Options of the Legal Form of the 2015 Climate Agreement: Consideration for Africa

Contents

1. Introduction

Parties to the United Nations Framework Convention on Climate Change (UNFCCC), at the 17th Conference of Parties (COP), launched a process to develop an agreement under the convention applicable to all Parties, through a subsidiary body known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP).[1] Further, it was decided that the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but not later than 2015 in order to adopt **a protocol, another legal instrument or an agreed outcome with legal force** at COP 21 and for it to come into effect and be implemented from 2020.[2]

The Parties agreed on three optional legal forms: "a protocol, another legal instrument or an agreed outcome with legal force". The purpose of this paper is to examine at length the meaning and implications of these options. In doing so, it also highlights some of the key factors to consider in making an informed choice among the three options. To this end, an attempt is first made to shed light on the meaning of the options agreed by the parties at COP17. Next, important terms used in the process of treaty negotiation and their application are dealt with. Finally, some factors that should be considered on making the choice among the options are presented.[3]

2. The 2015 Climate Agreement as an International Law

We must always recognize that international law is different from national law. In national law, the powers to determine and enforce laws are determinable. Specific government branches are devoted to monitoring and enforcement of national laws. When a piece of national law is said to be enforceable, what it means is that in case of non-compliance, there are procedures by which the alleged non-complier can be to an institution which determines whether the alleged non-compliance has in fact occurred. In case of a determination of non-compliance, the institution determines the type and scale of the sanctions to be imposed. These sanctions not only work as threats to encourage compliance but also serve as means by which disturbances caused by the non-compliance can be restored/remedied. In national laws, the default institution to make determination of non-compliance and type and scale of the sanction are the courts. It is possible that non-court institutions might be created to make the same determinations. In some cases,

[1] Decision 1/CP.17, preamble
[2] Decision 1/CP17, paragraphs 2
[3] The author of the paper is Selam Kidane Abebe with inputs by Webster Whande and reviewed by Dr. Mulugeta Mengist Ayalew . The purpose of this paper is to examine at length the meaning and implications of the legal options for the 2015 Climate Agreement.

there will be dedicated institutions charged with monitoring, detection and investigation of non-compliance. National laws not only provide procedures for monitoring and enforcement of laws but also criteria by which whether the standard/rule/decision/agreement which is alleged not to have been non-complied is actually part of national law.

International is different from national law.[4] First, there is no specific central legislature with the power to make laws. International law is created by and for states[5]. However, like national laws, there are known criteria by which a determination can be made whether a given instrument/piece is part of international law.

Second, there is no central court system wherein instances of non-compliance are determined and addressed. It is often up to individual pieces of international law to provide for procedures and institutions by which non-compliance are determined and addressed.

Third, there is no also dedicated institution generally charged with monitoring, detection and investigation of non-compliance. Of course, it is possible for individual pieces of international law to provide for procedures and institutions by which non-compliance are detected and investigated.

Having said these about the differences between national and international law, we must now distinguish between terms/terminologies often encountered in climate discussions as far as legal form and content are concerned. These include "legal force", "legal agreement", "legally enforceable", and "legally binding".

When a certain international agreement is described as having legal force or as a legal agreement, what it means is that it can be regarded as being part of international law. And to determine whether a given instrument is part of international law, what we should use is the criteria provided by general international law itself. This will be explained in a bit. For now it suffices to say that being part of international law does not necessarily mean that there will be definite consequences in cases of breach. The point is that a legal climate agreement or an agreement with legal force does not mean a legally binding or enforceable agreement.

On the other hand, when a certain international agreement is described as legally enforceable/legally binding, what it means is that there are definite procedures and consequences (sanctions, or remedies) of non-compliance. Legal force or enforceability requires the fulfillment of certain conditions.

First, to even speak of breach or non-compliance of a given law, certain conditions must be met. First the alleged law which is breached must be prescriptive. There are laws which have

[4] Malcolm N. Shaw, International law, fifth edition Cambridge university press 2003

[5] See Shaw defined international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. And see also John Dugard international law: a body of rules and principles, which are binding upon states in their relations with one another.

facilitative or inspirational objectives. Hence, non-compliance of such laws does not necessary result in definite adverse consequences/sanctions/remedies. Second, even if the law is found to be prescriptive, the alleged law must be sufficiently complete and clear. There are international agreements which are apparently prescriptive and yet what they require is for the parties to take actions, the nature, scale and conditions of which are not sufficiently defined.

