Enforceability of International Climate Change Agreements:

The need to implement International Commitments into Local Legal Frameworks

AKROM

OCTOBER 2014

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TABLE OF CONTENTS

INTRODUCTION

The long established role of International Climate Change Agreements is becoming vital as the issue of climate change is directly connected to the emissions of greenhouse gases on a global level. There are many opinions around the urgency of the requirement to integrate the global warming issue in the global agenda. However, the high number of states involved in the Kyoto protocol may be interpreted as international recognition that climate change is a matter that must be considered sooner rather than later. The Kyoto Protocol is recognised as one of the most important international mechanism for addressing climate change and emissions trading. The Kyoto protocol establishes emission targets for carbon dioxide and other greenhouse gases for each signatory country with the goal of reducing global emissions. 172 countries are part of this Protocol, making it a strong cooperative international agreement. However, even now, many years after the signing of the protocol, there are still issues to be resolved and leaks to be fixed in relation to the success of the implementation of international environmental agreements.

In order to reduce climate change the international agreements has addressed main topics such as periodical objectives for emission reductions, incentives and responsibilities of the parties. However, none of the commitments will be effective if the signatory countries are not legally bound to observe them. A flexible compliance enforcement system will not be sufficient to guarantee results. The effectiveness of any international agreement is directly related to the enforceability of the clauses that were agreed by the parties.

The thesis of this paper is that in order to ensure the success of any International Climate Change legal framework, it is required for each signatory country to implement the signed International Convention into the domestic legal system further to its formal ratification.

With the aim of demonstrating the thesis, this paper will be divided into four sections. The first section will describe the history of International Law in order to understand the foundation and the basis of International Agreements. The second section will briefly explain the steps required to put in place International Agreements, putting particular focus on the meaning of the ratification of the treaties. The third section will consider the mechanism used in the past by Climate Change agreements to address the issue of signatory states not complying with their commitments under the ratified agreement. The fourth section of this paper will analyse the experience of some International Agreements and the interpretation of their enforceability within the domestic legal systems of signatories' countries. For the purpose of this paper, treaty, conventions and agreements are considered synonyms.

SECTION 1 The Concept of International Law

International Law is generally believed to have its origin in ancient times [1] and it has been required ever since various human societies and territories came into being. As described by L. M. Singhi before the existence of the nation states, International law already existed as the existence of tribes, and societies living close to each other generated the need for regulation of those relationships.[2] Some authors interpret international public law as the opposite of domestic law. Other authors consider International Law as a complement of domestic law, as the former refers to interstate relations while the latter governs the relations of the inhabitants of the state. Even though globalisation was a concept that only became widely used at the end of the 20th century, it developed much earlier within the concept of Cosmopolitanism, defined as the idea that all social groups belong to one society. This concept has his roots Before the Common Era and different philosophers and writers have deeply analysed the theories around it.

During the seventeenth century philosophers such as Hobbes and Kant focused on the idea of the need for a social contract[3]. In his classic *Metaphysics of Moral*, Kant differentiates the law within the state from the Cosmopolitan Law, which covers the relations and interactions across borders[4]. Kant based his theory on the initial concept of the existence of two community stages; a first stage of people living and occupying a territory and a second and earlier stage of citizens of the earth. In this early stage, every person was a citizen of the world as a whole, regardless of where they were born or where they lived.[5] The author Peter Kemp revived the old concept of Kosmopolis[6] to explain the strong development of global relations over the last two centuries. In the 19th and 20th centuries, new international players such as transnational companies, multinational organisations and global issues emerged. These have played a fundamental role in the international scenario and the decisions around global matters[7]. Kemp highlights three common global problems resulting from the existence of these players; Financial Globalisation, Intercultural Existence and the Physical Sustainability of the Earth. International Law was an important participant before the First World War and, more significantly for this topic, the global chaos of the Second World War triggered the nations of the world to come together as a whole to seek an urgent global solution. This led to the creation of the United Nations, an international organisation comprised of independent states with the shared goal of returning and maintaining peace within the world. This organization was born from the dramatic conflict the world was experiencing throughout the escalation of the Second World War. The world itself was asking for a global solution.

