty regimes[190], combining specific primary rules[191] with specific secondary rules[192] that claim autonomy from principles of general international law, or, in other words, self-containment[193], the issue of interaction between enforcement mechanisms provided in general international law and enforcement mechanisms provided by particular treaties[194] becomes newsworthy. Therefore, the author maintains, that it is fruitful to deal with the issue of relationship between enforcement mechanisms provided in general international law and those provided by particular treaties.

Indeed, modern international law often suffers from accusation of fragmentation, which in the past few years became "a hot topic for international lawyers, fashionable even in the established circles of the *International Court of Justice* and the *International Law Commission"*[195]. In recognition of this widely held concern, the fragmentation of international law has been included in the agenda of the ILC. At its fifty-second session (2000), the ILC included a risk-study of fragmentation in their long-time work with

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[189] The principles are set out most crucially in Article 2 para. 3 and 4 of the UN Charter: (3) "*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; (4) "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"*.

[190] A number closely integrated sets of rules of international law pertaining to particular subject-areas such as human rights, the environment, trade, international crimes, and so on.

[191] Rules laying down particular rights and obligations.

[192] Rules about rule-creation and change, responsibility and dispute settlement. For instance the ILC Draft Articles on State Responsibility is considered as secondary in nature.

[193] A self-contained regime - a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches that seeks precedence in regard to the general law. See Koskenniemi M. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"*, UN Doc. ILC (LVI)/SG/FIL/CRD.1/Add.1 (2004), p. 9. Available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf [last visited 10 May 2011].

[194] Ibid., p.1.

[195] Pulkowski D. Narratives of Fragmentation International Law between Unity and Multiplicity [interactive], p.1. Available at http://www.esil-sedi.eu/fichiers/en/Pulkowski_670.pdf [last visited 10 May 2011].

the objective of looking into the effects of the diversification of international law.[196] Two years later (in 2002), a special study group was established by the ILC and different studies, including "The Function and Scope of the *lex specialis* Rule and the Question of "Self-Contained Regimes""[197] were rendered.

A self-contained regime, according to the ILC Study Group on Fragmentation, "covers the case where a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claims priority to the secondary rules provided by general law".[198] In case of enforcement of international treaty and possibility to invoke mechanisms provided by general international law, a narrower view of "secondary rules" are followed, according to which, secondary rules are those that lay down the consequences of a breach of primary law. The PCIJ used the notion of self-containment in its very first case, the *S.S. Wimbledon* in 1923 where it recognized that a special set of rules and institutions may be created to deviate from the general law on a matter such as the uses of internal navigable waterways.[199] In the famous decision in relation to "self-contained regime" - *Hostages case* in 1980 - the Court identified diplomatic law as this kind of regime by stating that: "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse. These means are by their nature, entirely efficacious."[200] This implies that the Court considered the VCDR as able to achieve the goals itself, without resorting to general international law (such as the rules on State Responsibility embodied in the ILC Draft Articles on State Responsibility as well as in customary international law). Thus, the possibility to make reference to countermeasures in that case was excluded. However, the Court failed to give a comprehensive definition of self-contained regime. Superficial reading of this judgment can at first sight suppose an idea, that a self-contained regime is entirely autonomous and closed legal

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[196] International Law Commission. *Report on the Work of its fifty-second session*, Official Records of the General Assembly, Fifty-fifth Session Supplement, No. 10 (A/55/10), para. 729.

[197] International Law Commission, *Report on the work of its fifty-fourth session* (A/57/10), para. 512; In the year of 2006, a final report on the fragmentation of international law was made. See International Law Commission. *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf [last visited 10 May 2011].

[198] Koskenniemi M. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"*, UN Doc. ILC (LVI)/SG/FIL/CRD.1/Add.1 (2004), p. 8. Available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf [last visited 10 May 2011].

[199] *Case of the S.S "Wimbledon" (Brittany, France, Italy and Japan (with Poland as intervener)* v. *Germany)* [1923] PCIJ Series A No. 1, p. 8-9. Available at www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon/ [last visited 15 May 2011].

[200] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (Judgment) ICJ Rep. 1980, p. 3, para. 86. Available at www.icj-cij.org/docket/files/64/6291.pdf [last visited 15 May 2011].

system of international law. It is not surprising that after the *Tehran Hostages* ruling self-contained regimes were understood in this way; like parallel self-contained islands of international law without any vanishing-point. Indeed, as Simma B. and Pulkowski D. note, "lack of uniform terminology has probably contributed a good deal to the controversial character of the discussion addressing the alleged self-containment of legal subsystems."[201] However, according to Koskenniemi M.,[202] no such regime can be created outside the scope of general international law.[203] The focus of the discussion on the term self-contained regime has hence shifted from closed systems in international law to the more narrow definition of self-contained regimes as interrelated sub-systems in the field of international law with relationships to both general international law and other sub-systems in the international law.

The ILC in its final report on the topic on fragmentation of international law distinguishes three categories of the term self-contained regime.[204] Since the rules on state responsibility are *secondary rules*, in contrast to the *primary rules* that consist of the rules of conduct, the thesis focuses on the first category, defining self-contained regime as a subcategory of *lex specialis* within the law of state responsibility.

