LIMITATIONS IN ENFORCEMENT OF INTERNATIONAL CONVENTIONS: IMPLICATIONS FOR PROTECTION OF MONUMENTS AND SITES

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Introduction

The international community and, in particular, the professionals working in the field of preserving world heritage, have been troubled for some time regarding the appropriate methods for determining international norms to protect world heritage; even when the country (or other entity controlling the territory) within whose boundaries the sites which have been declared world heritage sites are located are not interested in preservation or, perhaps, are interested in destroying the sites as part of an ongoing conflict in the territory.

The need to cope with the difficulties of preserving heritage was not born, as some assume, in the last century. For example, even in ancient Greece, we find in the writings of Pausanias, the well known traveler of the second century, a description of the ancient monuments which he saw on his journeys. Regarding the temple of Hera in Olympia, documented in his writings as being 800 years old, he notes that the pillars of wood in the temple which had rotted had been replaced with new pillars of marble and that only in the temple itself had one of the wooden pillars survived. Archaeological studies have, in fact, proved that the pillars were built in the style of the period in which they were replaced, a detail which can teach us of the Greek's concept of preservation. Another example may be found in the "*Rise and Fall of Athens*" by Plutarch. Among other things, he writes of Theseus' ship which was preserved by the Athenians. Its' wooden beams were replaced one by one until the last, something which made the Greek philosophers debate whether the ship remained the same or whether it had become another boat?

Whereas in the history of Greece, Rome, the Middle Ages and the Renaissance and Baroque periods we find much evidence of the attempt to confront the difficulties of preserving the heritage, including local legislation, it is only in the previous century that we find a real effort to confront these issues in the international arena, with the international community beginning to adopt a series of recommendations, charters and conventions which reached their peak in the adoption of the Convention for the Protection of World Cultural and Nature Heritage – The world Heritage convension, at the 17th General assembly of UNESCO.

Here in Madrid we see the closing of a circle, as to the best of our knowledge, the commencement of the work of the international community in this field began exactly 100 years ago with the initial preparations to phrase what later became the Recommendations of the Madrid Conference (1904), which were adopted at the 6th International Assembly of Architects. These recommendations were the first attempt to establish, at the international level, basic principles for architectural preservation. Even then, the recommendations stressed the importance of minimal intervention in the building to be preserved and the necessity of finding new functionality for historic buildings. However, they also established a number of principles which are no longer accepted in modern preservation, such as the principle of rehabilitating a building which was built in a number of styles exclusively in the dominant style employed, while at the same time removing or adapting the elements of different periods or styles.

Only 27 years later, within the Recommendations of the Athens Conference (1931), we can find the idea of world heritage and some recognition of the importance of certain monuments to the entire international community raised for the first time. In that same year a local Convention was adopted in Italy (the Carta del restauro Italiana) which reflects the Italian approach to preservation at the local level but its' importance is much greater, as it established principles which 33 years later formed the foundation for the Venice Convention.

In the past few years it has become more and more clear that the international conventions relating to preservation of sites are, in their current form, a particularly problematic tool for the enforcement of norms of preservation, even for the countries that have signed the Convention. The reasons for this principally arise from the normative system of which the Convention is a part, i.e. the international legal system. The difficulty of enforcement of preservation conventions is not specifically unique to this type of convention and, in practice, it characterizes international law in general, with the exception of international criminal law.

In order to obtain a clearer picture of the problematic situation which has developed, we shall attempt to clarify what exactly is "international law" and what is the place of the conventions within it, as well as proposing to adopt an alternative approach which can more successfully ensure the enforcement of the accepted norms by the professional international community.

International Law

International law is a collection of written and unwritten is commonly seen as binding upon members of the international community as such. Historically, it has been argued that international law is not even a part of the legal world, as it lacks some of the essential elements of a legal system, such as a legislature and an efficient system of enforcement. Today, the accepted position is that the international legal system is, in fact, a legal system, as it has a legislature – in international law the legislature is the countries themselves; and it has enforcement, as international law provides for sanctions, such as trade embargoes, diplomatic sanctions and others. At the same time, it is also clear that the international legal system has certain unique characteristics which are not common to regular legal systems but a discussion of these is beyond the purview of this lecture.