The League of Nations, created after World War One, failed to prevent World War Two. To achieve greater success than its predecessor, the United Nations needed to be strongly supported by its member

[1] Altman, Amnon, Tracing the Earliest Recorded Concepts of International Law. (2) The Old Akkadian and Ur III Periods in Mesopotamia, Martinus Nijhoff Publishers, 2012 Koninklijke Brill NV, Leiden, Netherlands.
[2] Singhi, L.M "International Law and the United States" *India International Centre Quarterly* 12. 1 (1985): 65-75.
[3] Pauline, Kleinheld Kant Cosmopolitan Law: World Citizenship for a Global Order. Kantian Review, 2, pp 72-90.
[4] Kant, Imanuel. : Metaphysical of Moral" Ed Gregor, Mary. Cambridge University Press, 2013.
[5] Kant Cosmopolitan Law: World Citizenship for a Global Order, Pauline Kleinheld p.74-76
[6] Kemp, Peter, "The Cosmopolitan Foundation of International Law". The Idea of Kosmopolis. Ed Lettevall Rebecka and Linder Klockar. Södertörns högskola (2008):143-156
[7] As above

countries. This global support was finally reached after lengthy negotiations between the permanent members of the Unites Nations (which will not be analysed in this paper). In June 1942 after the creation of the United Nations, former US president Franklin Roosevelt, with the purpose of encouraging the dissemination of United Nations values, introduced a Global Day of Solidarity. The United Nations started being viewed with hope and people all around the world embraced United Nations day. In this context former Prime Minister Churchill wrote a message *"In this ceremony we pledge to each other not only support and succour until victory comes, but that wider understanding, that quickened sense of human sympathy, that recognition of the common purpose of humanity without which the suffering and striving of the United Nations would not achieve its full reward"*[8] By mid-1945 the war had ended. With the reinforcing of the United Nations, international law and as a result international agreements continued to form the basis of current global frameworks.

In 1945, The Charter of the United Nations came into force. Its third preambular paragraph highlights the primary objective of the organisation, "we the peoples of the United Nations determined…to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained…"[9]. The International Court of Justice (ICJ) was created as the main legal organisation of the United Nations for the resolution of parties' disputes. As such, the ICJ is based on a treaty between the signatory countries and the legally binding effect of the court decision that coincides with the binding effect of the international treaty that put it in place.

SECTION 2 Ratification of an international Treaty

With the purpose of understanding the moment in which a state becomes a state-party of an International Agreement, this section intends to briefly summarise the processes involved in the development and final execution of international treaties.

The creation of the United Nations led to a globalised world in constant inter-state interactions. The development of global agreements became more significant in order to rule people and countries' relations in different matter. Putting in place international agreements involves a number of formal steps.

The Vienna Convention on the Law of Treaties (VCLT) was ratified by 114 states and came into force on 27 January 1980[10]. In Article 2.1(a) it defines an international treaty as *"… 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation…"*[11]

[8] As above.
[9] United Nations, *"Charter of the United Nations".* (1945)
[10] United Nations, Vienna Convention on the Law of Treaties (1980) United Nations, Treaty Series, vol. 1155, p. 331
[11] As above

Adoption

Article 9.2 of the VCLT establishes how the text of the negotiated international treaty is adopted.

"…The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."[12]

This means that further negotiations of what would be included in the international treaty, the states agree a final text that would be considered the treaty, this step would be followed by signatures of the states, demonstrating their intention to become party of the agreement. However, parties do not become a state-party until its ratification.

Acceptance or Approval of an International Convention (Ratification)

Article 14 of the Convention

"*1. 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.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification".

The ratification of a treaty represents the most important and final confirmation of states becoming part of the agreement, it is considered the action that accepts the legally binding conditions of an international treaty for the legal system of the state. In the past, treaties were occasionally signed but finally not ratified by the parties, therefore, not legally adopted by the party.

Independently of the negotiation of a treaty, the only step that represents the commitment of a state is the Ratification. There were a significant number of cases in which the negotiated treaties were agreed by the ministers or head of states, but finally rejected by their legislative organisms.[13] Such is the case of the United Sates that signed the Kyoto Protocol but did not ratify it. Former President Bill Clinton went through the complete process and signatory requirement of the protocol, however, the document was rejected by the US Senate. Generally the executive power of each country negotiates their participation in the agreement, but the last word is given by the legislative power which determines the actual incorporation (or not) of the country as a member of the agreement.

As it will be analysed on the next sections of the paper, the ratification is the final step for the commitment of a party to be part of an international agreement, however, the enforceability of the

[12] As above
[13] Lantis, Jeffrey S. "The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective" Oxford Scholarship Online (2009) p2-3

agreement will depend on the conditions put in place in the content of the agreement. This means that ratification of treaties do not represent *per se* a legal binding condition for the state-parties.

SECTION 3 Enforceability Mechanisms on International Climate Change Agreements

The experience of previous International Climate Change agreements has exposed the problem of non-compliance with the commitments of the agreements by the parties and the difficulties of enforcing the agreement obligations. New approaches were taken into consideration for the development of the most recent international environmental agreement. Steps range from punitive clauses establishing penalties to those countries that breach the agreement down to softer, encouraging approaches establishing rewards and recognitions to the countries that are in compliance with the treaty. The two conventions being analysed in this paper, which include in their clauses Non-Compliance Procedures, are the 1987 Montreal Protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer and the 1997 Kyoto Protocol to the 1992 Framework Convention on the Climate change[14].

