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Frail International Obligation and Imperiled Global Peace: The Myth of Pacta Sunt Servanda

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ABSTRACT

The law of the treaties is based on the principles of "pacta sunt servanda" which means that agreements are to be kept. It is one of the basic principles of international law that treaties must be performed in good faith and are binding. Article 26 of the Vienna Convention on Law of The Treaties reiterates that treaties are meant to be adhered to in good faith. Bilateral or multilateral treaties and agreements have been the most apt and amicable way of addressing disputes between the nations. These treaties lay down rights and obligations of the parties and the course of action required to ensure de-escalation of the dispute. Yet there have been numerous instances where the treaties and agreements have violated for individual interests of nations. In significant number of cases, such breaches jeopardized the international peace and security. This can be ascribed to the inefficient enforcement regime and insignificant repercussion for such breaches. This has grossly limited the relevance of the law of treaties and the principle "pacta sunt servanda" has been rendered nugatory. This research paper attempts to throw light upon the lacunas in the existing regime of the United Nations regarding the breach of treaties. It also attempts to put forward suggestions and reforms to strengthen the obligation of aggressors.

I. INTRODUCTION

With globalisation at its peak in the contemporary world, treaties, covenants, charters and concordat hold grave importance and are indispensable. The concept behind all these terms is one and the same i.e. they all are agreements and are based upon the Latin principle of **consensus-ad-idem**.[3] In 1969, International Convention on the Law of Treaties was validated and it came into effect in 1980. ***Article 2 of The Vienna Convention*** defines treaty as "*a written agreement that has been concluded between states, in a single instrument or in two or more related instruments, and comes under the gamut of International Law*."[4] For a treaty to come into existence there is no stringent or definite form and the only pre-requisite is that the parties must have an intention to engender binding legal obligation between them by the instrument

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[3] MALCOLM N. SHAW, THE LAW OF TREATIES 655 (7th ed. 2014).
[4] Article 2, Vienna Convention on the Law of Treaties

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of agreement. In a case before the International Court of Justice i.e. ***Qatar v Bahrain***[5], it was mentioned that to decide upon the nature of the agreement whether it is legally binding or not 'all its actual terms and circumstances' in which it was formed are to be considered.

The cardinal principle behind the law of treaties is that treaties must be performed in good faith and are binding. These principle has emanated from the Latin principle ***'****pacta sunt servanda',* which means that agreements are to be kept. ***Article 26 of the Vienna Convention*** reiterates that treaties are meant to be adhered to in good faith.[6] In ***Gabcikovo-Nagymaros Project case***[7] the court was of the view that treaties are entered into for the purpose of their performance and if not so then why to enter into agreements those are destined for non-adherence.

II. KEY EXISTING REGIME FOR SETTLEMENT OF DISPUTE

A. UNITED NATIONS

The maintenance of the international peace and security, and to develop friendly relations among the nations are two of the prime objectives of the UN and have been enshrined in Article 1 of the UN Charter. The UN has power to undertake measures to achieve its objectives.[8] The Security Council is one of the six organs of the UN. It has fifteen members, out of which, five (USA, UK, Russia, China and France) are permanent members.[9] The primary responsibility for the maintenance of peace and security has been conferred upon the Security Council by dint of Article 24 of the UN Charter, which reads as:

> *"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."*

Further, Article 24 also asserts that in performing duties pertaining to the responsibilities conferred upon it, the UNSC is authorised to exercise certain powers that have been enshrined in Chapters VI, VII, VIII and IX of the Charter of the UN. In case of dispute between nations, the UNSC has been accorded with powers to resolve such disputes by various means. Chapters VI and VII of the Charter of The UN encompasses this dispute resolution power of the UN. Chapter VI deals with pacific settlement of disputes wherein the UN's power is limited to recommendation making whereas Chapter VII encompasses dispute having potential to pose

[5] Qatar v. Bahrain ICJ Reports, 1994, p.112;102 ILR, p.1
[6] Article 26, Vienna Convention on the Law of Treaties
[7] Gabcikovo-Nagymaros Project Case, ICJ Reports, 1997 , pp. 7: 116 ILR, p. 1.
[8] Article 1, Charter of the United Nations.
[9] Article 23, Ibid.

threat to peace, breaches of peace, and any act of aggression.

