CREATING INTERNATIONAL LEGAL NORMS THROUGH THE TREATY-MAKING PRACTICE IN UZBEKISTAN

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I. Introduction

There are probably few fields of international law where confusion and clarity reign more supreme than that of the sources[1]. The sources of international law have been codified in the Statute of the International Court of Justice[2]. Article 38 of the Statute provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law ;

(c) the general principles 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.

The first source referred to in Article 38(1) of the ICJ Statute is “conventions, whether general or particular, establishing rules expressly recognized by the contesting states”. As a term of international law, “conventions” are more commonly referred to as ‘treaties’[3]. Before, the most important source of

[1] G.J.H. van Hoot Rethinking the Sources of International Law (Deventer/Netherlands : Kluwer Law and Taxation Publishers, 1983) at 13, 57-60 .
[2] Statute of the International Court of Justice, 24 October 1945 // https://www.icj-cij.org/en/statute
3 Ademola Abass, Complete International Law: Text, Cases, and Materials, 2nd edn, the United States of America by Oxford University Press, 2014. ISBN 978–0–19–967907–2. P. 77.

international law for centuries was customary law, evolving from the practice of states[4]. The recent attempt to codify international law and the conclusion of multilateral treaties in many important areas, such as diplomatic and consular relations, the law of war, or the law of the sea, have sought to clarify the law and to establish universally accepted norms[5].

After World War II, treaties have become the most important sources of international law in both quantitative and qualitative terms. The database of treaties registered in the United Nations since 1946 contains over 70,000 treaties[6].

The progressive development of international law has shown that treaties are the major instrument of cooperation in international fora. To some extent, treaties have begun to replace customary law. Where there is agreement about rules of customary law, they are codified by treaty; where there is disagreement or uncertainty, states tend to settle disputes by ad hoc compromises—which also take the form of treaties.[7]

II. Treaties as the Main Sources of International Law

Much of the recent international law principles related to law-making treaties are codified in the 1969 Vienna Convention on the Law of Treaties (hereafter the VCLT).

The VCLT sets forth a comprehensive set of rules governing the formation, interpretation, and termination of treaties[8].

The VCLT defines written treaties as follows:

4 R.Bernhardt, Customary International Law, EPIL I (1992), 898.905.
5 Peter Malanczuk. Akehurst's Modern Introduction to International law. The Taylor & Francis e-Library, 2002. P. 36.
6 Carter, Weiner, & Hollis, International Law. Wolters Kluwer in New York 7th ed. 2018. P. 69.
7 Peter Malanczuk. Akehurst's Modern Introduction to International law. The Taylor & Francis e-Library,2002. P.36.
8 Carter, Weiner, & Hollis, International Law. Wolters Kluwer in New York 7th ed. 2018. P. 72.

".....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."[9]

Treaties are also sometimes called 'protocols', 'pacts', 'general Acts', 'accords', 'statutes', 'declarations', 'charters', and 'covenants'. Treaties are the most certain, popular, and important source of international law.

Article 38(1) (a) talks about conventions, whether 'general or particular'. This phrase thus raises the question of whether all treaties are equal, as far as their ability to constitute a source of international law is concerned.

In this sense, it is important to analyze a distinction between 'law-making treaties' and 'contract treaties'. A 'law-making treaty' can be defined as an agreement through which several States declare their understanding of the law on a particular subject. 'Contract treaties', meanwhile, are agreements concluded by a few States— usually two States—relating to common and shared interests between those States.[10]

According to Peter Malanczuk, the only distinction between a 'law-making treaty' and a 'contract-treaty' is one of content. As a result, many treaties constitute orderline cases, which are hard to classify. A single treaty may contain some provisions that are 'contractual', and others which are 'law-making'.[11]

Brownlie provides a distinction with the following definition: "Some treaties, dispositive of territory and rights in relation to territory, are like conveyances in private law. Treaties involving bargains between few states are like contracts; whereas the multilateral treaty creating either a set of rules, such as the Hague

[9] The Vienna Convention on the Law of Treaties, 1969 // https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[10] Ademola Abass, Complete International Law: Text, Cases, and Materials, 2nd edn, the United States of America by Oxford University Press, 2014. ISBN 978–0–19–967907–2. P. 78-79.

[11] Peter Malanczuk. Akehurst's Modern Introduction to International law. The Taylor & Francis e-Library,2002. P.38.

Conventions on the Law of War, or an institution, such as the Copyright Union, is 'law-making'."[12]

However, Brownlie notes that the International Law Commission *"did not consider it necessary to make a distinction between 'law-making' and other treaties"*[13].