2.2.3. Self-contained regimes and the ILC work on State responsibility

The ILC's stand with regard to the existence of self-contained regimes concerning state responsibility has varied with each special rapporteur.[205] Special Rapporteur Roberto Ago did not see a need for classifying different consequences by reference to the source or the content of the obligation breached. What he aimed at a generally applicable set of rules about wrongfulness that could cover the breach of any primary rules. He also accepted that in the text of a particular treaty concluded between them, some states may well provide for a special regime of responsibility for the breach of obligations for which the treaty makes special provision, without refining on the matter of how these special treaty-

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[201] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*. 2006, 17(3), p. 491. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].
[202] Chairman of the Study Group on Fragmentation, at its session in 2004, focusing on the role of *lex specialis* and self-contained regimes. M. Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes'*, UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004).
[203] Ibid., p.10.
[204] International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law.* Report of the Study Group of the International Law Commision, Finalized by Martti Koskenniemi, (A/CN.4/L.682), p. 72.
[205] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*. 2006, 17(3), p. 493. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].

regimes would relate to the general rules.[206] The latter question was taken up at great length by Special Rapporteur Riphagen in 1982 in connection with his discussion of what he called the "general problem underlying the drafting of Part 2 of State responsibility".[207] Riphagen used the term "self-contained", and foresaw a theoretical possibility that the relevant set of conduct rules, procedural rules, and status provisions might form a closed legal circuit; however, in fact, he never wanted to say they were completely isolated.[208] Arangio-Ruiz did not oppose the establishment of special treaty-based regimes. They were needed "to achieve, by means of *ad hoc* machinery, a more effective organized monitoring of violations and responses thereto". But he rejected the conclusion that this would bar them from ever resorting to general law.[209] According to Crawford, the question whether special secondary rules of treaty-regimes are exclusive is "always a question of interpretation in each case".[210]

After these interpretations, the Draft Articles on State Responsibility conceptualized the relationship between general international law and secondary norms contained in the proliferating new regimes of international law in terms of a general/special distinction. Article 55, titled *lex specialis*, is designed to open the door to such special sets of secondary rules: "[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law".[211] The expressed prerequisite seems to conform to the general principle *lex specialis derogat lege generali*, special law derogates from general law in the same subject matter.[212] It seems that the ILC commentary on Draft Articles acknowledges the same conclusion: "Article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency".[213] According to the ILC, the special law is often more substantial, better adjusted to the specific context and creates a more equitable result.[214] However, according to the ILC, "for the *lex*

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[206] International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law.* Report of the Study Group of the International Law Commision, Finalized by Martti Koskenniemi, (A/CN.4/L.682), p.74.
[207] Ibid.
[208] Ibid. p.76.
[209] Ibid. p.79.
[210] Ibid.
[211] International Law Commission, *Report on the Work of its Fifty-third Session, Official Records of the General Assembly*, Fifty-Sixth Session, Supplement No. 10 (A/56/10), at para. 58.
[212] Shaw M. N. *International Law.* 5th ed. – Cambridge: Cambridge University Press, 2003, p. 117.
[213] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries. 2001. *Yearbook of International Law Commission*, Vol. II, 1966. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011], p. 139.
[214] International Law Commission. *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law.* 2006, para. 7. Available at

specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".[215] For example, in the *Neumeister* case, the European Court of Human Rights held that the "specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention". It was sufficient, in applying article 50, to take account of the specific provision".[216]

In its comments to the ILC Draft Article 55, the ILC states that "Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution."[217] Unfortunately, the ILC instead of giving a clear definition of strong *lex specialis* (self-contained regime) and its relationship to general international law, simply refer to the *S.S. Wimbledon Case* and the *Tehran Hostages Case*, which do not contain conclusive definitions as well. Therefore, it creates a kind of circular chain of definition making it more inexpedient than not. According to Simma B. and Pulkowski D., the possibility to exclude general law "by explicit provision or by implication that is by virtue of a regime's particular structure or its object and purpose"[218], allows to distinguish the strong form of *lex specialis* from the weak. Thus, the interference is that it is possible to exclude general international law not only by explicit provision, but also by implication. This raises another question, of how to determine such implication.

Since most of regimes that might qualify as self-contained are based on international treaties, one of possible solutions in determining whether a particular treaty intends to exclude enforcement mechanisms embodied in general international law, could be recourse to the VCLT or its equivalence in international

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http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf [last visited 10 May 2011]; moreover, it should be noted, that the *lex specialis* principle is not included in the VCLT, which only indicates the question of *successive* treaties on the same subject matter and between the same parties. However, according to A. Lindroos, does not exclude the use of the principle, international tribunals have used other principles on interpretation and the principles included in the VCLT are not exhaustive. See Lindroos A. Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*. *Nordic Journal of International* Law. 2005, 74(1), p. 36-37. Available at http://heinonline.org/HOL/Page?handle=hein.journals/nordic74&div=8&g_sent=1&collection=journals [last visited 15 May 2011].

