Global Journal of Politics and Law Research
Vol.6, No.1, pp.1-11, Febuary 2017
Published by European Centre for Research Training and Development UK (www.eajournals.org)

THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

Dr. Luljeta Kodra
Head of Law Department
Faculty of Juridical and Political Sciences
Mediterranean University of Albania

ABSTRACT: *The relationship between international law and national law as well as the concept of supremacy of international law are currently very controversial issues. Many authors accept the supremacy of international law as a value that allows the existence of an international legal rule.Although the domestic law of many states in today's conditionscomply with the ever-increasing demands of international law, it is generally refused to accept the unconditional supremacy of international law on constitutional principles. Most states have declared their supreme constitutions.Some international treaties obligate States Parties to adapt their national legislation or to undertake other measures to meet with the international obligations they have undertaken. States have the right not to become part of an international act that may be in conflict with their constitution. They can also avoid the conflict between the international act and their constitution by making a reservation against the international act in order to protect their domestic law projections and to prevent conflict at international level or by amending their constitution.There is a principle according to which it is the internal law that permits the application of international law in the domestic legal system, since international acts must first be ratified by the parliaments of states in order to become part of the interior right of a state.*

KEYWORDS: international law, national law, States parties, civil codes, criminal codes.

INTRODUCTION

Entry

International law consists of rules, customs and legal decisions that regulate relations between states.The entirety of the acts constituting this right is related to issues such as human rights, humanitarian interventions, diplomatic and consular rights, etc.In contrast to international law, domestic law regulates the relations of individuals and legal persons within the borders of each individual state.The main acts constituting domestic law are: Civil Codes and Criminal Codes.

When disagreements or conflicts arise in relations between sovereign states, they are resolved under the rules of international public law. International law provides that in international relations all parties should be considered as sovereign and equal states.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

There are conflicts in the sense of international public law when two states have openly different views regarding the implementation or non-implementation of the provisions of a treaty or the general principles of international law recognized by all.[1]These conflicts can be solved through diplomatic or judicial means provided by international public law. Diplomatic means include direct diplomatic talks between the parties, good intentional service, mediation, committee commissions (divided into commission of inquiry and reconciliation).In judicial remedies are included Arbitration and the International Court.The International Court of Justice has jurisdiction: Firstly, when conflicting countries agree to an agreement, called a compromise, to pass the case to the International Court of Justice; Secondly, when a treaty specifies the international court as a sovereign legal authority in relation to the resolution of the dispute.[2]

International law, which is made up of international customs[3]and treaties[4],was created through the agreement of states. The way of establishing international law norms varies with the legislative process that creates the domestic law of states. International treaties are legally binding agreement of the states that are part of them.Treaties are usually agreements ratified by the highest organs of a state and in many states once treaties are ratified, they become part of the country's domestic legal system.

Many authors consider international law and domestic law as two independent entities, claiming that they regulate separate issues and exist in quite different spheres. According to them, international law norms regulate the behavior of states and their interaction with each other, while domestic norms on the other hand govern the conduct of people within a sovereign state.

Other authors claim that both types of right usually interact when the domestic law of a state recognizes and has made its part of the rules of international law. But there are other authors who believe that international law and domestic law are both part of the same legal system.Advocates of this opinion claim that international law has priority over domestic law of states even in the judicial processes of the states.[5]

Supremacy of international law

[1]E drejta ndërkombëtare publike, Arben Puto, fq 424.

[2]How to Distinguish International Law from Municipal (http://www.wikihow.com/Distinguish-International-Law-from-Municipal-Law)

[3]International custom, as one of the sources of international law are created when a country generally and consistently adheres to a particular practice which it considers as a legal obligation. They are not written and are less formal than all kinds of international laws.

[4]International treaties are acts that establish, modify or suspend the rights and obligations between the parties. They can get different denominations like pact, convention, deal etc, but their legal value remains the same.

[5]How to Distinguish International Law from Municipal.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

If we talk about the relationship between a country's international law and domestic law, we will conclude that this report varies depends on the different views.According to author Heisenberg[6], We start from the perspective of the domestic law of a state and of constitutionalism, results that are internal law and state constitutions that define the criteria for acceptance or rejection of the norms of international law in the domestic legal system of a country.So, internal acts are those that determine what requirements must be met before a government takes on the commitments of international treaties; what place will the international treaties have in the domestic legal system of the state; to what degree will be recognized and will be accepted the interference of customary international law; in what ways national courts have to deal with international law, and so on.