International law does not relate only to countries but to all subjects of international society, including international organizations (such as the U.N., the International Red Cross) and individuals. International law incorporates written codes of conduct (conventions) and unwritten ones (custom). As already discussed, for our purposes, the written conventions are more significant, though to obtain a clearer picture consideration must be given to custom as well.

Section 2 of the Vienna Treaty (1969) (the "Treaty of Treaties") defines a "Treaty" as follows:

> "(a) "treaty" means 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;"

The "treaty" is a collective name for the entirety of agreements formally established between countries. In order to explain the legal validity of a treaty, we must distinguish between the external aspect of the treaty which deals with the validity of the treaty within the framework of international law and the internal aspect of the treaty which deals with the relationship between the treaty and the internal laws of the country which has signed, or not signed, the specific treaty.

The External Aspect – the Treaty and International Law

Looking outwards, each and every country is subject to the rules of international law. At the same time, in the international level, a regular treaty is not binding on countries which have signed or joined as parties to it. It does not obligate countries that voted against it or dissociated themselves from it, even if they were in the minority. Aside from this point and as we shall see shortly, we do not speak of an international treaty as being parallel to an internal law, mainly because of the limitations on enforcement which exist in relation to treaties.

A treaty has a double facet: international legislation and contract. In relation to the first facet, which deals with establishing international norms of behavior, the treaty is a source of law in international law. In the second facet, which deals with the specific agreements between the parties to the treaty, the treaty itself has no normative aspect in international law. In practice, this distinction is not simple because usually within the treaty itself one can find contractual provisions and legislative provisions. Bilateral agreements may be seen as contractual agreements and multi-lateral agreements as international treaties which are effectively legislative, but this distinction is also completely inaccurate and there are those who dissociate themselves from it completely.

It is possible to point to one important distinction between two types of treaties:

The first, a declarative treaty: a treaty that does not legislate new rules but rather states the existence of existing rules. Since the custom – which is not usually reduced to written rules – is a central legal source in international law, the main purpose of a declarative treaty is to enshrine customary rules in writing.

The other, a constitutive/establishing treaty: a treaty which establishes new rules in international law, which have no foundation in custom or whose customary origin is not strong enough to make them binding.

In matters relating to multi-lateral treaties, or treaties which have been signed by more than two countries, there is room for an additional classification, between universal treaties, general treaties, and special treaties:

Universal treaties: treaties which the number of countries not a party to them is insignificant. In these cases, the massive joining of countries to the treaty has led to the creation of a binding rule even for the limited number of countries who formally did not join the treaty, since the joining of the vast majority of countries has created an international custom which also applies to those countries who did not join and the custom has binding force. For example, Switzerland, which until recently had not joined the U.N. has been obligated by the prohibition against the use of force created by the members of the U.N. in the U.N. charter.

General treaties: The difference between them and universal treaties is the number of countries which are party to the treaty. The general treaty also aspires to be universal but has yet to reach this stage. The distinction between a general treaty and a universal one is not precise and depends on the individual circumstances. The charter of the Red Cross and the charter of the sea are general treaties.

Special treaties: Treaties which from the outset do not aspire to unlimited expansion and are therefore, closed treaties. Treaties such as these establish special terms for agreement or joining. Take for example the NATO treaty or the treaty of the Organization of African Unity. These are not normative treaties, they are not binding at the international law level and there main application is at the contractual level.

As may be seen, until a treaty has become a universal treaty, or at least – a general treaty, they do not obligate countries which have not willingly joined. This presents a central difficulty for anyone wishing to establish a binding international norm in the field of preserving world heritage.

The Treaty and Internal Law

In order to understand the place of treaties in the internal law of countries, it is first important to understand the relationship between international and internal law. In this context there exist two main approaches: the dualistic approach and the Monistic approach.

The dualistic approach perceives international law as a separate system, dealing with other areas from the internal systems of each country. According to this approach, the internal law of the country does not recognize international law as such. Any recognition of any international legal norm must be achieved in accordance with the rules of internal law. The monistic approach sees the international and internal system as two parts of one whole, whereby the rules of international law are also the rules of internal law. There also exists a middle approach which proposes that both systems are partly common and partly separate. This question, which appears seemingly theoretical, has important ramifications for the question of whether the rules of international law – including international treaties – obligate the countries and their residents identically to the manner in which they are bound by internal law.

