

SPECIFIC PROBLEMS REGARDING INTERNATIONAL TREATIES INCLUDED IN LAW No. 590/2003

Author: Adrian CRĂCIUNESCU*

***Abstract:** O analiză amănunțită a prevederilor Legii nr. 590/2003 privind tratatele internaționale va permite câteva mențiuni referitoare la relația dintre noile reglementări privind tratatele internaționale și Convenția pentru codificarea legislației privind tratatele semnată la Viena în anul 1969.*

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A close reading of Law No. 590/2003 regarding treaties imposes several mentions concerning the relation between the new regulation of international treaties and the Convention for the codification of treaties' law concluded in Vienna, 1969.

Paraphrasing the Latin adagio – *incredibilis et incredibile est* – it is unimaginable why Romania is not a party to the documents by which treaties' law has been codified, especially because 35 years have passed from its ratification and at the same time we are not a party to (we haven't ratified) the 1986 Convention regarding treaties' law between states and international organizations, or between international organizations.

According to O.N.U. documents – *Traitè multilatèraux déposés auprès du Secrétaire général* – 98 states had adhered or ratified the Convention regarding treaties' law (1969) by the end of 2003. At the same time most European Union states have ratified these conventions. To this it is added the Vienna Convention regarding states' succession for treaties' matters (1978) to which Romania has not adhered and hasn't constituted itself as signatory party.

Although the representatives of the Romanian Minister of Foreign Affairs participated to these regulations by being present at Vienna Diplomatic Conference in the two sessions of 1968 and 1969, then to that of 1986- when they were very active by presenting amendments, still the state Council didn't approved anything until 1989. After 1990, the only regulation in the field of international treaties was Law No. 4/1991 regarding treaties' concluding and the ratifying- an organic law-, which was abrogated in 2003 by Law No. 590.

* Ph.D., Associate professor, "Vasile Goldiș" University of Arad, Romania.

In post-revolutionary Romania, the legislative area has witnessed an impressive conventional frame; yearly over 200 treaties on the state, government and department level have been accepted, approved and ratified.

The two Conventions that codify treaties' law - Vienna Convention regarding treaties' law (1969) and Vienna Convention regarding the law of treaties between states and international organizations, or between international organizations (1986) – cover the entire area regarding treaties concluded between the most important international law subjects – the states and the international organizations.

The conventions also apply to the treaties that represent the constitutive acts for international organizations and to the treaties adopted within certain international organizations; the concern not to overlook this important area of treaties by not including it in a codified regulation has largely been shared. Moreover the regulations included in the above mentioned conventions apply also to the treaties that the other international law subjects conclude – belligerents and national freedom movements; although Art. 3 stipulates that their application regards neither the agreements concluded between states and other international law subjects, or between these international law subjects, nor the agreements that were not concluded in a written form, the Conventions don't infringe, in the case of these agreements, all the rules set by them and to which they would be subjected on the basis of international law which is independent from them (one should not forget that they are mainly based on the rules of general international law- the international custom). At the same time these Conventions don't infringe the agreements' application to the relations between states which are regulated by international agreements and to which other international law subjects are parties. The Conventions don't cover directly these categories of treaties but they don't mean to change their regime; this regime is common to that of treaties between states and it is hard to imagine that their will be a deviation from the common rules after treaties' law has been codified.

On the other hand, by establishing in the Preamble of Conventions that the rules of international custom law will continue to rule over the issues that haven't been regulated by their dispositions, it is concluded that no custom norm will be valid along with the conventional one provided it differs from them.

Within their efficiency limits, the Conventions have replaced the pre-existent custom law which means that the Conventions' rules will prevail. Therefore we can conclude that the entire domain of treaties is regulated conventionally as there is an ordered and viable framework for the development of custom law within this branch of international law.

The influence of these two Conventions is increasing as they have been accepted and applied by most states and their effects have a direct impact on the third states. The Conventions' stipulations also contribute to the creation of custom rules in this field following the regulations they encompassed and represent their basis.

