

CHAPTER 2

INTERNATIONAL LABOR CONVENTIONS' ENFORCEMENT

Binding Force

The International Labor Organization is one of the most important agencies in the United Nations. The general principles of international law are used. If we mention on the source of international law, the article 38 of the statute of the International Court of Justice must be mentioned. It states that *“The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall be applied;*

a. International Conventions, whether general or particular establishing rules expressly recognized by contracting states

b. International Customs, as evidence of a general practice accepted as law

c. General Principle of Law recognized by civilized nations

d. Subject to the provisions of article 59, Judicial Decisions and the Teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

This provision shall not prejudice the power of the court to decide a case ex aequo et bono, if the parties agree thereto”

Regarding the above article, there are many sources of international law such as customs, treaties, general principles of law, judicial decisions and teachings of publicists, resolutions, and state practices. The enforcement of the international law can be analyzed as follows:

1. The international law enforcement

a. International Conventions

According to the article 2 (1) (a) of Vienna Convention on the law of Treaties 1969 *“Treaty means 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”, it can be assumed that conventions can be originated in 3 forms: signature, ratification, and accession.

All obligations will be bound automatically after ratification or accession according to article 14 and article 15 of Vienna Convention as follows:

Article 14 *“The consent of a State to be bound by a treaty is expressed by ratification when:*

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation”.

Article 15 *“The consent of a State to be bound by a treaty is expressed by accession when:*

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.”.

This means that the last process for binding the contracting states is the ratification and accession – not the signature process. However, if any states have reservations (a unilateral statement purporting to exclude or to modify the legal

obligation of a treaty¹⁰) according to article 21, 22, 23, reservations will not bind those state. Thus, consent is important for making conventions or treaties¹¹

b. International Customs

These rules can be mentioned as *opinio juris sine necessitates*, meaning general practice must be accepted as a law. Every state should practice according to international customary law. If any states do not accept international custom, those should expressly object – if not that state will be estoppel.

However, there is one excepted principle called *Jus Cogens* which will bind all states regardless of consent because it is the compelling law. In the case of unclear international customs, if any states accept that principle as the customary law, that principle will bind it.

**From the 2 above principles, it can be noted that the hierarchy of international law can be ranged high to low as Jus Cogens, Law-Making Treaties, and Treaties or Non-Signatories.*

c. General Principles of Law

These principles can be assumed as the general rules for enforcement in all states because of their basic principles such as consent, estoppel, or good faith. **Pacta sunt servanda**¹² (Latin for "pacts must be respected"), is a Brocard, a basic principle of civil law and of international law.

In its most common sense, the principle refers to private contracts, stressing that contained pacts and clauses are law between the parties, and implies that non-fulfilment of respective obligations is a breach of the pact. The general principle of correct behaviour in commercial praxis — and implies the *bona fide* — is requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some systems even without any direct damages incurred by any of the parties.

¹⁰ <http://www.answers.com/topic/reservation-law>.

¹¹ <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

¹² http://www.en.wikipedia.org/wiki/Pacta_sunt_servanda.

With reference to international agreements, "every treaty in force is binding upon the parties to it and must be performed by them in good faith".^[1] *Pacta sunt servanda* is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform. The only limit to *pacta sunt servanda* is ***jus cogens*** (Latin for "compelling law"), the peremptory norms of general international law.

Jus Cogens¹³

That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. Elementary rules that concern the safeguarding of peace and notably those that prohibit recourse to force or the threat of force. Norms of a humanitarian nature are included, such as prohibitions against genocide, slavery, and racial discrimination. *Jus cogens* may, therefore, operate to invalidate a treaty or agreement between states to the extent of the inconsistency with any such principles or norms.

Unlike ordinary customary law that has traditionally required consent and allows the alteration of its obligations between states through treaties, peremptory norms cannot be violated by any state "though international treaties or local or special customs or even general customary rules not endowed with the same normative force".^[1] Under the Vienna Convention on the Law of Treaties, any treaty in violation of a peremptory norm is null and void.^[2] The treaty allows for the emergence of new peremptory norms,^[3] but does not itself specify any peremptory norms (see Art. 53 of the Vienna Convention).