[215] International Law Commission. Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries. 2001. *Yearbook of International Law Commission*, Vol. II, 1966, p. 140. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last visited 10 May 2011].

[216] Ibid.

[217] Ibid.

[218] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*. 2006, 17(3), p. 490. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].

customary law on interpretation. Articles 31-32 of the VCLT set up general and supplementary rules on interpretation of treaties, and these rules thereby apply when analyzing whether a specific treaty fulfils the prerequisite of a self-contained regime and to what extent a self-contained regime is supposed to exclude general international law. According to article 31 in the VCLT, the principle of ordinary meaning of a treaty is the primary rule of interpretation. According to this article, as well as the principle of integration[219], the ordinary meaning has to be determined taking into account the whole context of the treaty and in the light of its object and purpose. Article 32 of the VCLT provides additional (supplementary to Article 31, non-exhaustive list) means for interpretation, which can be used in order to confirm the result attained when using the rule of Article 31, or to determine the meaning of the treaty when an interpretation in accordance with Article 31 VCLT leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.[220] Accordingly, when applying the rules on interpretation in order to reveal the possibility to invoke enforcement mechanisms provided in general international law for the enforcement of a particular treaty, the main purpose is to find out whether the state parties to that treaty intended the regime to be exhaustive in the specific field of secondary rules or not. If no such intention is to be found, the parties did not intend the regime to be exhaustive and the treaty is not a self-contained regime in that specific field of law. The implication is that since state parties have not intended to contract them out, all other fields of law with rules of the second degree in general international law, on e.g. interpretation or attribution will still be applicable.

2.2.4. Fall-back onto general rules due to the failure of self-contained regimes

What is more, the question of the possibility to fallback to the enforcement mechanisms provided in general international law when those provided in special treaty, arises. What happens if a self-contained regime, with its special rules on state responsibility, is not capable of handling a breach of one of its primary rules? A commonly used example of a situation creating this type of problem is a continuous violation of a treaty obligation where all special rules and procedures of the regime are exhausted without reaching the intended effect. In such a situation, is a fallback on general international law acceptable in spite of the fact that the regime is self-contained in that specific field of secondary rules, e.g. on state responsibility? Can states fall back on general international law, after they have exhausted the special rules and procedures of a special regime? Countermeasures under general international law provide an

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[219] See e.g. Brownlie I. *Principles of Public International Law*. 7th ed. - Oxford University Press, 2008, p. 604
[220] Article 32 of the VCLT.

enforcement mechanism that special systems may lack. Thus, the policy question is whether primary rules contained in special subsystems "deserve" the additional "bite" that enforcement through countermeasures can deliver.[221]

According to the ILC, in case of failure the regime might fallback on the general international law or, in other words, the relevant general law becomes applicable if the special regime fails.[222] It seems a little bit strange, why then the ILC has not introduced that possibility clearly when drafting the Articles on State responsibility in general and Article 55 in particular? The possible answer could be that since the definition of failure is, however, contestable and unclear, the statement raises additional question of what constitutes a "failure", thus, the ILC did not want to open a new never-ending debate.[223] Coming back to the "failure", Koskenniemi M. distinguishes between two kinds: substantive and procedural. A substantive failure, according to him, takes place if the regime completely fails to attain the purpose for which it was created, whereas procedural failure occurs when the institutions of the regime fail to function in the way they should.[224] When it is a question about how far must the states parties to the special regime continue to have resort to the special procedures, the ILC suggests to make an analogy to the requirement of exhaustion of local remedies in the Law of Diplomatic Protection. In this regard, the main principles would be that the exhaustion of local remedies rule need not be followed in cases where the remedy would be manifestly unavailable or ineffective or where it would be otherwise unreasonable to expect recourse to it.[225]

In dealing with the issue, Simma B. and Pulkowski D. refer to the principle of effective treaty interpretation to justify the view that specific treaty-based mechanisms have a priority over the more general international Law on State Responsibility only as long as the mechanisms are effective.[226] Accordingly, they delineate three cases for a fallback on state responsibility, particularly on the regime of countermeasures: first, in the case of continuous violation of an obligation under a special system, despite a decision to the contrary by the system's competent dispute settlement body; second, in the case of an

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[221] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*. 2006, 17(3), p. 507. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].
[222] International Law Commission. *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, para. 16. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf [last visited 10 May 2011];
[223] It should be noted that it is just a speculation made by the author of the thesis.
[224] International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law.* Report of the Study Group of the International Law Commision, Finalized by Martti Koskenniemi, (A/CN.4/L.682), p. 98.
[225] Ibid.
[226] Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*. 2006, 17(3), p. 507-509. Available at http://www.ejil.org/pdfs/17/3/202.pdf [last visited 15 May 2011].

injured state's failure to obtain reparation, despite a respective decision by the system's competent dispute settlement body; third, if unilateral action is necessary as a defensive measure.[227]