The regulations of the two codifying Conventions constitute the common law in the field of treaties.

Therefore, the participation to the 1969 Convention, as well as to that of 1986, the increasing frequency of the treaties concluded by Romania with different international organizations, financial and banking institutions and so on, justifies such an imperative concern and cannot be avoided by Romania, too.

The only possibility for Romania to participate now to the codifying Convention

of 1969 its accession to EU (Romania hasn't signed the Convention within the term stipulated by Art. 81; however the Convention has remained open to the accession of any state that represents one of the categories mentioned in Art. 81 and to which Romania belongs).

In the case of Romania's accession - which will happen sooner or later - to the 1969 Codifying Convention of treaties' law, a series of issues is raised especially in relation to the present regulation – Law No. 590/2003.

The first mention would be that the accession to the Codifying Convention doesn't override domestic regulations, including Law No. 590/2003; the participation to the Convention doesn't deny, but on the contrary, presupposes the existence of a national legislation imposes this module, this part from the treaties' regulation and makes reference to it to be able to function.

The possible accession of Romania to the codifying Convention doesn't consider the existence of a domestic regulation in the area of treaties, but enforces it. The rules from the codifying Convention represent the general framework on the international level of treaties, and its existence is very important for the domestic legislation to reach its ends by means of the international relations that are established; if the Convention didn't exist, this datum should be looked for (codified or as international custom), without which conventional international relations cannot be made.

If domestic legislation supposes the existence of rules on international level for regulation on interstate level, including in a codified form, the codifying Convention, in its turn, is not only permissive but supposes national legislation in the area of treaties; the two areas are parts of the same whole and are not incompatible.

There is no doubt that treaties law represents a branch of public international law; it is part of the international legal order and is based on the fundamental principles of international law. In the case of treaties law, in the correlation international law-domestic law, there is a certain level of overlapping and interconnection which is particularly given by the relation between international treaty-domestic law; interconnections are frequent and organic, thus when we speak about treaties law in general, we should consider both international law and the national legislation in this area. International treaties law is doubled and emphasized by the rules of domestic law; by the actions they offer, the concluding and the application of treaties cannot be made without an ensemble of regulations and mechanisms on national level; for the internal legal order they indicate the general framework represented by the international treaties law. If national legislation has to make reference to international law which represents the general frame for regulations, international law in its turn has to make reference to the national one to prove that it is operational.

The norms of treaties law regarding the procedure for concluding treaties suppose legal categories that derive from internal legal order; the constitutional law of each state stipulates the norms for defining their own organisms' competences in reaching the purposes for which the treaties have been concluded. While international law lists the ways of giving approval to be bound through a treaty, domestic legislation establishes the cases when the ratification takes place, etc. and the issuing organism (the notion of chief of the state, parliament and so on belongs to the constitutional system of each state); if international law establishes the ways for terminating the treaty, domestic law is the one that regulates by law the competence of national authorities and the procedure which will

be followed for disputing the treaty and so on. Therefore a law in the area of treaties is highly necessary.

The problem that arises as a result of accession is that of compatibility between domestic law regulations and the stipulations of the codifying Convention: on the basis of Art. 11, paragraph 2 of the Constitution the latter will become part of the domestic law; therefore Law No. 590/2003, as well as any other regulation in the field, will be confronted to the Convention and will have to be revised so as the rules of treaties law created in the Romanian legislation as a result of its accession to constitute an integrated, compatible and harmonious whole to carry out its role. This merged legislation derived from the association of the Convention with Law No. 590/2003 will have to add through its regulations the elements that don't exist and shouldn't exist in the codifying Convention and which are specific to each national system.

This connexion imposes a complete correspondence between the two legal orders, imposes conformity between international law norms and those from national legislation, and one or the other having to regulate reciprocally. On one hand international law starts from national law systems where it finds its spinal bone (the general principles of law and the basic legal concepts); on the other hand, domestic law cannot develop contrary to international law, the agreement between treaties law and domestic law made by adapting the latter to international rules, corresponds to an international obligation and for the area we refer to any non-synchronization would jeopardize the existence of international law.