Second, even if the law is prescriptive and sufficiently definite, it does not necessarily become enforceable if the procedures and sanctions for addressing non-compliance are not available. This is in fact the very point that makes international law different from national law. Whereas there is a default compliance and enforcement mechanism under national law, there is no such thing in international law. For international law, compliance and enforcement mechanisms must be created as part of a given international law. The strength of such a mechanism also determines the degree of enforceability.

Having provided the above by way of introduction, it must be noted that it is generally agreed that what the Durban Mandate provides is for an outcome which is part of international law; it does not provide for an outcome which is legally binding or enforceable. To make the outcome legally binding or enforceable, the parties must agree on requirements and commitments which are sufficiently definite and prescriptive and on strong procedures and institutions of compliance and enforcement. Now in the next section, a very brief outline of the criteria used to find whether a given instrument has a legal force or legal nature under international law.

3. Is a given instrument part of international law?

The only general institution provided to resolve disputes among states or determine and address alleged non-compliance of international law is the International Court of Justice (ICJ). Even for the ICJ to be able to act, both parties must agree to submit themselves to its jurisdiction. Hence, ICJ is not a default and general dispute resolution mechanism which is often found in national laws.

The Statute which established ICJ recognizes the long-held view that sources of international law are: (1) treaties; (2) customs; (3) judicial decisions and teachings of publicists; and (4) general principles. The idea is that for a give instrument to be regarded as part of international law, it must be embedded within one of the above sources. Since, the three sources mentioned above are not directly related to the issue which this paper tries to address, we can now focus on the first source of international law, treaties. The implication of this for the topic under discussion is this: the 2015 agreement must be embedded in a treaty to be regarded as a legal agreement or an agreement with legal force.

The term 'treaty' [6]is not consistently used by states as a title for an international instrument. There is a preference to reserve the use of the term 'treaty' for matters of some gravity that require more solemn agreements. Their signatures are usually sealed and they normally require ratification.

The term 'treaty' is often used as a generic term, however. As such it is embraces all instruments binding at international law concluded between international entities, regardless of their formal designation. Both the 1969 Vienna Convention and the 1986 Vienna Convention confirm this generic use of the term 'treaty'. The 1969 Vienna Convention confirm defines a 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". The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties. In order to speak of a "treaty" in the generic sense, an instrument has to meet various criteria. First of all, it has to be a binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making power. Thirdly, it has to be governed by international law. Finally the engagement has to be in writing. Even before the 1969 Vienna Convention on the Law of Treaties, the word "treaty" in its generic sense had been generally reserved for engagements concluded in written form. In addition to the treaties, other terms are also used: charter, convention, covenant, protocol and declaration.

Charter means a formal and solemn instrument, such as the constituent treaty of an international organization. The term itself has an emotive content that does back to the Magna Carta of 1215. Well-known recent examples are the Charter of the United Nations of 1945[7] and the Charter of the Organization of American States of 1952[8]. The African Charter on Human and Peoples' Rights which established the African Commission on Human, and Peoples' Right[9] is another example.

The term "convention" is generally used for formal multilateral treaties with a broad number of parties. Usually this instrument is negotiated under the auspices of an international organization. Examples include Convention on Biological Diversity of 192; the United Nations Convention on the Law of the Sea of 1982; and the Vienna Convention on the Law of Treaties of 1969.

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[6] Shaw, Supranote, pp 4

[7] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI,

[8] Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948

[9] African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. *entered into force* Oct. 21, 1986

The name ‘declaration’ is used in different international legal instruments. However, declaration is not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration.

Declarations can, however, also be agreements in the generic sense intended to be binding at international law. Declarations that are intended to have binding effects could also exist in situations such as the following:

a) When the parties intended to create binding obligations
b) Declarations, in their provisions, may reflect customary international law or may have gained binding character as customary law at a larger stage. Such was the case with the 1948 Universal Declaration of Human Rights
c) A declaration can be a treaty in the proper sense. A significant example is the Joint Declaration between the United Kingdom and China on the Question of Hong Kong of 1984
d) An interpretive declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter
e) A declaration can also be an informal agreement with respect to a matter of minor importance
f) A series of unilateral declarations can constitute binding agreements. Typical examples are declarations under the Optional Clause of the Statute of the International Court of Justice that create legal bonds between declarants, although not directly addressed to each other. Another example is the unilateral Declaration on the Suez Canal and the arrangements for its operation issued by Egypt in 1957 which was considered to be an engagement of an international character.