To sum up, it seems that despite general recognition of possibility to fallback to the enforcement mechanisms provided in general international law, it is still doubtful, when it is possible to take countermeasures against the state under the Draft Articles on State Responsibility or the parallel rules of customary international law in case of non-implementation or defective implementation of international treaty which provides enforcement mechanisms by itself. There are no clear answers to these questions but it seems evident that at some point there must be a fallback on general rules of State responsibility, including countermeasures and general mechanisms of dispute settlement (e.g. recourse to the International Court of Justice under a compulsory jurisdiction declaration made by two members of the special regime).[228]

The main point of the possibility to fallback on the general international law from the perspective of enforcement of international treaty is that countermeasures contribute to creating future expectations of effective enforcement in the international community; whereas such expectation is a factor inducing compliance.[229] In the words of Reisman M., in such a way, enforcement becomes a "self-fulfilling prophecy".[230] Moreover, he argue, that once countermeasures have contributed to the peaceful resolution of possible failures, mentioned above, generated expectations of effectiveness permits enforcement machinery subsequently to fulfill its function by symbolic presence rather than by active intervention. Countermeasures may thus ultimately preserve (rather than jeopardize) the integrity of a special regime's enforcement mechanism.[231] Therefore, such possibility of fallback may serve as additional safeguard for inducing implementation of international treaty in case of failure of treaty-based mechanisms. Moreover, considering the conclusions of empirical analysis that dispute settlement mechanisms tend to promote not decrease treaty participation,[232] it is possible to conclude that if state parties to a particular treaty agreed

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[227] Ibid., p. 509.
[228] International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law.* Report of the Study Group of the International Law Commision, Finalized by Martti Koskenniemi, (A/CN.4/L.682), p. 99.
[229] Simma B., Pulkowski D. *Of Planets and the Universe, Self-contained Regimes in International Law.* The European Journal of International Law, Vol. 17 no. 3 (2006), p. 509.
[230] Citation from Reisman, The Enforcement of International Judgments. *American Journal of International Law.* 1969, 63(1), p. 7., as indicated by Simma B., Pulkowski D. Of Planets and the Universe, Self-contained Regimes in International Law. *The European Journal of International Law*, Vol. 17 no. 3 (2006), p. 509.
[231] Ibid.
[232] Bernauer Th., et al. *Is There a Depth versus Participation Dilemma in International Cooperation.*
APSA 2010 Annual Meeting Paper [interactive]. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641748 [last visited 18 April 2011].

and introduced specific enforcement mechanisms (including dispute settlement provisions), they have made this seeking some kind of stability and transparency. Thus, possibility to invoke enforcement mechanisms provided by general international law may stimulate using treaty-based enforcement mechanisms to the best of their ability, or, in other words, to enhance their effectiveness.

All things considered, the following general conclusions may be made of the treatment of "self-contained regimes" by the ILC in the context of State responsibility. Firstly, States are entitled to set up self-contained regimes (or in other words to agree on specific treaty containing not only primary, but also secondary rules, including enforcement mechanisms in that particular treaty) that have priority over the general rules in the draft articles and by analogy in customary international law. However, some limitations which are either prohibited expressly or may be derived from the nature of the general international law still exist; in particular it is generally accepted that no derogations from peremptory norms of general international law (*ius cogens*)[233] are allowed. Secondly, the relationship between a self-contained regime and the general law on State responsibility should be determined principally by the rules of interpretation, firstly, using the Articles 31-32 of the VCLT in interpreting the instrument that established that regime. If there is no expressed or implied contract out of the rules of the general law on State responsibility (like the rest of general international law), these rules should be seen as supplementing self-contained regime (the concept "special regime" would be more appropriate in this case). Moreover, the question of residual application of the general rules in situations not expressly covered by the self-contained regime or possible fallback to the general rules of State responsibility in case of the failure of that regime is not expressly treated in the draft or in its commentary. However, it is dealt with by Special Rapporteurs Riphagen and Arangio-Ruiz both of whom hold it self-evident that once a self-contained regime fails, recourse to general law must be allowed. What such failure might consist in has not been explicitly treated by the ILC. Taking into account the existing uncertainties in regulation, the author believes that, introducing clear possibility of fallback to the enforcement mechanisms provided by general international law in case of failure of treaty-based mechanisms into international legal acts may enhance credibility of treaty-based mechanisms and serve as additional inducement to implement international treaties. Thus, there is a need to specify certain conditions for the fallback for instance in addition to *lex specialis* rule embodied in Article 55 of the Draft Articles.

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[233] See Article 53 of the VCLT.

CONCLUSIONS AND SUGGESTIONS

1. Practice shows that not all treaties are implemented at an acceptable level, which indicates that domestic treaty implementation and domestic enforcement measures are insufficient. The situation necessitates looking for enforcement possibilities provided under international law, which creates additional difficulties. Despite the rooted problem of enforcement in international law, there is no clear and coherent definition of the concept provided in international legal acts, creating illusion that international treaties are not enforceable. The literature on the issue has advanced considerably in recent years, making a better – though admittedly still incomplete – understanding of the mechanisms that underlie enforcement. Paradoxically this makes enforcement of international treaty implementation becoming fragmented and lacking a coherent identity. The term therefore has to be continuously discussed in order to sort out its effect.