The Montreal Protocol and the Vienna Convention on the Protection of the Ozone Layer

The Montreal Protocol was developed in response to the recognition of the urgent requirement to reduce chlorofluorocarbons (CFCs) emissions, due to their direct negative impact on the ozone layer. As happens with all the environmental agreements, action was required from as many states as possible. This involved both developed and developing countries committing to an international agreement to reduce the widespread use of CFCs.[15] The Montreal Protocol includes incentives and control tools that intend to encourage or enforce the states' commitments.

Donald Kanariu identified the main reasons for states not complying with their commitments as economic, technical or administrative[16]. "In the case of the Montreal Protocol parties took the realistic assumption that non-compliance with the Protocol obligations would most likely be a consequence of economic, technical or administrative problems and therefore, needed a non-compliance regime that would work with the Parties in difficulty…[17].

The Montreal Protocol incorporated financial assistance for those parties in difficulty as well as supervisory institutions to monitor parties and their compliance with their obligations under the protocol. These were the Secretariat, the Implementation Committee and the Meeting of the Parties.

Funds: Article 10 of the Montreal Protocol considered the economic and financial difficulties that developing countries may have in fulfilling their commitments. For this reason, a Multilateral Fund

[14] Fitzmaurice, M.A. and Redgwell, C. "Environmental Non-Compliance Procedures and International Law", Netherlands Yearbook of International Law 31(2000) 35-65
[15] Murase, S et al "Compliance-Control in Respect of the Montreal Protocol" Proceedings of the Annual Meeting. American Society of International Law 89 (2014)
[16] Ed Kaniaru, D. "The Montreal Protocol: Celebrating 20 Years of Environmental Progress: Ozone Layer and Climate Protection (2007). UNEP/Eartthprint.
[17] As above

(Multilateral Fund for the Implementation of the Montreal Protocol) was created in which the developed countries should financially collaborate to facilitate compliance by developing countries. Additionally, the funds were utilised as incentives for developing countries that would be provided with financial assistance and transfer of technology.[18]

Reporting of Data as a Monitoring Measure: Each party is required to submit a report of their annual production and consumption of ozone depleting substances to the Secretariat that administrates the information.

Compliance Enforcement: In accordance with Article 8, any party that considers that other party is not complying with the commitments stipulated under the protocol, can submit its concerns to the Secretariat which requests the party for which compliance is an issue, to provide information about the matter and shall prepare a report and to submit it to the Implementation Committee. The Committee then issues a recommendation. The Meeting of the Parties is responsible for making decisions in relation to the Non-Compliant parties. This is an exclusive prerogative of the Meeting of the Parties. The affected party may be asked to submit action plans to the Meeting[19]

Under the Protocol non-compliance with the treaty obligations may result in the following consequences for the non-compliant party:

- The suspension of the party
- Any right or privilege of the party under the agreement (such as rights related to industrial rationalisation, production, consumption, trade, and transfer of technology, financial mechanism and institutional arrangements are subject to be suspended or withdrawn[20].
- Trading in the ozone-depleting zone is considered to be a privilege granted by the Protocol so restrictions would apply for those states that did not ratify the Protocol, and therefore, would work as an incentive mechanism (and an enforcement mechanism when Trade Restrictions are applied.)[21]

Kyoto Protocol and the United Nations Framework Convention on Climate Change

There is a large number of analyses examining the success and effectiveness of the Kyoto Protocol in relation to the goal of reducing emissions. Based on the experience of previous internal agreements related to climate change, the Kyoto protocol addresses many leaks identified from the previous agreements.

Building on the experience of International Climate Change frameworks from the past, the Kyoto Protocol developed a system consisting of rules, incentives, processes, penalties, and committees to ensure the effectiveness and the enforceability of the conditions set, utilising as the starting point Article 18 of the Kyoto Protocol;

[18] As above 16
[19] As above
[20] As above.
[21] As above.