On the other hand, if the relationship between the international law and the domestic law of a state is seen from the perspective of international law, the point of view changes.The application of international law depends on the consent of the states, whether express or implied. When a state undertakes the commitment to an international treaty, it is associated with this commitment and must fulfill all obligations arising from it.

Gerald Fitzmaurice has also expressed in the debate about the international law and domestic law report the concept of supremacy of international law.[7]Systems of international law and domestic law in his view can not come into conflict because they belong to different kingdoms.A state that fails because of the supremacy of its domestic law in the implementation of its international obligations has committed a violation of its international obligations.The concept that Fitzmaurice presents is more like a description of a divergence between international law and domestic law than with a theory of reconciliation between these two types of rights.

The author Hersch Lauterpacht[8] says that the supremacy of international law is a concept designed to oversee human rights abuses at the national and international level.International law contains basic principles that set the standard by which states must agree on the treatment of the very important issue of respect for human rights.However, international law can not play an absolute role in this regard, because it is quite obvious the problem of international customary law as a complementary source of international law, which has an endlessly unfathomablecontent and is very difficult to implement.[9]Difficulties include also the application of the general principles of international law.

[6] Heisenberg, The Heisenberg Uncertainty Principle and the Challenge of Resisting - or Engaging - Transnational Constitutional Law, Alabama Law Review, Vol. 66, 2014, 12 March 2015.
[7]General Principles of International Law, Gerald Fitzmaurice, lectures, Hague, 1957.
[8] International Law and Human Rights, Hersch Lauterpacht, Archon books, 1968.
[9]The supremacy of International Law? – Part One, Published on June 2, 2016, Daniel Bethlehem KCMG QC.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

The concept of supremacy of international law has been and is still a powerful tool to turn international law into a set of principles that govern the behavior of states in a system of strict rules that regulate their behavior.

The current debate about the supremacy of international law shows the success, effectiveness and authority that has achieved the international law.This debate, contrary to what the other authors suggest, does not signal the weakness of international law, but rather its power and commitment in all aspects of international life.[10]

Both international and national law has developed the principles of coordination and reconciliation between them. Here we can mention the principle reflected in Article 27 of the Vienna Convention of 1969 "On the Law of Treaties", according to which "a State can not be justified by the provisions of its domestic legislation for its failure to implement the obligations deriving from a treaty". But also, there are other principles about this coordination between the two types of rights.

There has also been a development of theoretical thought by international jurists on starting the re-conceptualization of the relationship between international law and domestic law regarding the issue of supremacy of international law, at least in cases when the fundamental human rights are in dispute. We can mention Andre Nollkaemper authors and Anne Peters, but there are also many other contributions in this regard.

Daniel Bethlehem has expressed his opinion that international law prevails over the domestic law of states. In the view of this author, the application of international law in the domestic area should not be diminished and the application and effect of international law should not be undermined. This is the concept of supremacy, at least in the form that applies in today's international space, and this is what everyone should expect in the decisions of the International Court of Justice.

Concerning the concept of supremacy of international law, also the author Andre Nollkaemper has expressed his opinion. According to him, the concept of supremacy of international law is the key to the international rule of law, which requires states to exercise their powers in accordance with international law rather than domestic law. Again, according to this author, allowing states to give priority to the domestic legal arrangements of the state in relation to international law, can cause the effectiveness of international law and the consequent undermining of international rule of law.

Despite the idea he expresses, this author believes that many scholars in Europe may be convinced of the need to prioritize the fundamental freedoms on the arbitrary use of power by international organizations, but this raises the question of how to distinguish challenges based on fundamental

[10]The supremacy of International Law? – Part Two, Published on June 3, 2016, Daniel Bethlehem KCMG QC.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

human rights as claimed and built in Western Europe and challenges based on other reasons that may undermine any achievement of international law.[11]

All we mentioned above is about the doctrinal debate about the relationship between international law and domestic law and the supremacy of international law. However, it is quite obvious that in the practice of relations between states, the positionation can be very different from the theoretical aspect or position, especially in matters relating to national security. This is related to the fact that a country is more likely to be guided by its domestic law provisions even in cases where its domestic law is in violation of international law.