2. According to the given dictionary as well as doctrinal definitions of enforcement, it is possible to distinguish two kinds of enforcement definition, the broad and the narrow ones. On the ground of generic explanation given by dictionaries in conjunction with its amplification given by some authors, **in broad terms, enforcement means an action or process of using additional stimulus in order to cause implementation of international treaty to be carried out successfully**, including: 1) the pressure to implement international treaty - persuasion (e.g. a requirement for information reviewing national performance of treaty obligations); 2) non-implementation response measures (incentives - technical and financial assistance to support improved implementation; and disincentives – penalties, aiming at bringing back the violating party to treaty implementation and functioning as a deterrents from later non-implementation); and, 3) finally, dispute settlement procedures. **In narrow sense, enforcement can be defined as encompassing only the negative non-implementation response measures** (e.g. financial penalties, the withdrawal of privileges, or sanctions including trade, military and economic sanctions) aiming at bringing back the violating party to treaty implementation.

3. In accordance with semiotics rules and unique architecture of international law, the author suggests defining enforcement of international treaty implementation as **a reaction of competent subjects of international law to defective or absolute non-implementation of international treaty using enforcement mechanisms provided by international law with the aim to induce the non-implementing State back into compliance with its obligation to implement international treaty (*pacta sunt servanda*).**

4. Systematic analysis of the provisions of the VCLT confirms that **t**he free will of the Parties to a particular treaty to create and bind themselves by international legal obligations together with the principles of free consent, good faith and *pacta sunt servanda* rule enshrined in the VCLT, creates legally binding obligation to implement international treaty. The implementation of international treaty from the perspective of international law can be defined as **the obligation to fulfill the valid international treaty not only by observance of/or compliance with and performance of obligations provided by its provisions *in a reasonable way and in such a manner that its purpose can be realized,* but also by refraining from acts that could defeat the object and purpose of such an obligation and from any other acts preventing its implementation.** Accordingly, the breach of this obligation by an act or omission serves as a ground for taking international enforcement measures.

5. According to the results of studies of the main challenges faced in implementing international treaties, non-implementation of international treaties can be classified into two main categories: intentional and non-intentional (objective inability). While non-intentional non-implementation can be best tackled by soft enforcement mechanisms or so-called incentives, the intentional non-implementation may require harder enforcement mechanisms. This indicates that there is a need for particular flexibility in choosing enforcement mechanisms.

6. The consent-based nature of international law determining its unique architecture, especially non-existence of centralized legislative and enforcement authorities inevitably led to the fragmentation of international regulation. Mechanisms of enforcement of international treaties, on this background, are widely located not only in the general international law, but also in the particular treaties itself. It is possible to distinguish between the mechanisms provided in general international law and treaty-based mechanisms. While the former mechanisms are embodied in either customary international law or multilateral treaties (such as the VCLT) and can be invoked for the enforcement of any international treaty, treaty-based mechanisms, provided by a particular treaty, designed to enforce its provisions vary from treaty to treaty.

7. The author identifies two types of enforcement mechanisms for treaty implementation provided by general international law: 1) suspension or termination of treaty according to Article 60 of the VCLT; and 2) claiming reparation for injury and applying countermeasures against a State violating its international obligations under the Law of State Responsibility. The former embodies enforcement through reciprocity; the latter appears to have more coercive effect. These enforcement mechanisms are of limited use in cases where the central objective is the protection of collective interests (e.g. environmental protection, human rights) rather than balanced or reciprocal grant of privileges to the Parties. Because of

strict requirements for applying Article 60 the availability of using this mechanism in case of protecting collective interests is very restricted and almost non-existent. The possibility to invoke the Law of State Responsibility provides theoretical possibility for protecting collective interest, but the field is not developed sufficiently and does not provide a clear system for its functioning in practice.

8. Because of diversification of international treaties the treaty-based enforcement mechanisms varies from treaty to treaty, from persuasion in the form of non-binding recommendations and giving publicity serving as reputational enforcement mechanism to incentives and disincentives and finally to (quasi-)judicial dispute settlement. International treaty regimes and other regulatory instruments show an increasing reliance on non-confrontational, cooperative enforcement mechanisms, especially provision of incentives to adhere to international norms as well as other co-operative mechanisms - notification and reporting requirements, monitoring systems, capacity building and technical assistance which can be found in various areas of international law such as international human rights law, international environmental law, mostly protecting the so-called community interest. Since Parties are free to agree on particular enforcement mechanisms, at least they should not contradict to peremptory norms of international law (*ius cogens*) and reflect generally accepted principles of prohibition to use force in international relations as well as peaceful settlement of international disputes.

9. With regard to interrelation between enforcement mechanisms provided by general international law and treaty-based or those provided by "self-contained" regimes (special regimes), both in defining a set of rules as a self-contained regime and determining the relationship between the regime and general international law the rules of the VCLT on interpretation of treaties are to be seen as being the main tools. The intention of Parties as a decisive factor has to be identified in order to clarify if and to what extent a certain set of rules excludes the possibility to refer to general international law.