"The Conference of the Parties serving as the meeting of the Parties to this Protocol shall (…) approve, appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol"[22]

With the adoption of the Kyoto Protocol, and for the purpose of implementing the climate regime, measures were taken as part of the procedure indicated under the Kyoto Protocol[23];

Committee: The creation of a Compliance committee with Facilitative ND Enforcement Branches to control/monitor the emissions targets; the committee is comprised of 10 members from countries party to the protocol[24]

Sanctions: For parties demonstrated to be not in compliance with their obligations under the Protocol, a number of sanctions were put in place that included for the non-compliant party;

- The requirement to develop a compliance action plan by the non-compliant party
- The suspension of the non-compliant party's eligibility to make transfers under art 17.
- The deduction from the party's assigned amount for the second commitment period a number of tonnes equal to 1.3 times the number of tonnes of excess emissions in the first commitment period[25]

Among other commitments, the Kyoto Protocol established emission trading targets for the parties which were detailed in the document. Non-compliance with these targets by a signatory country produces a change in the state's commitment from the original target to the commitment of covering its deficit plus 30% of this. Additionally, the party is no longer entitled to sell its emission permit until it is re-approved to do so [26] Nevertheless, the Kyoto Protocol intentions cover the possibility of countries not complying with their commitments. It is clear that there are no adverse or punitive consequences for the non-compliant state if the second commitment stage is not reached.

Even though the non-compliance issue was acknowledged and considered in both the Montreal Protocol and the Kyoto Protocol, the measures taken did not result in having a legally binding effect, one of the primary conditions needed to ensure compliance with the agreement. By creating mechanisms to facilitate compliance, the parties rely on assistance which cannot be considered a compliance mechanism per se. Furthermore, the non-compliance mechanisms in the Protocols set up a number of soft sanctions for those parties that breach their obligations. Such sanctions are not relevant as they foresee reduction or suspension of benefits but do not have established legal consequences for the non-compliant party as a direct result of breaching the agreement. In other words, the strategies of these

[22] United Nations. United Nations Framework Convention on Climate Change. Kyoto Protocol (2005)
[23] Stokke, Olav. Implementing the Climate Change Regime: International Compliance. Ed Hovi, Jon and Geir Ulfstein. UK:Earthscan (2005): 107-109
[24] As above 22
[25] As above 23
[26] Hovi, John et al. A Credible Compliance Enforcement System for the Climate Regime. London: Taylor & Francis, 2012.

protocols are focused on cooperative approaches and moral commitments. They do not include a mechanism to legally bind the parties.

SECTION 4 Learning from the Experience of other International Agreements and its Enforceability throughout the different national judicial systems

International Law has been developed over thousands of years, growing through different international scenarios. The experience gained by international law in general can be taken as a learning base to develop more effective International treaties. This section will be focused on different examples of International Laws and the degree of their success in enforcing their commitments on the signatory states. Independently of the subject of International Treaties, International Law in general has grown and developed better conditions on its path toward effectiveness.

South America:

The Case M. L., M. S/ INSANIA[27] and the Convention on the Rights of Persons with Disabilities (CRDP)

The Convention on the Rights of Persons with Disabilities (CRDP)[28] entered into force in May, 2008. It established general principles and rights for persons with disabilities. The CRDP includes a number of measures required to ensure the effectiveness and compliance of the parties within the convention, one of them being the incorporation of the treaty at the domestic level.

Article 4 of the CRDP states that parties shall *"…adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention…"*[29]

The implementation of monitoring mechanisms at national levels has been pointed out by some authors as representing a *"particular innovation for international human right conventions…"*[30]

Furthermore, Article 33.2 of the CRDP establishes parties' obligation for the national implementation and monitoring of the convention; *"States Parties States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."*[31] As per the wording utilised in

[27] "M. L., M. S/ ··INSANIA " (R) Folio Nro.:601/606 Expte. Nro. 156275 JCC. 13, Argentina. The name of people involved in legal cases related to mental disability is not disclosed by the legal system as it is part of the parties' rights the confidentiality of their details. For this reason only the initials are published for this case N#156275 JCC. 13.
[28] United Nations. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Art.4
[29] As above.
[30] Janet E. Lord and Michael Ashley Stein. The Domestics Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities", *Washington law Review Association* (2008).
[31] United Nations.Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Art 33.2

Article 33.2, each party can decide the mechanisms to be utilised and the convention provides guidelines for the requirements by providing a list of monitoring topics that should be addressed. Even though the domestic legal framework required to be established is discretionally developed by each state, the guideline provided by Article 33 seems to cover the main requirements.

The Argentinean legal system establishes a hierarchy between laws. On the top of the pyramid the is national law, followed by provincial laws and finally municipal laws.