There exist two aspects in relation to the question of adopting treaties into internal law and there is, in practice, a two-way relationship: the first aspect – the manner in which the international treaty relates to the internal law of the countries which are signatories; and the second aspect – the manner in which the internal law of each country relates to an international treaty.

Regarding the first aspect, it is customary to include in treaties specific provisions regarding procedures for ratifying the treaty by the country, aside from signing. The treaty may provide that a country shall be deemed to have adopted the treaty into its internal law immediately upon signing or only after ratification of a certain internal body of the country, such as the government or parliament.

In relation to the second aspect, it is difficult to identify one dominant approach which is recognized in a majority of countries. Generally speaking, the majority of countries adopt international law at one level or another as part of their internal law. Having said that, there is no clear practice in relation to treaties and each country acts as it sees fit. Generally speaking, it may be said that signing a treaty is not sufficient for it to be adopted into the internal law of the signing country but rather there is a necessity for an act of the country's parliament for this purpose. This is because usually the relevant authority for signing treaties is the executive branch (government) and not the legislative branch (parliament). This fact also causes a relative devaluation in the standing of the provision in the treaty regarding its adoption (which was dealt with previously in relation to the first aspect), as even when a country signs a treaty, in which it is provided that upon signing it shall become a part of internal law, the signature itself is executed by an organ of the country which is not authorized to determine the content of the internal law.

In Britain, for instance, the dominant approach is based on the Blackstone doctrine, according to which the provisions of international law are adopted, in full, by the accepted law and are therefore seen as part of the law of the country (incorporation). It should be emphasized that the intention here is only to international law based on custom with two exceptions – the supremacy of statute and precedent. The Blackstone doctrine does not apply to treaties, the only exception being the legislation of the European Community, which has been adopted in advance by appropriate statute. In Israel, customary international law has been adopted into Israeli law but in accordance with the exceptions to the Blackstone doctrine pursuant to which in the event of a conflict between a statute and an international custom, the statute shall prevail. In relation to treaties, when dealing with a declarative treaty, since its only purpose is to enshrine the existence of a custom in writing, they are assimilated into Israeli law, as a custom would be. In relation to constitutive treaties, these are not automatically assimilated and there is a need for a legislative act of the Knesset to make it part of the internal law.

International Criminal Law

What may be discerned as the one possible exception to the "voluntarianism" of the rules of international law may be found in the criminal law field. International criminal law applies to individuals and not to states. The concept is that there exist certain types of crimes whose perpetrators cannot hide behind the legislation of the country in which the crimes were committed or behind the fact that a norm has been adopted at the international level but not at the local level and therefore, in the fullness of time, an international tribunal will be able to prosecute them for their acts. Currently, there exist international crimes in relation to war crimes and in relation to damage to the environment. It is also important to note in this field that the defendants being subject to the laws they broke is founded in international custom, which prohibits, as it were, these types of actions and is not founded in any specific treaty. Thus, when it was decided to form the international tribunal at Nuremberg to prosecute the war criminals of the Second World War, it was determined in the constitution of the tribunal that in relation to crimes, the constitution was declarative, as international custom prohibits the commission of such offences.

International tribunals continue to operate until this day in relation war crimes of World War II, war crimes in Rwanda and war crimes in the Balkans.

It is possible to identify two reasons for which the rules of criminal law may be seen as more binding than the other

areas of international law:

Despite the use of the terminology of customary international law, there does, in fact, exist a substantial preparedness on the part of tribunals who enforce these rules to enforce them even when it is clear that the laws of the country permitted acting in contradiction of the rules. In practice, from the perspective of international law in these fields there is little consideration given to the internal law of the countries.

This field has been undergoing a period of significant development over the past few years, both at the international level (such as prosecuting the Balkan war criminals and the establishment of the International War Crimes Tribunal at The Hague) and at the state-internal level, whereby states take upon themselves the right to prosecute those who are perceived in their eyes as a criminal even within the framework of their internal legal system (for example, Belgium). The sanctions currently available against offenders are particularly severe and there is a substantial readiness to employ them.

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