10. Accepting the consent-based nature of international treaties and the fact that special enforcement mechanisms (secondary rules) contained in a particular treaty can be often better adjusted to the specific context and creates a more equitable result, the possibility to fallback when the outcome in the self-contained regime is no longer effective or has failed to execute its object and purpose seems to be accepted by the ILC as well as scholar writings. The author believes that, the possibility of fallback to the enforcement mechanisms provided by general international law in case of failure of treaty-based mechanisms may enhance credibility of treaty-based mechanisms and serve as additional inducement to implement international treaties. Since it is not clear what constitutes failure, there is a need to specify certain conditions for the fallback in addition to *lex specialis* rule embodied in Article 55 of the Draft Articles.

11. Since the research shows that enforcement of international treaty implementation is still unclear as well as international regulation is of the issue is vague, it seems sensible to contribute to strengthening enforcement of international treaty implementation: by providing a clear guidance: firstly, on what enforcement of international treaty implementation encompasses; secondly, explaining possibilities to use enforcement mechanisms embodied in different sources of international law, their limits and interrelation. In other words, there is a need not only to gather certain enforcement mechanisms for instance in Draft Articles on State Responsibility, but also by providing a framework for creating treaty-based enforcement mechanisms. Under this background, the hypothesis seems to be confirmed.

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ANOTACIJA

Tamošiūnaitė J. Tarptautinių sutarčių įgyvendinimo užtikrinimas / Tarptautinės teisės jungtinės programos magistro baigiamasis darbas. Vadovas prof. dr. L. Jakulevičienė – Vilnius: Mykolo Romerio Universitetas, Teisės Fakultetas, 2011. – p. 74.

Atsižvelgiant į gausėjantį tarptautinių sutarčių, skirtų svarbiausioms tarptautinėms problemoms spręsti, skaičių bei, pripažįstant nacionalinių priemonių nepakankamumą efektyviam jų įgyvendinimui, magistro baigiamajame darbe išanalizuota ir įvertinta tarptautinių sutarčių įgyvendinimo užtikrinimo galimybė tarptautinės teisės kontekste bei identifikuotos pagrindinės realizavimo problemos. Pirmojoje darbo dalyje aptariami bendrieji įgyvendinimo užtikrinimo aspektai: aiškinamos pagrindinės koncepcijos bei sąvokos, nustatomas tarptautinių sutarčių įgyvendinimo užtikrinimo taikymo pagrindas bei ribos, taip pat identifikuotos pagrindinės tarptautinių sutarčių neįgyvendinimo/netinkamo įgyvendinimo priežastys. Antrojoje dalyje aptariamas įgyvendinimo užtikrinimo reguliavimas pagal skirtingus tarptautinės teisės šaltinius, išskiriami du įgyvendinimo užtikrinimo mechanizmų tipai: įgyvendinimo užtikrinimo mechanizmai, numatyti konkrečiose tarptautinėse sutartyse (skirti tos konkrečios sutarties įgyvendinimui) ir įgyvendinimo užtikrinimo mechanizmai, numatyti bendrojoje tarptautinėje teisėje (tie, kuriuos teoriškai būtų galima taikyti visoms tarptautinėms sutartims) bei aptariami pagrindiniai jų elementai. Taip pat, remiantis „uždaro režimo“ (self-contained regime) kaip *lex specialis* principo, įtvirtinto nuostatose dėl valstybių atsakomybės pagal tarptautinę teisę, subkategorijos idėja, kilusia kartu su tarptautinės teisės fragmentacija ir specializacija, analizuojamas galimas šių mechanizmų tarpusavio ryšys bei taikymo galimybės, siekiant kuo efektyvesnio tarptautinių sutarčių įgyvendinimo užtikrinimo tarptautiniu mastu. Baigiamojoje dalyje pateikiamos atitinkamos išvados bei siūlymai.

Raktiniai žodžiai: tarptautinė teisė, tarptautinė sutartis, įgyvendinimas, įgyvendinimo užtikrinimas, mechanizmas, „uždaras režimas“.

ANNOTATION

Tamošiūnaitė J. Enforcement of International Treaty Implementation / Joint Master Degree Program in International Law master thesis. Supervisor prof. dr. L. Jakulevičienė – Vilnius: Mykolas Romeris University, Faculty of Law, 2011. – p. 74.