The recent case M. L., M. S/ INSANIA[32] detailed below analyses the applicability of a convention over a provincial law, as the convention was implemented under the domestic system under the national law N# 26.378

Facts

In the city of Mar del Plata, Argentina, the party M.L.M was declared incompetent to manage his financial and health matters, therefore an official carer was designated by the judge in the first instance. The party M. L. M. appealed, requesting this decision be analysed in a second instance. The provincial law Nº 13.634 states that appeal to a second hearing is only permitted in exceptional circumstances. Therefore, in this case the right for the decision to be revised by a higher court would not be applicable. The plaintiff alleged that The Convention on the Rights of Persons with Disabilities was applicable in this case, resulting in the right to appeal for a second hearing under its Article 13. The crux of the case was whether provincial law was enforceable over the Convention on the Rights of Persons with Disabilities.

The judges Nélida I. Zampini and Ruben D. Gerez decided that following ratification of the convention, National Law N# 26.378 implemented the convention to the domestic system, giving the convention national hierarchy over provincial laws. Therefore, the plaintiff's argument was accepted and his right for the case to be reviewed by a higher court was recognised and confirmed by the judges.[33]

North America

The Case Sanchez-Llamas v. Oregon[34] and the Vienna Convention on Consular Relations- United States

US is party to the Vienna Convention on Consular Relations(VCCR)[35] which establishes in its Article 36.1 that when citizens of other states are detained or accused of committing a crime this should be reported to the state "*…if he so requests, the competent authorities of the receiving State shall, without delay, inform the Consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay…"* further to the establishment of this previous rights it recognises the existence and the importance of the local regulations Article 36.2 clarifies *"The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State"* regardless of the acknowledgment of the significance of the domestic

[32] As above 25.
[33] As above 25.
[34] Sánchez-Llamas v. Oregón, 126 S. Ct. 2669 (2006).
[35] United Nations. Vienna Convention on Consular Relations (1961)

laws the article also highlights the requirement of such laws being aligned with the rights of this Convention "*…subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended"*[36] Moreover, US has also ratified the Optional Protocol in which the U.S. agreed that all the matters arising under the VCCR will be resolved by the International Court of Justice. [37]

In 2006, two Central American citizens were accused of separate crimes committed in US territory and these accusations were not reported to their respective countries. This was claimed by both individuals but rejected by the US Supreme Court on the basis that the petitioners filed habeas corpus after their convictions so it was a procedural default and the Article 36 right was not violated. [38] The petitioners requested the Court to use its national judicial authority to grant a provision to enable the enforceability of Article 36. However, the Court rejected this argument based in its interpretation of Article 36.2, part one where, based on the Court's understanding, it allows domestic judicial decisions to be conclusive.[39] On his analysis of the Sanchez-Llamas case, Professor Carlos Vazquez summarised, *"The Court recognised that the state courts are required to provide remedies that are required by treaties either [expressly] or implicitly. The apparent recognition that treaty remedies can be implicit in a treaty appears to be a rejection of the argument-based on recent implied right of action cases-that only express remedies are available for treaty violations"*[40]. The domestic legal system in this case reflects the final internal decision of a party to recognise whether rights stated by an international convention are enforceable or not.

Furthermore, in the case Mexico v. United States of America (Avena and Other Mexican Nationals) This case started with the issue of suits by Mexico against the Unites States as a result of the conviction and capital sentencing of a number of Mexican citizens without considering the rights and obligations under Article 36 of the Vienna Convention on Consular Relations. The International Court of Justice (ICJ) understood that the United States has not complied with its obligations under the VCCR. Now, the relevant issue in relation to this decision by the ICJ is what impact this decision made by an international court has for the United States. The author Curtis A. Bradley[41] interprets that although the Unites States has signed the Convention, this represents an international obligation but it does not affect the Unites States domestic legal system. What is more, the possibility of considering the ICJ decision effective and applicable in the Unites States system may have constitutional implications[42] (as decisions made by an international court are not part of the constitutional hierarchy system). This deduction may be interpreted as a valid conclusion not only in the Unites States but also in South America and Central America as most of their legal systems are also organised in a hierarchical order in which International Law is not located at the top of the pyramid which is the province of the National Supreme Court. Therefore, the final decisions are made by the domestic supreme court of each country and international decisions cannot overturn domestic ones.

[36] As above 33.
[37] McGuinness, Margaret E. Sanchez-Llamas, American Human Rights Exceptionalism And The VCCR Norm Portal
[38] Bodansky, Daniel "International Decisions" *The American Journal of International Law* 2006:884-885
[39] As above
[40] Alford Roger, "Vazquez on Sanchez-Llamas and Bustillo" Opinio Juris 28 June 2006 <http://opiniojuris.org/2006/06/28/vazquez-on-sanchez-llamas-and-bustillo>
[41] Bradley, Curtis A. "ENFORCING THE AVENA DECISION IN U.S. COURTS" *Harvard Journal of Law & Public Policy,* 30 (2006) 119-125.
[42] As above

Europe

Seidi-Hohenveldern has analysed the scientific discussions that took place in Austria in relation to International law and Domestic law.[43] To develop his analysis he cites the author Mosler, who suggests that is not necessary to "transform" an international law to municipal law to ensure its effectiveness because a mere "adoption" of it would be enough for this purpose[44] However, this does not seem to be the case as there is a significant number of cases in which Austrian Court have found International Treaties inapplicable. So in the event of an International Treaty violating or in discord with local laws, the Austrian Courts are inclined to prioritise the local framework.