From this perspective we should consider the position of codified treaties law, the conventional law in this matter; Vienna Convention of 1969 regarding treaties law codified the custom law (*lex lata*), and for certain cases it has contributed to the progressive development of treaties law by establishing and developing some rules over the existent ones. In the context of this equation, the codified international treaties law and the national legislations in this matter, we are going to identify what the position of Law No. 590/2003 is in relation to treaties law, the necessity of a total correspondence between them as two parts of a mechanism that is to function.

In all constitutional systems there are rules referring to the conclusion and the effects of treaties, some of the Constitutions (title IV of French Constitution) having entire chapters particularly designed for this area.

Regarding the relation between the regulation from the codifying Convention (in the event of accession to it) and our domestic legislation, especially Law No. 590/2003, but not only, we appreciate that the following requirements should be considered.

On the basis of the constitutional disposition (art. 11 paragraph 2) the ratifying Convention to which our country will access and the rules it contains, will be part of domestic law and will have the force of law. The Convention text appears as annex to the respective accession law, this international regulation being from now on part of domestic law (being incorporated), it becomes a norm of domestic law and has the force of law.

The position of these stipulations is not mentioned in the Constitution or in Law No. 590/2003 (apart from the fact that they cannot be abrogated by further normative acts - art. 31, paragraph 4). One can conclude that these stipulations transformed into domestic legislation, have the general regime of any legal norms. There are of course dispositions (art 20, paragraph 2) by which the pacts and other international treaties regarding the fundamental human rights have priority over domestic laws, but this

priority is applied to the limited area of the fundamental human rights and only as long as the Constitution or the internal laws don't include more favorable dispositions. The rule which sets the priority of regulations from international treaties appears as an exception case as it is limited to the case of human rights and consequently the case of treaties is generally considered the one established by art. 11. Therefore the regulation introduced in the Romanian legislation as a result of its accession to the Convention is treated in the domestic legislation as any other norm; what follows is to apply it the rules for conflicting laws in time (as it is after all a succession of laws) and the principles applied in this matter. Given this background we are to see in what relation it is with Law No. 590/2003 (or with other laws in force on that date).

The rules in this matter are illustrated by the well-known adagios – “*lex posterior derogat priori*”; “*lex specialis generalibus derogate*”; “*generalia specialibus non derogate*”; “*lex posterior non derogat priori speciali*” and so on.

The attempt to determine the position of the codifying Convention in relation to the national legislation that is in force, as well as in relation to Law No. 590/2003, indicates us that the taking over of this international law regulation was made in the context of Law No. 590/2003 which regulates the treaties domain, therefore a general regulation represents the common law in this matter and will be in force as existent law on the accession date. The codifying Convention in its turn appear on positions for a special and further regulation; a special regulation because the stipulations of codifying Convention don't have a general application but one that is limited to the category of relations regulated between the states that are part to the Convention; the category of relations regulated between the states that are part to the Convention is applied according to the principle “*pacta tertiis nec nocent nec prosunt*” only between parties (inter se) and not in general; a further regulation because it doesn't appear against the background of an existent legislation.

For this situation the norms taken over from the codifying Convention will abrogate the ones from Law No. 590/2003, both on the basis of “*lex posterior derogat priori rule*”, as well as on the one of “*lex specialis generalibus derogate*”; abrogation will be partial not total.

Therefore, as regards the treaties to be concluded in the future with the states that take part to the codifying Convention, Romania will apply its rules and the rules of Law No. 590/2003 as long as the latter will not get into conflict with the new stipulations brought by accession; in the relation with the states that are not part to the codifying Convention, Romania will apply the Law No. 590/2003 (to the extent it doesn't get into conflict with the norms of general international law); the stipulations of Law No. 590/2003 which follow those from the codifying Convention will continue to be applied even in the relation with the states that take part to the Convention because they represent the common law in this matter (the rule “*lex speciali generalibus derogate*” being applied in this case).