The constitutions of states refer to international law

The constitutions of states traditionally are referred to international law. However, in recent decades, there has been an increase in reference to international law by the constitutions of States which nowadays provide and enforce the binding force of international law in the domestic legal area, although the priority of international law on the domestic constitution is often not accepted.

It may be mentioned also that in the constitutions of the EU member states are made provisions for the transfer of sovereign powers of the states to the EU, while specific provisions of state constitutions contain international human rights and give them priority over their domestic law.

More and more the various national constitutions are referring to international law and there are several factors that influence in explaining this trend. The most important factors are the collapse of the communist bloc in the 1990s, which increased the need for the elaboration of new constitutions for the former communist countries that came to rule of law and accepted the market economy; the integration of states into international organizations, a process that has demanded that member states of these international organizations amend their internal constitutions[12]; some of the members of the international community have overseen the change of political regimes of many states and have promoted the creation or have themselves created new constitutions in these countries. Typical cases are the constitution of Bosnia-Herzegovina in 1995, Afghanistan in 2004, Kosovo in 2008.

As the domestic constitutional right of many states in today's conditions responds to ever-increasing demands to comply with international law, despite the refusal to accept unconditional supremacy of international law on constitutional principles, results that international law and constitutional law of the states increasingly converge and that the constitutions of different states

[11]Rethinking the Supremaci of International Law, Andre Nollkaemper, Amsterdam Center for International Law, Working Papers 2009.

[12]The Maastricht Treaty of 1992, which established the EU and substantially reformed European Community, imposed revisions to constitutions in most member states, including powerful members such as France and Germany.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

have more and more similarities. In particular, the new constitutions of states drafted according to international principles have many similarities with each other. They are based on the fundamental principles of law, rule of law, democracy, and the separation of powers. As we noted, one reason for this convergence of international law with the constitutional right of states is that states have strong political motives to amend and reform the constitutions of their states in order to become members of different international organizations. The greatest pressure for reforming internal constitutions has been exercised by organizations such as the EC, the EU and NATO. Eastern and Central European States had to undertake serious constitutional reforms in order to be recognized as EC members. Conditions that were settled for the membership of these countries in important international organizations, were the most related with the implementation of fundamental human rights and democratic norms.[13]

Traditionally, the domestic constitutional principles of states have been exported internationally. For example, the national principle of democracy was transformed into a principle of international law, self-determination. On the other hand, nowadays, international standards relating to the protection of human rights, good governance, and democracy are often incorporated into internal constitutions. The most important thing in this regard is the concept of human rights which was recognized as a legal obligation 2 centuries ago at national level and internationally adapted and became recognized after World War II.[14] This interaction of international law with the domestic constitutional law of the states, which mainly deals with the acceptance of international standards at the national level has led to the globalization of the constitutions of States and to the constitutionalization of international law.

European integration has contributed to a fundamental structural change, which has to do with the creation of constitutions that have the supremacy over ordinary laws.

In the contemporary practice of relations between states, there is a new phenomenon. This phenomenon has to do with the interpretation of the constitutions of particular states in the light of international law. This interpretation has increasingly reduced the clash between domestic constitutional law and international law. For example, the Portuguese Constitution of 1976, the Spanish Constitution of 1978, the Romanian Constitution of 1991 and the Constitution of South Africa 1996, explicitly require that the state constitution should be interpreted in accordance with with international law on human rights.[15] The practice of voluntary acceptance of the authority of international law on constitutional law contributes to constitutional harmonization.

[13]E drejta ndërkombëtare publike, Arben Puto, Tirana 2009.
[14]Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, Vol 3, 3/2009.
[15]Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, Vol 3, 3/2009.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

The controversial supremacy of international law on domestic constitutional law.

There are some constitutions that accept the supremacy of international law on the domestic law of states even though they are limited in number. So the constitutions of some states place international human rights treaties and in particular the European Convention on Human Rights in the hierarchy of the sources of law at a higher level than the domestic laws of the state. So the constitutions of some countries after the transition, such as Romania in 1991, Slovakia in 1992, the Czech Republic in 1992, explicitly give international treaties on human rights precedence over domestic law.