The Kadi Case: EU Law or United Nations Security Council

In 1999, The United Nations established a Sanctions Committee under UN Security Council Resolution 1267. This committee can designate economic sanctions against individuals such as freezing funds to eliminate the possibility of terrorist supporters to economically assist terrorism.

Facts

Between 1999 and 2000 the Saudi Arabian businessman Kadi was identified by the United Nations Security Council as a possible member of the terrorist organisation Al Qaeda, a potential associate of Bin Laden and listed as a terrorist. The United Nations consequently sanctioned him. Based on these facts, in 2011 the US Department of Treasury decided to freeze all his assets located in the US.

Kadi's lawyer appealed the EU decision on the basis that he had been denied the rights of due process. In 2008, the Court of Justice (CJEU) reached a decision in Kadi's favour and stated that "UN agreements cannot have the effect of prejudicing constitutional principles agreed to in the treaty establishing the European Community. The court found the EU regulation allowing listing and asset freezes to breach fundamental human rights, since no evidence was communicated to Kadi, and the right of defence and effective judicial review were prejudiced. It gave EU authorities three months to remedy these defects, leaving the sanctions in place during that time"[45]

The position taken by the Court reaffirmed the independence of EU law from international law. It can be seen in this particular case how EU law and international law interact in different circumstances; when the internal framework is more effective in protecting rights, or more suitable for reaching a goal, than the international law. The court in this case stated that, "…the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not prejudiced by an international agreement…"[46].

[43] "International and Comparative Law Quarterly". Transformation or adoption of International Law into Municipal Law. Ed. Seidi-Hohenveldern, I.1963 88-124 Online doi:10.1093/iclqaj/12.1.88.
[44] As above
[45] Posch, A, "The Kadi Rethinking the relationship between EU Law and International Law? "The Columbia Journal of European Law Online.
[46] As above

Whether the case delivered justice or was more or less protective of rights are not points to be analysed in this paper. It can be concluded from this case that it is at the discretion of judges to interpret the applicable law (domestic or international law) in each case before their courts.

Oceania

Ernst Willheim examined the situation and position of the High Court of Australia in relation to international law affecting a number of cases within Australian territory[47].

The case Al-Kateb v Godwin and the Refugee Convention

Under the Migration Act 1958, Australia legislation established a procedure/scheme valid for all the applications for refugee status.[48] When an officer has suspicions that entry by a non-citizen into Australian territory may be unlawful (unlawful non-citizen), the officer must detain the person. In accordance with this Australian legislation, Section 196(1) the unlawful non-citizen must be kept in detention until he is decided by the authorities to be removed from Australia, deported or approved to enter or stay in Australia[49]. Section 198 establishes that if the unlawful non-citizen requests his removal or his visa application is rejected, his removal shall take place as soon as reasonably practical.

Ahmed Al-Kateb was a Palestinian born in Kuwait, holding Palestinian citizenship. In December 2000, he arrived in Australia by sea with no visa approving his entrance and stay. Al-Kateb applied for a protection visa, which was rejected by the authorities of the Department of Immigration and Multicultural and Indigenous Affairs[50]. Al Kateb subsequently appealed the decision before the Refugee Review Tribunal which confirmed the Department's decision. Consequently, the applicant decided to appeal before the Full Federal Court. The result obtained was the same, however.

During this process Al-Kateb was held in immigration detention according to the mandatory provisions under the Australian law for refugee applicants. Having used all the legal instances to stay in Australia under a Protection Visa, without success, Mr Al Kateb requested Australia to deport him to Kuwait. However, the Australian authorities were unable to deport him as Mr Al-Kateb did not hold sufficient documentation from a third country to exercise any "right of return" and the third countries were not cooperating or approving the residence of the applicant in their territory. He was considered then, a stateless person.[51] Giving his stateless condition Mr Al Kateb decided to challenge his detention while his status was resolved and his probable deportation to a third country. According to his position before the High Court, his detention for an undetermined period was unlawful.