Chapter VI contains means for pacific settlement of disputes, the continuance of which can pose threat to international peace and security. The UNSC may investigate any dispute which may lead to international friction in order to determine whether the continuance of it can compromise international peace and security or not.[10] Under this chapter, the parties to such disputes are obliged to solve such dispute through *"negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".*[11] If the parties fail to resolve the dispute through these means, they are mandated to refer the same to the Security Council.[12] The Security Council has power to recommend such procedures or measures which it deems necessary for the settlement of the dispute but these recommendations are not binding.[13]

Chapter VII encompasses disputes which pose threat to peace, breaches of peace, or any act of aggression. The powers conferred upon the Security Council in such cases are recommendatory as well as decisive. The decisions taken by the Security Council under Chapter VII are binding upon the parties to dispute. After ascertaining that the dispute poses threat to international peace or of any act of aggression, the Security Council can take measures to contain the further aggravation of the dispute and to resolve the dispute under Articles 41 and 42. While the measures adopted under Article 41 doesn't involve the use of force and include economic sanction, measures adopted under Article 42 may involve use of force.

The dispute solving mechanism of the Security Council is embedded with two shortcomings. Firstly, the grant of veto power to the five permanent members of the Security Council has grossly limited the capability of the UN in maintenance of international peace and security. Any decision of the Security Council can be made after affirmative vote of nine members and concurring vote of the permanent members.[14] Therefore, a negative vote by any of the five members would veto any resolution of the Security Council. Owing to this, the UN has failed many a times in coming up with a workable solution to critical disputes having potential to dismantle international peace and security. Since the establishment of the UN, 293 vetoes have been cast by the permanent members. The exercise of veto power by Russia against the resolutions of Security Council addressing the Syrian Civil War (2011) is a recent instance

[10] Article 34, Ibid.
[11] Article 33, Ibid.
[12] Article 37, Ibid.
[13] Article 36, Ibid.
[14] Article 27, Ibid.

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where the UN failed miserably.[15] The inability of the Security Council to take any measures addressing the Syrian conflict made the situation worse by many fold.[16] The Syrian conflict also lifted the veil from the inefficiency of Security Council when the dispute involved the personal interests of the permanent UNSC members. The deleterious division in political opinion among the permanent members of the UNSC were also evident during the era of cold war during which veto was cast 263 times.[17] Other instances of detrimental use of veto power are Russian-Ukrainian conflict, the Second Gulf War (Second Iraq War), and the NATO Kosovo Campaign.[18] These incidents aptly testify that the ability of the Security Council to address and resolve a dispute is subject to personal interests of the permanent members of the Security Council.

Secondly, the power to recommend measures seems to be frail and insignificant barring some cases. The measures recommended under Chapter VI of the charter are not binding upon the parties and hence they can't ensure proper determination of dispute.

III. THE INTERNATIONAL COURT OF JUSTICE

The ICJ is one of the six principle organs of the United Nations. It is a judicial institution and decides matters before it on the basis of international law. Article 92 of the charter regards the ICJ as "principle judicial organ of the United Nations". It has been accorded with the status of the "*guardian of legality for the international community as a whole, both within and without the United Nations*".[19] Though the ICJ has always adjudicated upon the matter on the legal facet, thereby keeping the political repercussion at bay[20], the issue arises with the enforcement of its decisions. Article 94(1) obligates the members of UN to comply with the decisions of the ICJ. Article 94(2) bestows duty upon the Security Council to ensure compliance with the decisions of the ICJ. It reads as:

> *"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon*

[15] *UN Security Council Working Methods,* Security Council Report. (Oct. 19, 2020), https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php
[16] Simon Adams, "Failure to Protect: Syria and the UN Security Council", Occasional Paper Series No. 5, March 2015, Global Center for the Responsibility to Protect.
[17] Richard Butler, "Reform of the United Nations Security Council", *Penn State Journal of Law and International Affairs*, Vol. 1: Iss. 1.
[18] Richard Gowan & Nora Gordon, "Pathways to Security Council Reform", Center on International Cooperation, New York University, May 2014.
[19] The Lockerbie case, ICJ Reports, 1992, pp. 3, 26; 94 ILR, pp. 478, 509.
[20] Iranian Hostages case, See also, Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports, 1996, pp. 66, 73.

measures to be taken to give effect to the judgment."