The number of peremptory norms is considered limited but not exclusively catalogued. They are not listed or defined by any authoritative body, but arise out of

¹³ http://www.en.wikipedia.org/wiki/Peremptory_norm - 32k.

case law and changing social and political attitudes. Generally included are prohibitions on waging aggressive war, crimes against humanity, war crimes, piracy, genocide, slavery, and torture.^{[4][5]}

Despite the seemingly clear weight of condemnation of such practices, some critics disagree with the division of international legal norms into a hierarchy. There is also disagreement over how such norms are recognized or established. The relatively new concept of peremptory norms is at odds with the traditionally consensual nature of international law considered necessary to state sovereignty. However, sovereignty has never truly been an absolute concept and limitations upon it are increasingly supported.

Some peremptory norms define criminal offences which are considered to be enforceable against not only states, but individuals as well. This has been increasingly accepted since the Nuremberg Trials (the first enforcement in world history of international norms upon individuals) and now might be considered uncontroversial. However, the language of peremptory norms was not used in connection with these trials - rather the basis of criminalisation and punishment of Nazi atrocities was that civilisation could not tolerate their being ignored, because it could not survive their being repeated.

There are often disagreements over whether a particular case violates a peremptory norm. As in other areas of law, states generally reserve the right to interpret the concept for themselves.

Good faith, or in Latin *bona fides*¹⁴

Good faith is the mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct, even if the conviction is objectively unfounded. This concept is important in law.

¹⁴ http://www.en.wikipedia.org/wiki/Good_faith - 20k.

One who acts in good faith, so far as the violation of positive law (or even in certain junctures of natural law) is concerned, is said to labor under an invincible error, and hence to be guiltless. This consideration is frequently applied to determine the degree of right or obligation prevailing in the various forms of human engagements, such as contracts (common law) and the law of obligations (civil law). In fact, good faith has been identified as the key essence of a contract, and the parties are expected to act in good faith in their dealings.

In the matter of prescription, good faith is held to be an indispensable requirement whether there be question of acquiring dominion or freeing oneself from a burden. Also, in deciding the duty incumbent upon one who finds himself in possession of another's property, cognizance is taken of the good faith with which perchance the holding began and was accompanied.

As the positive freedom of contract, this principle means that the formation of a contract and the selections of its terms are the result of the free will of the parties. Freedom of contracts admits contest between the contracting parties themselves as to the terms of the contract, but the value of reinforcing self-reliance and initiative, underlying any contest, is not absolute.

d. The subsidiary means for the determination of rules of law

- Judicial Decisions and Teachings of Publicists

The decision of the court has no binding force except between the parties and in respect of that particular case according to article 59 of the Statute of the ICJ. The ICJ has 2 major powers: first is the Judgment which has binding force power, and second is Advisory Opinion or Recommendation which has no binding force power though being parties.

- Resolutions

The resolutions according to the United Nations can be divided into 2 parts. One is the Security Council Resolution called decision which has legal binding forces

to all the UN member states. The other is the General Assembly Resolution which has partial legal binding force for the member states.

If the resolutions are involved in the internal executives of the GA, they will have legal binding force for all member states. If the resolutions are involved in the external practices of the GA, the decisions will not bind any states excluding the international customs or the general practices of the states.

However, if we compare the power between the UNSC and the UNGA, we can see that the UNSC has more power than the UNGA. It can be noticed from the article 12 of the UN Charter “*While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests*”. Thus, the resolutions from the UNSC can force the member states to do the states’ obligations that depend on the legal base.

- State Practice, Evidence and Other Sources of International Law

These sources have no binding forces for the states because they do not extend the legal base through the states.

From the 6 sources of international law, each enforcement has various legal binding forces depending on the persistence, duration, and acceptance of those sources. However, the main variable factor is international politics because international relations depend on political issues more than international rules.