The constitutions of some states have given to the international instruments an equal status as the state constitution. For example, according to the Austrian constitutional law until 2008, any provision of international treaties that could raise constitutional problems, was declared in order to proceed, if necessary, with the review of the Austrian Constitution.

So, the supremacy of international law on the domestic law of states is generally accepted, but there are also refusals to accept this sovereignty over domestic constitutional law. Only the constitutions of some states seem to accept the call for supremacy over the domestic constitutional law. Here we can mention the Constitution of Belgium of 1994 and the 1983 Constitution of the Netherlands, which give international law precedence over constitutional law.

The position of many international trial organisms nowadays is that international law has precedence over all national laws, including constitutions of states.

But while international courts claim supremacy of international law against all national laws including constitutional law, this claim is increasingly being rejected by domestic actors. A number of states have refused to recognize the supremacy of international law over their constitutional law. Most states do not give international or european law a priority over their constitutions. The Constitution of Belarus of 1994, the Constitution of Georgia of 1995, the Constitution of South Africa of 1996 are some of the constitutions of states which expressly claim the superiority of their constitutional right over international law. While some other constitutions, such as the 1975 Greek Constitution, the 1992 Estonian Constitution and the 1997 Constitution of Poland, expressly recognize the priority of international law over ordinary laws, but not on the Constitution of their country. According to the French Constitution, the ratification of an international agreement that is in conflict with the constitution, can only be made after a constitutional revision. This means that the French Constitution stands above international law.

Another argument we can mention in terms of refusing to recognize the supremacy of international law in relation to the constitutional right of states is also the one that deals with the positioning of the European Convention on Human Rights in the hierarchy of resources of the right for the

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

member states of the Council of Europe. In most Member States, the European Convention on Human Rights, in the hierarchy of the sources of law, comes under the constitutions of states or between constitutions and laws or at the same level as the domestic laws of the state. Exceptionally in some member states such as Austria and Italy, the European Convention on Human Rights has the same status as domestic constitutional law. While in the Netherlands and Belgium, the European Convention of Human Rights is set in the hierarchy of the sources of the law above the domestic constitution of the state.

Challenges of the supremacy of international law at the national level

As we discussed above, few countries recognize the supreme supremacy of international law against domestic law and, above all, to domestic constitutions. Most states have declared their supreme constitutions, while other states have decided that in case of conflict between international law and domestic law, supreme is national or international rule, depending by the will expressed by the Parliament.

There is a principle according to which is the domestic law that allows the application of international law to the domestic legal system. In countries that accept this principle (including here, Albania), international law norms lie in the hierarchy of the sources of justice at a higher level than the domestic laws, but no higher than the state constitution. According to the legislation of the Republic of Albania in case of conflict between international norms and domestic laws, international norms will have priority, but we should remember that an international norm becomes part of the internal legal system of the Republic of Albania only if it is ratified by the parliament.[16] So it is the national law that paves the way for the international norm. In other words, the supremacy of international law is not always recognized.

States have the right not to become part of an international act that may be in conflict with their constitution. They can also avoid the conflict between the international act and their constitution by making a reservation against the international act in order to protect their domestic law projections and to prevent conflict at international level or by amending their constitution. It is clear that in such cases there will be no conflict between international law and domestic law and the issue of supremacy of international law will not arise. A controversial issue is how to act in situations where states are united with international acts and at a later stage constitutional conflict appears. Can States in this case give priority to their domestic law?

The issue of compliance of domestic law with international obligations is a matter of international law because firstly, discrepancy undermines the effectiveness of international law and second,

[16]Articles 116 and 122 of the Constitution of the Republic of Albania.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

when failing to enforce their international obligations, states may face international accountability.[17]

The international courts have also consistently admitted that the national law of the states can not prevail over the international legal obligations, and also have rejected any claims by states that contradict this rule. This general principle of supremacy of international law at the international level is driven by the mutual interests of states in the implementation of international obligations and by the overall interest of a stable international legal system.