Law No. 590/2003 will enter the common law (residuary) and applies whenever there isn't a contrary regulation. In this case the rule “*tot iure per speciem derogate*” is applied (Law No. 590/2003 remains in force as common law and the new regulation will limit to the setting of a legal regime for the domain of regulation relations by treaty). This statement should consider the circumstances because independently from the participation to the codifying Convention, the rules of custom law are formed and

developed by following those from the Convention and theoretically we can speak about a paradoxical situation when Romania has to observe what is stipulated in the Convention even if it does not take part to it.

Apart from the above debate regarding the position of our legislation rules as a result of the accession, on the basis of Art. 11 paragraph 2 of the Constitution and of their effect on Law No. 590/2003, other aspects in this matter could be discussed.

Regarding treaties' conclusion, the codifying Convention has a supplementary character, namely the parties may come to an agreement different from that of the codifying Convention; *ius dispositivum*, the norms of international law of a supplementary character give the parties the liberty to decide by themselves on the acts' consequences and on their agreement, the only limit being that of "*ius cogens gentium*" rules. One can reply that by showing that this is valid in the relation between states, namely if the states are offered a regulation through the codifying Convention, but are not obliged to adopt, they can agree otherwise; this rule applies on the state level but once the codifying Convention has been accepted by a state as such and its content has been included in the national legislation with this content, it would be difficult to explain how it is difficult to derogate from such a stipulation which has from now on the quality of legal stipulation (which has not remained supplementary after the accession to the Convention has been made through law and it represents a legal norm as all the others).

We consider that the solutions considered should be adjusted as for some cases (as a way of expressing agreement one could consider "any other agreed means"- Art. 11 from the Constitution), the rules appear as a general framework allowing the parties to stop at the solution they agree on (even for the case of treaties' concluding, there are alternative solutions to which the parties can resort to); as a final analysis the stipulation of the codifying Convention should stay as it is and shouldn't be subjected to any transformation as it could become annoying (procedures should be agreed between the parties and it cannot be accepted for one party to impose the other rules that it cannot accept); in Law No. 590/2003, the ratification takes place even if this procedure is expressly stipulated in the treaty (letter h) - therefore it is agreed.

In the light of accession Law No. 590/2003 and other normative acts are going to be revised; on one hand to make it compatible with the stipulations of codifying Convention, to adapt and establish an organic and harmonious relation between them, and through correlation to assure their well integration and functioning; on the other hand to maintain those rules that continue to represent a worrying reason. As a way of harmonizing for example one could take it into consideration; for example, regarding treaty definition we could resort to that from the codifying Convention, stipulating in a separate text that the treaty's procedures will be applied to the departments' agreements.

Law No. 590/2003, as an act of domestic law doesn't take over the norms of international law as such and on the level of domestic legal order doesn't represent a reiteration of certain rules that govern the relations between states in the case of treaties; these rules preserve the character of international norms, but as they are opposed to the states they have to be included in their legislation, not by repetition, but by an articulated reflection on the national level which is to complete the general framework given by the international regulation and to provide it with an end. One cannot speak about a modern domestic legislation as long as international law rules are ignored.

If we make a thorough analysis of Law No. 590/2003 we will be stupefied to

discover that it has no reference to the Convention regarding treaties law (Vienna 1969); Art. 2 (paragraph 2) sets that when treaties are concluded some of the international law rules will be considered (their importance is made minimum here), but there is no reference to the codifying Convention. There are some stipulations in Law No. 590/2003, some of them being almost identical with those from the codifying Convention while others are amended to that extent that they become distant from them leaving the impression that the Romanian law-maker doesn't want to know anything about this. However if there is a link in the treaties area between international and domestic law, it is this ensemble of rules that should be considered; as the codifying Convention represents international law in the field of treaties, Law No. 590/2003 should have appeared as its reflex. The motivation seems to be that as long as Romania is not part to the Convention, it is not held by this – completely false because as long as the Convention represents a codification of treaties law, it incorporates the norms of custom law brought to the level of clarity, certainty and credibility.