The onus is on the Security Council to take measures for the compliance of decisions of the ICJ. The Security Council has been ineffective in taking significant decisions regarding disputes as discussed above and bestowing upon it with the responsibility to ensure compliance of decisions of the ICJ further deteriorates the circumstances. Also, there have been cases where the nations refused to comply with the decisions of the ICJ.[21]

IV. Recent Breach Of Treaties And Compromised International Peace

Recently, there have been many significant breaches of international treaties by various nations. Many of these breaches also comprised of act of aggression. These breaches and acts are potential threat to international peace owing to the complex political scenario and their repercussions.

A. The Indo-China Dispute

There is a border dispute between India and China which even resulted in the 1962 Sino-Indian War. There is divergence in the perception of border between both the nations. The demarcation line between India and China is the Line of Actual Control (LAC) which was formed after the war of 1962.[22] India and China entered into five agreements in the form of Confidence Building Measures (CBM) to prevent future clash and border tussle.

The first agreement is the *1993 Agreement on the Maintenance of Peace and Tranquility along the Line of Actual Control in the Sino-Indian Border.* The major highlights of this agreement were that it mandated both the parties to respect and follow the Line of Actual Control (LAC) until the ultimate solution is crafted to the dispute and to keep the military forces to a minimum level.

The second agreement is the "*1996 Agreement between the Government of the Republic of India and the Government of the People's Republic of China on Confidence-Building Measures in the Military Field along the Line of Actual Control in the Sino-Indian Border".*

This agreement was signed between both the nations to prevent amassing of military forces and weapons along the LAC. The agreement consists of specified weapons were ought to be reduced and limited.

[21] Corfu Channel case ICJ Reports, 1949, p.4; 16 AD, p. 155. See also Iceland in the Fisheries Jurisdiction case, ICJ Reports, 1974, p. 3; 55 ILR, p. 238.
[22] "*Line Of Actual Control: China And India Again Squabbling Over Disputed Himalayan Border".* International Business Times. 3 May 2013.

The other agreements are:

- **i.** 2005 Protocol on the Modalities for the Implementation of Confidence-Building Measures in the Military Field along the Line of Actual Control in the Sino-Indian Border.
- **ii.** 2005 Agreement between the Government of the People's Republic of China and the Government of the Republic of India on the Political Parameters and Guiding Principles for the Settlement of the China-India Boundary Question.
- **iii.** 2012 Establishment of a Working Mechanism for Consultation and Coordination on China-India Border Affairs.
- **iv.** 2013 Border Defense Cooperation Agreement between India and China.

There was a violent clash between the troops of India and China along the LAC on 15th June 2020 in which 20 Indian Soldiers and an unknown number of Chinese soldiers were killed.[23] This was first fatal clash between both the sides after 1975. In August, India accused China of escalating tensions along the LAC where China accused India of firing shots upon its soldiers.[24] There has been massive amassing of troops and weapons including artillery from both the sides.[25]

This tension along the LAC has infracted all the five border agreements signed between the two nations and has significant potential to jeopardize international peace.

B. THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA)

Iran entered into an accord with six nations viz. USA, UK, France, Russia, China and Germany in 2015. This agreement had been named Joint Comprehensive Plan of Action. There was a prolonged conflict between USA and Iran with Iran's nuclear programme at its centre. the Security Council passed various resolutions addressing the disputes such as Resolution 1747(March 2007) and Resolution 1803 (March 2008).[26] The JCPOA was the culmination of conflict between the USA and Iran. This agreement obligated Iran to limit its nuclear activities. The primary obligation of Iran under the JCPA was to limit the Uranium enrichment to 3.67%, which is used in making fuel for nuclear power plants. The US was obligated to uplift various

[23] Ankit Panda, *India-China Tensions Spike In The Himalayas*, The Diplomat (Sept. 05, 2020) https://thediplomat.com/2020/09/india-china-tensions-spike-in-the-himalayas/

[24] *India-China dispute: The Border Row Explained in 400 Words,* BBC News (Sept. 10, 2020) *https*://www.bbc.com/news/world-asia-53062484.

[25] *China Continues Military Build-up Along LAC In Eastern Ladakh Amid Talks,* Bussiness-Standard. (June 24, 2020) https://www.business-standard.com/article/current-affairs/china-continues-military-build-up-along-lac-in-eastern-ladakh-amid-talks-120062401326_1.html

[26] Paul K. Kerry, "*Iran's Nuclear Program: Tehran's Compliance with International Obligations*", Congressional Research Service (25 June 2015).

sanctions imposed on Iran under the Countering America's Adversaries Through Sanctions Act (CAATSA). The Dispute revived when USA unilaterally withdrew from the JCPOA in May 2018 despite Iran's verifiable compliance to the accord.[27] The tussle flared up when the USA re-imposed sanctions upon Iran. In 2019, Iran accused USA of not uplifting the sanctions imposed and started enriching uranium beyond the agreed limit of 3.67%. [28]. USA withdrew from the JCPOA and also designated Iran's Islamic Revolutionary Guard Corps a terrorist organisation.[29] The tension arose between the two nations rapidly. This led to massive mobilisation of troops and weapons by USA in the Middle-East.[30]

C. THE SOUTH CHINA SEA DISPUTE

The South China Sea Dispute involves diversion in maritime claims in the South China Sea region. The parties involved in the dispute are China, Indonesia, Malaysia, Vietnam and Philippines. The important treaties to settle and pacify the dispute in the region are Declaration on the Conduct of the Parties in the South China Sea (2002), ASEAN Declaration on the South China Sea (1992), Treaty of Amity and Cooperation in Southeast Asia (1976) and the United Nations Convention on the Law of the Sea (1982).

There have been cases of breaches of these agreements and the disputes have flared up violently. There have been numerous events in the year 2020 alone that have increased tensions in the region. The sinking of Vietnamese fishing vessel by the Chinese Coast Guard, Chinese survey ship sailing in the Malaysian Exclusive Economic Zone (EEZ) and creation of new administrative districts in the region has resulted in further escalation.[31]

There has been mutual aggression between USA and China in recent times in the region. China has accused US navy of deploying its destroyer in the region without its permission which has worsen the situation further.[32]

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[27] Kelsey Davenport, *The Joint Comprehensive Plan of Action (JCPOA) at a Glance,* ARMS CONTROL ASSC. (October, 2020) https://www.armscontrol.org/factsheets/JCPOA-at-a-glance.

[28] Ivana Kottasova, *Iran to breach uranium enrichment limits set by landmark nuclear deal*, CNN (July7, 2019, 02:20 PM) https://edition.cnn.com/2019/07/07/middleeast/iran-nuclear-agreement-intl/index.html

[29] Rey Katech, *Confrontation Between the United States and Iran,* COUNCIL ON FN. REL. (October 9, 2020) https://www.cfr.org/global-conflict-tracker/conflict/confrontation-between-united-states-and-iran

[30] Ibid.