Considering the growing number of international treaties, designed to tackle the most fundamental international problems on the one hand, and insufficiency of domestic implementing and enforcement measures on the other hand, the master thesis is aimed at analyzing and assessing the concept of enforcement of international treaty implementation as it is used in the doctrine as well as its regulation under relevant sources of international law; in order to identify its content and possibilities as well as the main problems of its realization. The first part is dedicated to the general aspects of enforcement in international law. Review of the main difficulties in defining the concepts are presented, while the author makes an overview of enforcement definitions in scholarly writings as well as dictionary definitions in order to reveal the generic meaning of enforcement and trying to specify it in the context of international treaty implementation. After defining the concepts, the main challenges in implementing treaties are provided as well as the question of legal basis and limits for their enforcement is discussed. The second part examines legal regulation of enforcement and identifies two types of mechanisms of enforcement of international treaty implementation available under international law: treaty-based mechanisms and those, provided by general international law. Accordingly, in the light of the idea of *self-contained* regime as a subcategory of *lex specialis* within the Law on State Responsibility, brought forward by fragmentation and specification of international law, the analysis of their possible interrelation is conducted. On the background given above, the author concludes that insufficient clear regulation of enforcement in general, and enforcement of treaty implementation in particular, under international law influences the inconsistency in understanding the very meaning of the concept as well as creates additional difficulties in realizing the possibilities of inducing implementation of international treaty. Therefore, international community should take adequate steps to modify present situation to reflect the need for the clarity and stability of international legal order on the one hand, and its flexibility on the other.

Key words: international law, implementation, enforcement, international treaty, enforcement of international treaty implementation, self-contained regime.

SANTRAUKA

Dvidešimt pirmajame amžiuje tarptautinė bendruomenė susiduria ne tik su globalizacijos ir integracijos, bet tuo pat metu ir fragmentacijos procesais, lemiančiais sudėtingų tarptautinių santykių atsiradimą bei vis sudėtingesnį jų reguliavimą. Ryškėjančios globalinės problemos rodo, jog pavienės valstybės nebepajėgios spręsti kylančių sunkumų ir reikalauja problemų mastą atitinkančio atsako – tarptautinio bendradarbiavimo. Tai suprasdamos valstybės priima vis daugiau tarptautinių sutarčių, kartu prisiimdamos pareigą jas įgyvendinti. Deja, praktika rodo, jog ne visos tarptautinės sutartys yra įgyvendinamos tinkamai. Tai rodo nacionalinių tarptautinių sutarčių įgyvendinimo priemonių nepakankamumą ir verčia ieškoti įgyvendinimo užtikrinimo galimybių tarptautinėje teisėje. Šio darbo tikslas - remiantis įgyvendinimo užtikrinimo koncepcijos, egzistuojančios doktrinoje, bei jos reguliavimo tarptautinėje teisėje analize identifikuoti tarptautinių sutarčių įgyvendinimo užtikrinimo esmę, galimybes bei pagrindines kliūtis jo realizavimui.

Pirmoji darbo dalis yra skirta bendriems tarptautinės teisės įgyvendinimo užtikrinimo aspektams aptarti. Literatūros apžvalga leidžia daryti prielaidą, jog nepaisant vis labiau jaučiamo tarptautinių sutarčių įgyvendinimo užtikrinimo poreikio, skirtingi autoriai skirtingai aiškina tiek pačią sąvoką, tiek jos turinį, dėl ko tampa sunku nustatyti praktines taikymo ribas. Remiantis konceptualia analize, kartu atsižvelgiant į tarptautinės teisės sistemos specifiką bei vis labiau ryškėjančią tendenciją tarptautinėje teisėje vengti termino vartojimo keičiant jį neutralesnėmis sąvokomis ir/arba vartoti jį išskirtiniais atvejais, darbo autorius siūlo susiaurinti „įgyvendinimo užtikrinimo“ sąvokos bendrąją prasmę įtraukiant subjektyvųjį elementą – ketinimą (intenciją) grąžinti atsakingąją šalį atgal į „doros kelią“, t.y. priversti iš naujo laikytis prisiimtos *pacta sunt servanda* pareigos. Tai suponuoja, reakcinį įgyvendinimo užtikrinimo pobūdį, kitaip tariant, įgyvendinimo užtikrinimą sudaro tos priemonės, kurios taikytinos esant ankstesniam *pacta sunt servanda* pareigos pažeidimui. Atitinkamai, teisinės pareigos įgyvendinti tarptautinę sutartį (*pacta sunt servanda*) pažeidimas sudarytų teisinį pagrindą imtis įgyvendinimo užtikrinimą sudarančių priemonių. Be to, šiame skyriuje identifikuotos priežastys, kurių pagrindu tarptautinių sutarčių neįgyvendinimą/netinkamą įgyvendinimą galima skirti į tyčinį ir netyčinį (objektyvų negalėjimą), leidžia pabrėžti tam tikro lankstumo numatant ir taikant įgyvendinimo užtikrinimo mechanizmus būtinumą.