[47] Willheim, E. "Globalisation, State Sovereignty And Domestic Law: The Australian High Court Rejects International Law As A Proper Influence On Constitutional Interpretation" Asia-Pacific Journal on Human Rights and the Law 1 & 2: 1-38, 2005
[48] Willheim, E. (same as 38)
[49] Migration Act 1958, Section 196(1)
[50] Boyle, C. Executive Detention: A Law unto Itself? A case Study of Al-Kateb v Godwin. Notre Dame Australia Law Review (2005) Vol7 p119-126.
[51] As above

The case represented a challenge for the High Court. The situation came down to the Immigration Act (domestic law) and the International Human Rights Convention, to which Australia is party. The High Court, in a divided verdict (4-3), rejected the applicant's position. The majority made their decision based on a strict legalistic base.

"The words of ss196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights"[52]. Additionally, in response to other positions included in his presentation before High Court, the decision of the majority justices resolved that the authorities that held the appellant under detention had the authority to do so under the Constitution and that such detention shall not be considered a punishment being applied to the appellant, the detention of an unlawful non-citizen is not punitive.[53]

The minority set out their positions on the undetermined detention matter in relation to Australian law and the principles of international law developing separate judgments and analysis of the case. Justices Kirby and McHugh JJ put on the table their position of the importance of international law in this type of case. Australia is part of many conventions ruling on the right of freedom and arbitrary detention[54]. Among other analysis and interpretations on the Migration Act included in their judgments, these member judgements also focused their attention on the idea of interpreting the Constitution in alignment with international law. Justice Kirby strongly demonstrated his conciliatory position on the relationship between domestic law and international law and his view of considering Australia as part of an international legal framework when it is a party to conventions.

When judging on a previous case as President of the South Wales Court of Appeal, justice Kirby stated, "…A more relevant source of guidance in the statement of common law…may be the modern statements of human right found in international instruments…adopted by organs of the united Nations, ratified by Australia and now part of international law" and added " …where the inherited common law is uncertain, Australian judges…do well to look for more reliable and modern sources for the statement and development of the common law. One such reference point may be an international treaty which Australia has ratified and which now states international law"[55]. In the particular case of Al-Kateb v Godwin he stated that current judges had no excuse for not considering international law, given the globalised circumstances in which we live. He considered that judges in earlier times (1945 for example) were

[52] Al-Kateb (2004) 208 ALR 124, 199.
[53] Boyle, C. Executive Detention: A Law unto Itself? A case Study of Al-Kateb v Godwin. Notre Dame Australia Law Review (2005) Vol7 p119-126.
[54] Willheim, E. "Globalisation, Sate Sovereignty and Domestic Law: The Australian High Court Rejects International Law as a proper influence on Constitutional Interpretation "*Asia-Pacific Journal on Human Rights and the Law*. Netherlands (2005) 1-38.
[55] As above.

understandably excused as the circumstances were totally different from the current ones. In those times, the United Nations Organisation had not yet been established, the Crown of the United Kingdom was sovereign over one fifth of humanity, colonial structures were still in place and democracy and the rule of law were not the norm but the exception. Back then, it was reasonable to understand such decisions, however now "…contemporary judges are not excused for ignoring them"[56]. That being said, he also acknowledged that international law is not binding but, rather, an influence on domestic law.[57]

The case Ministry of Transport v Noort; Police v Curran[58]

The New Zealand Transport Act 1962 states that the officers of enforcement have the power to request a driver to submit to a breath screening test if he or she is suspected to be driving under the effect of drugs or alcohol. In Section 75 "(1)An enforcement officer may require any of the following persons to undergo a breath screening test without delay: (a) a driver of, or a person attempting to drive, a motor vehicle on a road: (b) a person whom the officer has good cause to suspect has recently committed an offence against this Act that involves the driving of a motor vehicle: (c) if an accident has occurred involving a motor vehicle, (i) the driver of the vehicle at the time of the accident; or (ii) if the enforcement officer is unable to ascertain who the driver of the motor vehicle was at the time of the accident, a person whom the officer has good cause to suspect was in the motor vehicle at the time of the accident." Furthermore, in accordance with the Transport Act, if the person refuses to take the test, the officer is allowed to escort the driver to an authorised testing station to take the test there.

In Section 23(1)(b) the New Zealand Bill of Rights Act 1990 establishes the rights of a person arrested or detained… the subsection applicable for this case is Subsection 1 "Everyone who is arrested or who is detained under any enactment: (a)shall be informed at the time of the arrest or detention of the reason for it; and (b)shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and (c)shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful."[59]

Mr Noort was requested to stop under the Transport Act and the officer requested him to take the test which showed the level of alcohol in blood was in excess of the allowed limits under the Act. Consequently after was convicted of driving with excess blood alcohol. Under the Act, Mr Noort was requested to take the test. In a second case Police v Curran, Mr Curran refused to take the requested test. The presentation of the both Curran and Noort is based on the fact that they were not told they had the right to counsel under S23(1)(b) of the New Zealand Bill of Rights Act 1990. In this case, from the Crown perspective, if the S23(1)(b) is applicable, then the lack of information given to the detained parties constituted a breach on their rights as they argued.