[31] Zachary Williams, *China's Tightening Grasp in the South China Sea: A First-Hand Look*, THE DIPL. (June 10, 2020) https://thediplomat.com/2020/06/chinas-tightening-grasp-in-the-south-china-sea-a-first-hand-look/

[32] Karen Ruiz, *Chinese military demands US 'stop provocative actions' and 'restrict' naval operations in the South China Sea after USS John McCain enters waters in disputed area without permission*, DAILY MAIL ONL. (October 9,2020 10:11 PM) https://www.dailymail.co.uk/news/article-8824635/Chinese-military-accuses-provocative-actions-South-China-Sea.html

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V. A New Way Ahead

A. A New Regime To Regulate Law Of Treaties

Bilateral agreements and treaties are the most common method which is taken recourse of by nations in dispute. These agreements have been significantly successful in subduing the conflict and preventing further escalation. But there have been many cases of breach, as discussed above, which can be ascribed to debilitated international obligation of the aggressor country. Therefore, there is an urgent need for a new regime which shall be independent of international political pressures to guide such agreements and treaties, and to punish the aggressor by undertaking measures such as economic sanctions. Such a regime can be set up under the Vienna Convention on Law of Treaties by bringing about an amendment such as inserting the provisions regarding obligations and measures to be taken in cases of breach.

B. Reform in the United Nations

The existence of the veto power in today's era of globalisation forms the basis for inefficiency of the United Nations. The rationale behind the grant of veto power to the permanent members is to guarantee unanimity. It was presumed that in order for the UN to succeed, it was necessary to ensure unanimity in its decisions so as to ensure enlisting of resources and will of super powers to foster the efficient functioning of the UN.[33] The statements of the representatives of the super powers subscribe to this rationale. The US representative stated that:

> *"The great powers could preserve the peace of the world if united…they could not do so if dissention were sowed among them. The great powers had every reason to exercise the requirement of unanimity for high and noble purposes, because they would not want again to expend millions in wealth and lives in another war."*[34]

The same rationale can be found in the statement of the representative of the Soviet Union when he stated that *"the agreement on a joint interpretation (that is of the veto power) would facilitate the creation of a truly effective and efficient international organization for the maintenance of peace."*[35]

The erroneous exercise of veto power by the super powers guided with their political and economic interests has jeopardized the functions of the United Nations. The continued exercise

[33] Zack A. Tucker, "*United in Progress: A Proposal to Reform United Nations' Organizational Structure*", Cultural Diplomacy News, 2010.
[34] Document 936, III/1/45, June 12, 1945 (also found in Summary Report of Eighteenth Meeting of Committee III/1/45, *compiled in Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XI*, 474.
[35] Ibid, at 475.

of veto power in selfish attitude over the decades has ingrained other members of the UN with the perception that veto power is to protect the individual national interests of the super power.[36]

It is high time that the UN did away with the veto power. The ability of the Security Council to take appropriate steps to foster international peace and security has largely been altered due to the existence of veto power. The introduction of majority rule in the Security Council seems to be indispensible to optimum functioning of UN for global peace. It is pertinent to have regards to the Treaty of Lisbon adopted by the European Union that facilitated multiple salient reforms. The key highlight of this treaty is a new institutional setup that made the European Parliament more powerful.[37] This was achieved by scrapping the concept of unanimity and adopting the notion of qualified majority voting in 45 policy areas. The concept of double majority has been introduced to further strengthen the relevancy of the European Union.[38]

There have been numerous calls worldwide to scrap the veto power. This issue needs to be addressed at the earliest to free the Security Council from the clutches of political pressures and individual interests of the super powers.

VI. CONCLUSION

The notion of "pacta sunt servanda" is regarded as one of the settled and basic principles of international law. Signing treaties and agreements is one of the most favoured ways of amicable dispute settlement. Yet, due to the weak international obligations and insignificant repercussions of breach, these treaties and agreements have been violated many times. In most of these cases, the international peace and security has been jeopardized. Therefore, there is an urgent need to undertake stern reforms in the existing institutions like the Security Council and to set up a new regime to regulate such bilateral and multilateral treaties and agreements. Only then an effective, independent and austere global system can be set up that would resolve disputes efficiently and determine binding rights and obligations of parties.

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[36] Richard Butler, "Reform of the United Nations Security Council", *Penn State Journal of Law and International Affairs*, Vol. 1: Iss. 1, at 28.
[37] eur-lex.europa.eu: " Official Journal of the European Union, ISSN 1725-2423 C 115 Volume 51, 9 May 2008.
[38] Ibid.