Antrojoje dalyje aptariamas įgyvendinimo užtikrinimo reguliavimas pagal skirtingus tarptautinės teisės šaltinius. Darbo autorius, atitinkamai, išskiria du įgyvendinimo užtikrinimo mechanizmų tipus: įgyvendinimo užtikrinimo mechanizmus, numatytus konkrečiose tarptautinėse sutartyse, skirtus tos

konkrečios sutarties įgyvendinimui ir įgyvendinimo užtikrinimo mechanizmus, numatytus bendrojoje tarptautinėje teisėje (tuos, kuriuos teoriškai būtų galima taikyti visoms tarptautinėms sutartims). Taip pat remiantis „uždaro režimo“ (self-contained regime) kaip *lex specialis* principo, įtvirtinto nuostatose dėl valstybių atsakomybės pagal tarptautinę teisę, subkategorijos idėja, paskatinta tarptautinės teisės fragmentacijos ir specializacijos, analizuojamas galimas šių mechanizmų tarpusavio ryšys. Šalių valia (intention) paprastai yra pripažįstama kaip lemiantis faktorius nustatant, ar ir kokiu mastu, jų tarptautine sutartimi sukurtas režimas pašalina bendrosios tarptautinės teisės nuostatų taikymą. Atitinkamai skiriami du požiūriai: kai kurie autoriai mano, jog sudarant sutartį įmanoma visiškai pašalinti bendrosios tarptautinės teisės nuostatų, įskaitant įgyvendinimo užtikrinimo mechanizmų, taikymą konkrečiam režimui; kiti mano, jog tais atvejais, kai sutarčių numatyti specifiniai įgyvendinimo užtikrinimo mechanizmai (netgi esant „uždaram režimui“) yra neveiksmingi, racionalu būtų leisti taikyti bendrojoje tarptautinėje teisėje numatytus mechanizmus.

Remiantis šiais duomenimis, darbo autorius mano, jog nepakankamai aiškus įgyvendinimo užtikrinimo ir ypatingai tarptautinių sutarčių įgyvendinimo užtikrinimo reguliavimas tarptautinėje teisėje turi įtakos skirtingam pačios sąvokos traktavimui. Neaiškus reguliavimas kartu su skirtingu sąvokos interpretavimu sukuria papildomus sunkumus praktiniam įgyvendinimo užtikrinimo realizavimui. Taigi, autoriaus nuomone, tarptautinė bendruomenė neturėtų vengti šio klausimo, bet imtis atitinkamų veiksmų siekiant padaryti tiek pačią koncepciją, tiek reguliavimą kiek galima aiškesnį. Remiantis tuo, kas išdėstyta, galima daryti prielaidą, kad darbo hipotezė bent iš dalies pasitvirtino.

SUMMARY

Realizing that solutions to global problems mostly are beyond the powers of any single state and effective result can only be achieved on a global scale cooperation, States increasingly adopts more and more international treaties, undertaking obligation to implement them. Unfortunately, as practice shows not all international treaties are implemented at an acceptable level, indicating that domestic measures are insufficient. The situation necessitates looking for enforcement possibilities under international law, which creates additional difficulties. The master thesis, therefore, is aimed at analyzing and assessing the concept of enforcement of international treaty implementation as it is used in the doctrine as well as its regulation under relevant sources of international law in order to identify its content and the main problems of its realization.

The first part is dedicated to the general aspects of enforcement in international law. An overview of the literature on the issue suggests that while the need for some kind of enforcement of international treaty implementation tends to be accepted more than disclaimed, its content and application vary significantly among different scholars, making it difficult to identify its limits. Using conceptual analysis and taking into account specificity of international law, the author suggests limiting generic meaning of the concept by including subjective element – intention to bring back defaulting Party into compliance with its *pacta sunt servanda* obligation. The breach of legally binding obligation to implement international treaty, accordingly, is identified as a legal ground for enforcement action. Moreover, identification of the main causes of non-implementation of international treaties as intentional and unintentional (objective inability) allows emphasizing the need for particular flexibility in choosing enforcement mechanisms.

The second part deals with the regulation of enforcement mechanisms under different sources of international law. The author respectively identifies two types of possible enforcement mechanisms: treaty-based and those, provided by general international law and analyzes their possible interrelation in the light of the idea of *self-contained* regime as a subcategory of *lex specialis* within the Law on State Responsibility brought forward by fragmentation and specification of international law. Intention of the Parties is considered as a decisive factor for determining if and to what extent their created regime excludes application of general international law. This forwards two opposite views: some scholars maintain that in case of self-contained regime it is possible to contract out the application of general international law (including enforcement mechanisms provided therein) completely; whereas the others

still believe that in case of failure of enforcement mechanisms provided in self-contained regime the fallback to those provided by general international law should be affirmative.

On the background given above, the author concludes that insufficient clear regulation of enforcement in general, and enforcement of treaty implementation in particular, under international law influences the inconsistency in understanding the very meaning of the concept as well as creates additional difficulties in realizing the possibilities of inducing implementation of international treaty. Therefore, international community should take adequate steps to modify present situation to reflect the need for the clarity and stability of international legal order on the one hand, and its flexibility on the other. Moreover, since the research shows that enforcement of international treaty implementation is still unclear as well as international regulation is of the issue is vague, it seems sensible to contribute to strengthening enforcement of international treaty implementation: by providing a clear guidance: firstly, on what enforcement of international treaty implementation encompasses; secondly, explaining possibilities to use enforcement mechanisms embodied in different sources of international law, their limits and interrelation. In other words, there is a need not only to gather certain enforcement mechanisms for instance in Draft Articles on State Responsibility, but also by providing a framework for creating treaty-based enforcement mechanisms. Under this background, the hypothesis seems to be confirmed.