Actually, the principle of supremacy of international law on the domestic law of states, does not imply that international law is necessarily insensitive to domestic laws that may impede the implementation of international obligations. Many international obligations explicitly open the way to domestic law.

However, if we accept that states based on their domestic law provisions could justify non-compliance with international obligations, this could lead to the underlying undermining of the effectiveness of international law, it could eliminate the limits of legality and may lead to the perception of international law, as unfair, as a system of non-enforceable principles of implementation, which have little or no power to limit state power.

The number of cases in which states or courts may give priority to domestic law may be increasing, if both international and domestic legal systems can, in some respects, meet the defect in defending another system. As a result of this co-operation, states may be more willing to allow international law to apply to their domestic legal system because they would make sure that international law would not violate their basic rules. Some international treaties oblige States Parties to adapt their national legislation or take other measures to meet the international obligations they have undertaken.

In the area of Human Rights we can mention the provision of Article 2/2 of the ICCPR, according to which "Any State Party to the Convention undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Convention, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Convention"; Or Article 2 (a) CEDAW: "States shall take appropriate measures to include the principle of equality

[17]Rethinking the Supremaci of International Law, Andre Nollkaemper, Amsterdam Center for International Law, Working Papers 2009.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

between men and women in their national constitutions or in their legislation and to provide by law or other appropriate means, practical realization Of this principle "[18]

Other examples of obligations, under international treaties, include the obligation to establish national preventive, independent mechanisms for the prevention of torture and ill-treatment at national level, as well as Article 49 of the four Geneva Conventions of 1949, according to which "The high contracting parties undertake to enact any law necessary to ensure effective criminal sanctions for persons committing or ordering the commission of any of those considered serious breaches of the Convention."

Konkluzione

The intensification of global governance in recent decades has increased the potential for conflicts between international law and the constitutional law of the states, provoking also the issue of hierarchy between them. This has been accompanied by efforts to seek other ways of resolving this conflict.

Because in the practice of relations between them, despite the acceptance of the supremacy of international law, states may prefer to be guided by their internal law projections, it remains an obligation for international jurists to find ways to be more effective on ensuring the realization of a closer interaction between the domestic law of the states and international law, in relation to those that exist.

The relationship between the international law and the domestic law of a state varies depending on different perspectives.

No country can be justified for its failure to enforce international obligations based on the supremacy of its domestic law.

The current debate on the supremacy of international law demonstrates the success, effectiveness and authority that has ensured international law. This debate, contrary to what some authors suggest, does not signal the weakness of international law, but rather its power and engagement in all aspects of international life.

The constitutions of many states have been reformed not only to adapt with the general international law but also because of the demands placed on states by the most important international organizations, in order to be accepted as members of these organizations.

Literature

[18]Relationship between national and international law, Amrei Muller, Public International Law, University of Oslo, 14 October 2013, page 9.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)

1. Constitution of the Republic of Albania, integrated version with draft constitutional amendments as approved by the Special Parliamentary Committee on Justice System Reform, 14.06. 2016.
2. Relationship between national and international law, Amrei Muller, Public International Law, University of Oslo, 14 October 2013.
3. The supremacy of International Law? – Part One, Published on June 2, 2016, Daniel Bethlehem KCMG QC.
4. The supremacy of International Law? – Part Two, Published on June 3, 2016, Daniel Bethlehem KCMG QC.
5. Rethinking the Supremaci of International Law, Andre Nollkaemper, Amsterdam Center for International Law, Working Papers 2009.
6. How to Distinguish International Law from Municipal Law(http://www.wikihow.com/Distinguish-International-Law-from-Municipal-Law)
7. General Principles of International Law, Gerald Fitzmaurice, lectures, Hague, 1957.
8. International Law and Human Rights.. Hersch Lauterpacht, Archon books, 1968.
9. Heisenberg, The Heisenberg Uncertainty Principle and the Challenge of Resisting - or Engaging - Transnational Constitutional Law, Alabama Law Review, Vol. 66, 2014, 12 March 2015.
10. Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, Vol 3, 3/2009.
11. E drejta ndërkombëtare publike, Arben Puto, Tirana 2009.

Print ISSN: ISSN 2053-6321(Print), Online ISSN: ISSN 2053-6593(Online)