What seems to be the most important consideration in determining what type of treaty constitutes a source of international law is the consent of States to be bound by it. In their joint dissenting opinion to the *ICJ's Advisory Opinion*[14] *(Reservations to the Genocide Convention)* (1951) ICJ Rep 15, 31–32, Judges Guerrero, McNair, Read, and Hsu Mo said that:

"The circumstance that this activity is often described as 'legislative' or 'quasi-legislative', must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties."[15]

In regard to the main elements of the treaties, the VCLT provides the basic four elements of treaties, namely (1) an international agreement; (2) concluded among states; (3) in writing; (4) governed by international law as well as it lists two potential elements – the agreement's designation and its number of instruments[16].

(See Duncan B. Hollis, Defining Treaties // The Oxford Guide to Treaties 19-30 (Duncan B. Hollis ed., 2012)).

[12] Brownlie, Principles (4th ed), supra, note 421 at 632-633 .
[13] Ibid. at 634.
[14] ICJ's Advisory Opinion (*Reservations to the Genocide Convention*) (1951) // https://www.icj-cij.org/en/case/12
[15] Ademola Abass, Complete International Law: Text, Cases, and Materials, 2nd edn, the United States of America by Oxford University Press, 2014. ISBN 978–0–19–967907–2. P. 80.
[16]See Case Concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) (Jurisdiction and admissibility) // International Court of Justice, 1994 I.C.J. Rep. 112 (July 1) // https://www.icj-cij.org/en/case/87

When talking about treaties as sources of international law, it is noteworthy distinguishing them from their alternatives such as Political Commitments, Contracts, and Unilateral Acts.

Unilateral acts or declarations are publicly made and manifesting the will to be bound may have the effect of creating legal obligations (See *Nuclear Test Case*[17] (ICJ, 2006)).

The visible distinction of contracts from treaties is that they are governed by domestic law while treaties are governed by international law.

Political commitments bring exclusively political and moral nature and there are neither legal force nor intention to be legally enforceable. In addition, treaties may contain political commitments[18].

III. Treaty-Making Practice of the Republic of Uzbekistan

After gaining independence on September 1, 1991, the Republic of Uzbekistan, as a full member of foreign policy and foreign economic relations, has formed a legal framework for mutually beneficial cooperation with foreign partners and is developing it in areas of mutual interest.

The preamble to the Constitution of the Republic of Uzbekistan stipulates that the republic recognizes the supremacy of universally recognized rules of international law.[19]

The Concept of Foreign Policy of Uzbekistan also determines the strengthening and improvement of the legal framework of international cooperation, the conclusion of prospective (*or forward-looking*) bilateral and multilateral agreements as one of the political and diplomatic tools of a unified state policy.

[17] *Nuclear Tests* (Australia v. France) // https://www.icj-cij.org/en/case/58
[18] Carter, Weiner, & Hollis, International Law. Wolters Kluwer in New York 7th ed. 2018. P. 80-90.
[19] The Constitution of the Republic of Uzbekistan, 1992. www.lex.uz // https://www.lex.uz/acts/20596

Therefore, in accordance with the national legislation of the Republic of Uzbekistan, international agreements as the main sources of international law form the legal framework of interstate relations and are a guarantee for the stability of the obligations of the parties.

The first normative legal act regulating the field of international agreements in Uzbekistan is the Law of the Republic of Uzbekistan "On International Treaties" adopted on December 22, 1995. Within the framework of ensuring the implementation of this law, several decisions of the Cabinet of Ministers have been adopted.

Previous legislation of the Republic of Uzbekistan on international agreements did not specify the subject of legal and other expertise of drafting international agreements, and the mechanism for ensuring their implementation and monitoring the process was not sufficiently formed.

Therefore, on February 6, 2019, a new Law "On International Treaties of the Republic of Uzbekistan" (hereinafter "the Law") was adopted[20].

The new Law is an example of an implementation of the 1969 Vienna Convention on the Law of Treaties, to which 116 countries are parties as of October 2021[21].

The main purpose of the Law is to form the legal framework of foreign policy in line with the current reforms.

In particular, the establishment of rules for the first time in the Law concerning the study of the practical significance of international treaties and the legal, economic, linguistic, and other types of expertise of their texts serve to strengthen the demand for their quality.

[20] The Law of the Republic of Uzbekistan "On International Treaties of the Republic of Uzbekistan", 2019. www.lex.uz // https://lex.uz/docs/4830084

[21] The Vienna Convention on the Law of Treaties, 1969 // https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Another novelty is that the law clarifies the legal status of international acts (declaration, joint statement, memorandum of understanding, etc.) which are not binding, and simplifies the procedure for their conclusion.