Finally, the term ‘protocol’ can also be used instead of treaty. A protocol is an instrument subsidiary to a treaty (or previously established legal instrument) and drawn up by the same parties. Such a protocol deals with ancillary matters such as the interpretation of particular clauses of the treaty, those formal clauses not inserted in the treaty, or the regulation of technical matters. Protocol as a supplementary treaty is an instrument which contains supplementary provisions to a previous treaty. A protocol is an instrument with specific substantive obligations to implement the general objectives of a previous framework or umbrella convention. Such protocols ensure a more simplified and accelerated treaty-making process and have been used particularly in the field of international environmental law. An example is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer adopted on the basis of Articles 2 and 8 of the 1985 Vienna Convention for the Protection of the Ozone Layer.

4. The Meaning and Implications of the Three Options Examined

4.1. Three options under the convention

Having discussed the meaning of 'treaty' and its various names as the first important source of international law, let us now turn to the three options provided in the Durban Mandate. These are: a protocol or another legal instrument or agreed outcome with legal force under the convention. First to consider is the key term "under the convention". The convention concerned is the UNFCCC. This qualification applies to all the three options. So properly speaking, the options are: 1) a protocol under the convention; 2) another legal instrument under the convention; and 3) agreed outcome with legal force under the convention. The question now is what does "under the convention mean"? There are various interpretations. One understanding of "under the convention" is that the outcome of the ADP must respect the principles and objectives of the convention. Another interpretation is that it must not try to amend any part of the convention, including the annexes; it ought to try to elaborate and further implement the provisions of the convention only. Yet, another interpretation is that the outcome must be any of those legal instruments envisaged under the convention. These interpretations are not necessarily mutually exclusive. It might also be observed that the UNFCCC itself has provisions dealing with amendments of its substantive parts and annexes and hence the argument that the outcome could not amend any part of the convention is not plausible.

Protocol under the convention

One of the options for the legal form of the outcome of the ADP process is protocol. But it is not any kind of protocol. It is a protocol under the convention. The convention envisages development of a protocol. Kyoto Protocol is an example. Article 17 of the UNFCCC provides that the COP may at any ordinary session adopt protocols to the Convention. The text of any proposed protocol shall be communicated to the parties by the secretariat at least six months before such a session. The same instrument shall establish the requirement for the entry into force of any protocol. Normally a certain number of instruments of acceptance (ratification) are required for protocols to come into force. Only parties to the convention may be parties to a protocol and only the parties shall take decisions under any protocol to the protocol concerned.

Another legal instrument under the convention

The question here is: is there any legal instrument under the convention other than a protocol. The answer is yes. The convention talks about amendments to the convention. These amendments could be targeted at the substantive parts of the convention or its annexes. The convention provides for the different requirements for the two kinds of amendments.

The convention provides that the COP could adopt amendments by three-fourth majority, provided that decisions could not be taken by consensus. How does this amendment comes into force depends on the nature of the provisions amended. Normally, amendments will not come

into force regarding a party until this party deposits its instrument of acceptance. On the other hand, if the amended relates to the annexes, it will come into force after a certain period of time on any party unless that party deposits its instrument of non-acceptance within a given period of time.

It must be noted a text which purports to amend the convention could be called by various names including declarations, convention, or protocol. The convention does not provide conditions under which a protocol comes into force. It only states that the text of the protocol will provide the conditions under which it will come into force. However, even if the text is called a protocol and if it, among others, amends the provisions of the convention, as far as these amending parts are concerned, the above rules will apply.

Agreed outcome with legal force under the convention

It is the least clear of the options. It is also a language that does not appear in the convention itself. The term "agreed outcome" was used in the Bali Roadmap but "agreed outcome with legal force" is the first time it was used in the climate negotiations. It is itself a result of compromise. It was to be remembered that it was India, which proposed this option. Following the decision, commentators suggested that it might be referring to outcomes which do not require ratification to be legally binding on a party. By this they are mainly referring to decisions. So according to this view, if the third option is what is opted for by the parties, the result of the Durban Platform on Enhanced Action would be a set of decisions. The idea here is that the first two options will be legally binding when they are ratified. Then a question arises as to the difference between 'legally binding outcome' and "an outcome with legal force"? Stated in other words, the question is: if by "agreed outcome with legal force" we are referring to decisions of the COP, then does it mean that decisions have legal force?

The conventional view is that decisions are not binding. The counter-argument is that in UNFCCC context, decisions, in practice, are binding. It can be submitted that if decisions are not binding, then CDM or other institutions and mechanisms could not have functioned if the decisions, which operationalized these, were to be regarded as non-binding.

Leaving the context of the climate change negotiations, under general international law, the term "moduls videndi" refers to an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an informal way, and never requires ratification. The term "memoranda of understanding" is at times used. These are not as such binding, but may be of legal consequence.