International obligations may disappear from our world if all states neglect those rules. Thus, the main principle for making agreements with other states depend on the politics among member states at that time. It has the flexibility to deal with other states. However, the advantages are relatively given to the superpower or major power states which are the core states.

2. The international labor conventions' enforcement

The instruments for ILO to enforce international labor obligations in the member states are conventions and recommendations. Conventions are instruments designed to create international obligations for the states that ratify them. In addition to its Conventions, the ILO has adopted a number of Recommendations, which are different from the point of view of their legal characters. Recommendations do not create obligations, but rather provide guidelines for actions. Fundamental Rights and labor standards will be used as a tool for analyzing the ILO enforcement.

A. Human Rights¹⁵

Rights that belong to an individual as a consequence of being human. The term came into wide use after World War II, replacing the earlier phrase "natural rights," which had been associated with the Greco-Roman concept of natural law since the end of the Middle Ages. As understood today, human rights refer to a wide variety of values and capabilities reflecting the diversity of human circumstances and history. They are conceived of as universal, applying to all human beings everywhere, and as fundamental, referring to essential or basic human needs. Human rights have been classified historically in terms of the notion of three "generations" of human rights. The first generation of civil and political rights, associated with the Enlightenment and the English, American, and French revolutions, includes the rights to life and liberty and the rights to freedom of speech and worship. The second generation of economic, social, and cultural rights, associated with revolts against the predations of unregulated capitalism from the mid-19th century, includes the right to work and the right to an education. Finally, the third generation of solidarity rights, associated with the political and economic aspirations of developing and newly decolonized countries after World War II, includes the collective rights to political self-determination and economic development. Since the adoption of the Universal Declaration of Human Rights in 1948, many treaties and agreements for the protection of human rights have been concluded through the auspices of the United Nations, and

¹⁵ <http://www.answers.com/Human+Rights?cat=biz-fin>.

several regional systems of human rights law have been established. In the late 20th century ad hoc international criminal tribunals were convened to prosecute serious human rights violations and other crimes in the former Yugoslavia and Rwanda. The International Criminal Court, which came into existence in 2002, is empowered to prosecute crimes against humanity, crimes of genocide, and war crimes.

B. ILO Standards for enforcement

Ratification of Conventions¹⁶

The coming into force of a Convention results in a legal obligation to apply its provisions by the nations that have ratified it. Ratification of a Convention is voluntary. Conventions that have not been ratified by member states have the same legal force as Recommendations. Governments are required to submit reports detailing their compliance with the obligations of the Conventions they have ratified. Every year the International Labor Conference's Committee on the Application of Standards examines a number of alleged breaches of international labor standards. In recent years, one of the member states that has received the most attention is Myanmar / Burma, as the country has repeatedly been criticized for its failure to protect its citizens against forced labor exacted by the army.

Recommendations¹⁷

Recommendations do not have the binding force of Conventions, and are not subject to ratification by member countries. Recommendations may be adopted at the same time as Conventions to supplement the latter with additional or more detailed provisions. The intent of these recommendations is often to more precisely detail the principles of related Conventions. In other cases Recommendations may be adopted separately, and address issues not covered by, or unrelated to any particular

¹⁶ <http://www.ilo.org/ilolex/english/convdisp1.htm>.

¹⁷ Ibid.

Convention. ILO Conventions have had specific features which differ from other conventions¹⁸.

1. Conventions are adopted within an institutional framework. Thus, the adoption of Conventions does not follow the type of diplomatic negotiation which is usual in the case of treaties.

2. The revision of Conventions is made only by the General Conference, which is the legislative body of the Organization.

3. Only the International Court of Justice can interpret the Conventions.

4. The International Labor Conference, which adopts Conventions, is constituted by representatives of governments, employers and workers, each delegate entitled to vote individually.

5. A two-thirds majority is sufficient for the adoption of a Convention, and governments should submit the Convention to their competent authorities for ratification.