It is worth noting that in the early days of independence, the main focus in this area was on the formation of a legal framework for cooperation with foreign countries, while the current urgent task is to further improve the international legal framework and actively participate in the creation of international norms.

As of August 2022, according to the information of the Ministry of Foreign Affairs of the Republic of Uzbekistan, the legal framework of the Republic of Uzbekistan consists of more than 4,300 documents, of which about more than 500 are multilateral international agreements of universal and regional character. More than 3,800 are bilateral international documents[22].

In recent years, special attention has been attached to strengthening bilateral and multilateral legal frameworks and expanding the geography of partner countries in order to further expand cooperation with foreign countries, consistently develop foreign trade relations, improve the investment climate and open promising transport corridors.

In particular, it should be noted that in recent years bilateral agreements on mutual encouragement and protection of investments with Turkey, Korea,

Belarus, Tajikistan[23]; avoidance of double taxation with Japan, Egypt, Tajikistan; international road transport with France, Spain, Turkey, Belarus, Tajikistan; as well as on interregional cooperation with neighboring countries have been signed.

[22] K.Rashidov. The international legal framework of the modern foreign policy of the new Uzbekistan is being strengthened. Scientific Article // The Ministry of Foreign Affairs of the Republic of Uzbekistan, 2021.
[24]www.uza.uz // https://uza.uz/uz/posts/yangi-ozbekiston-zamonaviy-tashqi-siyosatining-xalqaro-huquqiy-asoslari-mustahkamlanmoqda_288375
[23]Enumeration of countries with which the Republic of Uzbekistan has concluded international treaties in the field of promotion and mutual protection of investments. https://invest.gov.uz/investor/russkij-dvustoronnie-dogovora/

The Law of Uzbekistan (Article 4) also provides the definition of 'a treaty' similar to the one in the VCLT:

…"international treaty of the Republic of Uzbekistan — an international agreement concluded in writing by the Republic of Uzbekistan with a foreign state, international organization or other subject having the right to conclude international treaties, which is regulated by international law, regardless of whether it is contained in one document, in two or more related documents among themselves, as well as regardless of its specific name and method of conclusion (contract, agreement, convention, act, pact, protocol, exchange of letters or notes and other names and methods of concluding an international agreement)…".[24]

Similar to the VCLT provisions, the Uzbek Law also contains the four main elements of treaties and two potential elements (see above).

However, one of the distinctions between the provisions of the Law of Uzbekistan as of February 6, 2019 and the VCLT can be seen in terms of scopes and parties to these legal frameworks. The VCLT applies only to treaties between States, while the Law applies not only treaties between States but also other subjects

of International law such as international organizations or others possessing legal personality under International Law (See Article 4 of the Law above).

Another distinction between the law and the VCLT is that the Law describes procedures and formation of interagency agreements while the VCLT is silent in this issue.

It is noteworthy to mention that the Law has implemented the provisions of the 1986 Vienna Convention on the Law of Treaties between States and International

[24] The Law of the Republic of Uzbekistan "On International Treaties of the Republic of Uzbekistan", 2019. www.lex.uz // https://lex.uz/docs/4830084

Organizations or between International Organizations[25] although the Convention does not enter into force yet and the Republic of Uzbekistan has not ratified it.

The Law provides the provision regarding making reservations to treaties and acceptance or objections of other states to these reservations (Article 26):

"Upon signing, ratification, approval, acceptance of international treaties or accession to them, reservations may be made subject to the terms of the treaty and international law.

Reservations to international treaties of the Republic of Uzbekistan can be withdrawn at any time in the same order in which they were made.

The acceptance by the other contracting party of a reservation to an international treaty of the Republic of Uzbekistan or objection to it is carried out in accordance with the terms of the international treaty and international law by the body (official) that makes the decision on consent to be bound by the international treaty for the Republic of Uzbekistan."[26]

Contrary to Article 21 of the VCLT [27], the Law does not contain any provisions concerning legal effects of reservations and of objections to reservations [for more information regarding the case law on effects of objection to reservations see the ICJ

Advisory Opinion on *Reservations to the Genocide Convention*, 1951 I.C.J. Rep. 15, 21-24 (May 28)[28]]

Making a reservation is frequently encountered practice by States in the treaty-making sphere. Any State can establish a reservation to the treaty, which it

[25] The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 // https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf

[26] The Law of the Republic of Uzbekistan "On International Treaties of the Republic of Uzbekistan", 2019. www.lex.uz // https://lex.uz/docs/4830084

[27] The Vienna Convention on the Law of Treaties, 1969 // https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[28] ICJ Advisory Opinion on *Reservations to the Genocide Convention*, 1951 I.C.J. Rep. 15, 21-24 (May 28) https://www.icj-cij.org/en/case/12

intends to conclude or become a party in conformity with cultural, political perspectives.