[56] As above. 54.
[57] As above 54.
[58] Brick, C. "Ministry of Transport v Noort; Police v Curran (1992) 8 CRNZ114, Court of Appeal" *Auckland University Law Review* 7.1 (1992) 220-223
[59] Section 23(1)(b) the New Zealand Bill of Rights Act 1990

In response to Mr Noort's and Mr Curran's argument, the Crown replied that the nature of the test and the situation under the Transport Act required the immediate processing of a sample. The factor time was essential in order to confirm if the alcohol levels in the blood were above the allowed limit. Therefore, the idea of waiting for legal advice may put at risk the purpose of obtaining a reliable sample. Therefore, S23(1)(b) of the New Zealander Boll of Rights was not applicable in these cases.

The parties appealed their cases before the Court of Appeal that unanimously ruled that the Acts were not inconsistent between each other. Even though the nature of the test depended on the time factor, the right shall be recognised as limited and a telephone call would be considered sufficient for the purposes of S23(1)(b)[60]. Each judge came to the same decision but they used different arguments for their final decision. The relevant argument for this paper was the one issued by the President of the Court of Appeal, Cooke P.

The judge Cooke P wrote, "The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now a general recognition that some human rights are fundamental and anterior to any municipal law."[61] This statement from Cook is aligned with his position in regards to international law, which was later repeated in anther cases, such as Tavita v Minister of Immigration, "Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary human rights norms or obligations, the executive is necessarily free to ignore them"[62]

As seen in this section, the enforceability of international agreements depends on their interpretation by national courts in relation to the weight of the international convention and its hierarchy over the national laws. The applicability of the convention is directly related to the judgment of national legal systems. This can be interpreted as the non-existence of any legally binding characteristic of the international agreements.

Conclusion

The long road walked by international law and its evolution over the years can be recognised as a global development and improvement of international rules and agreements. Nevertheless, there is still a long way still to go for international agreements. The recognition of the need for further action from each state and further ratification of the treaties may guarantee the effectiveness of the treaties within national territories.

The ratification of an international Agreement is the recognition of a commitment by the internal system of each state. However, the extent to which it is legally binding will depend on its interpretation by national justice systems. The analysis of the different cases throughout the world shows how application of the commitments set out in ratified international conventions is discretionally open to national

[60] Ministry of Transport v Noort; Police v Curran (1992) 8 CRNZ114, Court of Appeal.
[61] As above 58
[62] Tavita v Minister of Immigration (1994) 2 NZLR 257.

judges' interpretation. This discretion puts the conventions in a dangerous position and their effectiveness depends in the last instance on the opinion of each state judicial organism in relation to the supremacy of international law over domestic law. International law is then reduced to being merely an influence on domestic law, and does not have a binding effect.

In a world in which sovereignty over territories triggers the cruellest and most expensive wars, the idea of sacrificing judicial authority and national dominion and ceding it to a supra-state organism is less than attractive to encourage states to be part of the agreements. Furthermore, the creation of an international court (such as the International Court of Justice) as a supreme authority over national courts will have the legal binding effect of the signed treaty that puts in place such courts for the parties. Therefore, without the incorporation of an effective legally binding strategy in such agreement, this does not seem to solve the enforceability issue suffered by international conventions nowadays.

The transformation of international conventions to the domestic law is a forward moving approach, which recognises each nation's sovereignty but at the same time, it adds in internationally agreed global goals to each nation. The incorporation of international agreements to the domestic law is a relevant solution to the enforceability issues. In the particular case of Climate Change Conventions, if they are developed for putting in place common goals to reduce the effect of the climate change, then an enforcement mechanism is required as part of the convention per se, and as demonstrated in this paper, the current situation is not sufficient.

All in all, the incorporation of assistance and encouragement options have been demonstrated to be insufficient in ensuring the compliance with the agreements. The incorporation of a legally binding mechanism is a matter still pending in international law, The incorporation of international agreements to the domestic law seems may be considered the most attractive mechanism for states to consider when entering agreements and committing to reaching global goals together, without reducing their judicial independence and authority.

In conclusion, the incorporation of international conventions into domestic law, allows independent and autonomy territories to collaborate globally with other independent states to reach a common goal having in place a legal binding mechanism. At the same time, the enforcement of such convention remains legally held by the authorities in their territory, without the overriding authority of supra-national organisms.