6. The governments have the obligation, when requested, to supply reports on various issues related to Conventions.

7. Some Conventions include flexibility clauses, because they are generally directed towards countries with very different economic, social and political conditions, as well as different constitutional and legal systems.

According to the ILO Constitution complaint procedure of ILO Enforcement (articles 26 to 34), a complaint may be filed against a member state for not complying with a ratified convention by another member state which ratified the same convention, a delegate to the International Labor Conference, or the Governing Body in its own capacity. The procedure after receiving the complaint will be as follows:

- Inquiry by a Commission consisting of three independent members formed by the Governing Body.

¹⁸ E. Gravel, C. Charbonneau-Jobin. *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*. Geneva. ILO press 2003. p.20-40.

- A full investigation.
- Ascertaining all the facts of the case.
- Making recommendations on measures.
- Taking action by the Governing Body.

The latter means that the accusing state refuses to fulfill the recommendations under article 33 of the ILO Constitution “*In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.*”

Article 33 was invoked for the first time in ILO history in 2000, when the Governing Body asked the International Labor Conference to take measures to lead Myanmar to end the use of forced labor. An article 26 complaint had been filed against Myanmar in 1996 for violations of the Forced Labor Convention, 1930, and the resulting Commission of Inquiry found "widespread and systematic use" of forced labor in the country.¹⁹

From the article 33, it can be noted that the ILO itself has no legal binding forces for the states which have not ratified the ILO conventions. The ILO inspective instruments are monitoring, surveillance, annual reports, global reports, consultation, and technical assistance. Thus, the ILO could not achieve the final goal of the dispute: remunerations or condemnations.

With the weakness of the ILO enforcement, the final process to settle disputes among parties is to bring the case to the International Court of Justice or ICJ. However, before bringing the case to the ICJ, the ILO Governing Body will use political pressure on the ILO violating states to resolve the problem.

¹⁹ ILO. Promoting better working conditions: a guide to the international labor standards system. Washington, DC. Washington Branch Office. 2003. p. 29.

For example, “*Poland ratified both the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) in 1957. When martial law was declared in the country in 1981, the government suspended the activities of the Solidarnosc trade union and detained or dismissed many of its leaders and members. After the case had been examined by the Committee on Freedom of Association, delegates at the 1982 International Labour Conference filed a complaint under article 26 against Poland.*

The resulting Commission of Inquiry found grave violations of both conventions. Based on the Commission's conclusions, the ILO and numerous countries and organizations put pressure on Poland to redress the situation, and in 1989 the Polish government gave Solidarnosc legal status. Lech Walesa, Solidarnosc leader and later President of Poland, noted that "the Commission of Inquiry created by the ILO after the imposition of martial law in my country made significant contributions to the changes which brought democracy to Poland."²⁰

From the above case, we see the political pressure on the ILO disputes. It can be seen that after the ILO commissions looked into the case and the Governing Body took action according to the decision of the ILO conference, all member states and other organizations cooperated to put pressure on the accused state because the ILO has no power to compel the member states to do or not to do anything.

ILO is the organization of the United Nations that also brings the disputes to the International Court of Justice according to the article 33 of the ILO Constitution. Thus, if the political pressures do nothing to the parties, the judicial means will be used according to articles 31 to 34.

However, if we look into article 33 about the failure to carry out the recommendations of commission of inquiry or ICJ, it can be noted that this article gives an important role to politics because the member states of the Conference have the power to do so.

²⁰ Ibid., p.27.

In conclusion, the implementation of ILO conventions in the international arena will flow according to the political pressures more than the legal forces. The final process to supervise the application of conventions and recommendations is the responsibility of the Conference. Although the judicial means of the ICJ have been practiced, the last process depends on the Conference that will use political pressure to force the accused state to practice along with the resolutions of the Conference according to article 33 of the ILO Constitution. It can be noted that politics has more power to pressure the ILO member states to enact the ILO conventions.