Accordingly, the legal effects of reservations to other parties of the treaty are as important as reservations themselves. There are vital issues such as objections of other states to reservations and relations between the reserving State and other parties objecting to reservations or keeping silent to them.

Apart from reservations, in the international treaty-making process, states may make other statements when consenting to be bound by a treaty. On occasion, states submit *understandings,* which are interpretive statements that seek to detail or clarify the meaning or reach of one or more treaty provisions. In some cases, a state may issue *declarations* when it consents to a treaty. These are unilateral statements of political opinion or intention about the treaty that are neither reservations or understandings. Declarations do not impact the consenting state's treaty obligations but rather signal that state's views on matters that may relate to the treaty[29].

IV. Conclusions and Proposals

Considering the above-mentioned opinions and facts, it can be supposed that treaties are the main sources of international law that form a legal basis of inter-state relations and are a guarantor of their stability.

The use of legal mechanisms (creating legal norms of international law, that's, treaties) in the promotion of bilateral and multilateral cooperation, the timely resolution of problems, preventing conflicts and escalation of tensions play an important role in modern international relations.

The rise of international organizations has impacted international law in many ways. The role of international organizations as subjects of international law is increasing. International organizations are actively involved in the creation of

[29] Carter, Weiner, & Hollis, International Law. Wolters Kluwer in New York 7th ed. 2018. P. 98.

international law and the conclusion of international agreements within their competence.

International organizations have come to play a significant role as a source of international law-making. Today, moreover, international law has evolved to define and regulate international organizations as legal persons [4].

Considering the role of international organizations as a subject of international law to conclude treaties with other subjects of international law is becoming more important in the current progressive development of international law. In this sense, entry into force of the 1986 Vienna Convention emerges a significant issue in front of the world community.

To this end, states are highly encouraged to ratify this Convention and bring legal order in the treaty-making process between international organizations and states or between international organizations.

The Law of Uzbekistan discussed above sufficiently reflects the provisions of the VCLT and norms of international law. However, the following proposals

would enhance the efficiency of this Law in domestic jurisdiction, taking into account the dualism theory.

Firstly, the provisions of the VCLT concerning legal effects of reservations and of objections to reservations are proposed to be incorporated into the Law so that a State will have an available legal framework in case any disagreements with other states appear.

Secondly, Considering Article 4 of the Law regarding parties of a treaty, the 1986 Vienna Convention is utmost of importance for a State to ratify and implement into national legislation.

Thirdly, apart from reservations, in the international treaty-making process, states may make other statements when consenting to be bound by a treaty. On occasion, states submit *understandings*, which are interpretive statements that seek to detail or clarify the meaning or reach of one or more treaty provisions. In some

cases, a state may issue *declarations* when it consents to a treaty. These are unilateral statements of political opinion or intention about the treaty that are neither reservations nor understandings. Declarations do not impact the consenting state's treaty obligations but rather signal that state's views on matters that may relate to the treaty.

To this end, legal definitions of declarations and understandings to a treaty are encouraged to be incorporated into the Law in conformity with the norms and principles of international law.

Fourthly, from the perspective of national legislation, the following proposal is elaborated in order to enhance the efficiency of the Law.

It is proposed to simplify procedures and set deadlines for each process of conclusion of bilateral treaties or study on the feasibility of participation in multilateral conventions in order to eliminate unnecessary bureaucratic barriers in the process and introduce effective mechanisms in this regard.

For example, similar laws in the CIS countries of Belarus and Kazakhstan set appropriate deadlines. In particular, following Article 5 of the Law of the Republic of Belarus "On Treaties" of July 23, 2008[30], the competent authority responsible for the international agreement shall submit a proposal to negotiate the document to the Council of Ministers of Belarus at least one month before the start of the planned negotiations with the Ministry of Foreign Affairs, the Ministry of Justice and other relevant agencies, and in some cases at least ten working days[31].

The Law of the Republic of Kazakhstan "On International Treaties" of May 30, 2005, sets a period of fourteen to thirty calendar days for the competent authorities to submit proposals to the President or the Government on signing, ratification, approval, adoption, and accession to international agreements[32]. In

[30] The Law of Treaties - Ministry of Foreign Affairs of the Republic of Belarus (mfa.gov.by)
[31]The Law on Treaties of the Republic of Belarus as of 2008 //
[31]https://pravo.by/document/?guid=3871&p0=h10800421
[32]The Law on International Treaties of the Republic of Kazakhstan as of 2005 //

conclusion, it can be inferred from the above-mentioned that treaties are more used by subjects of international law as the main source of international law in international relations.

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