In fact a large role is played in the normal course of interstate dealings by informal non-treaty instruments precisely because they are intended to be non-binding and are thus flexible, confidential and relatively speedy in comparison with treaties. They may be amended with ease

and without delay and may be terminated by reasonable notice (subject to provision to the contrary).

It might be observed that memoranda of understanding and decisions do not require ratification. However, memoranda of understanding are not regarded to have legal force. On the other hand, decisions, as suggested above, might be considered as having legal force. This can be further supported by the decision of the COP in Copenhagen to merely take note of the Copenhagen Accord, instead of incorporating the Copenhagen Accord into the decision. Consequently, the Copenhagen Accord was regarded as a political document. It is true that many of the provisions of the Accord found their way in subsequent decisions of the COP. For example, the commitment of USD 30 billion in fast-start and USD 100 billion in long-term finance were provided in the Copenhagen Accord and yet many refer to the subsequent Cancun decision, rather than the Copenhagen Accord, to suggest that the commitment was not merely political but legal. Therefore, the conclusion that can be drawn at the moment is that "agreed outcome with legal force" refers to COP decisions.

Understood this way, there are two important points that should be kept in mind:

First, the three options are not mutually exclusive in the sense that the negotiations under the ADP would not result only in one outcome with one legal form unless the legal form agreed is the last one, "agreed outcome with legal force". Even if the first two options are selected, some of the outcome will have to be, out of necessity or convenience, packaged in the form of "agreed outcome with legal force". We could not possibly have a protocol which contains all the important issues under discussion. Therefore, the details will have to be in the form of decisions in Paris and subsequent COPs.

Second, the discussion on legal form should be distinguished from the legal nature of the content. The point is mainly that you could have a protocol and yet the content could be so weak that it will not practically be legally binding. Therefore, the legal character of the outcome depends more than on the legal form. It depends on the prescriptive nature and content of these commitments; and the procedures and institutions set up under the agreement to hold its parties accountable for complying with their commitments.

The Durban decision does not refer to the legal character of any commitments that it may contain. If the outcome itself is not legally binding then any commitments within it will not be legally binding. But it is also possible for a legally binding agreement to contain provisions that are softly worded, or that are so imprecise as to be, in effect, non-binding.

5. Important terms with regard to the negotiation, entering into force, application and enforcement of international agreements

Adoption

"Adoption" is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the states participating in the treaty-making process. Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question. A treaty can also be adopted by an international conference which has specifically been convened for setting up the treaty, by a vote of two thirds of the states present and voting, unless, by the same majority, they have decided to apply a different rule. [Art.9, Vienna Convention of the Law of Treaties 1969]

Acceptance and approval

The instruments of "acceptance" or "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. In the practice of certain states acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state. [Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969]

Accession

"Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]

Act of formal confirmation

"Act of formal confirmation" is used as an equivalent for the term "ratification" when an international organization expresses its consent to be bound to a treaty. [Arts.2 (1) (b bis) and 14, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986]

Amendment

The term "amendment" refers to the formal alteration of treaty provisions affecting all the parties to the particular agreement. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Many multilateral treaties lay down specific requirements to be satisfied for amendments to be adopted. In the absence of such provisions, amendments require the consent of all the parties. [Art.40, Vienna Convention of the Law of Treaties 1969]

Authentication

The term "authentication" refers to the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, states cannot unilaterally change its provisions. If states which negotiated a given treaty do not agree on specific procedures for authentication, a treaty will usually be authenticated by signature, signature ad referendum or the initialling by the representatives of those states. [Art.10, Vienna Convention on the Law of Treaties 1969]

Correction of errors

If, after the authentication of a text, the signatory and contracting states are agreed that it contains an error, it can be corrected by initialling the corrected treaty text, by executing or exchanging an instrument containing the correction or by executing the corrected text of the whole treaty by the same procedure as in the case of the original text. If there is a depositary, the depositary must communicate the proposed corrections to all signatory and contracting states. In the UN practice, the Secretary-General, in his function as depositary, informs all parties to a treaty of the errors and the proposal to correct it. If, on the expiry of an appropriate time-limit, no objections are raised by the signatory and contracting states, the depositary circulates a proces-verbal of rectification and causes the corrections to be effected in the authentic text(s). [Art.79, Vienna Convention on the Law of Treaties 1969]

Declarations

Sometimes states make "declarations" as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty. Usually, declarations are made at the time of the deposit of the corresponding instrument or at the time of signature.

Definitive Signature

When the treaty is not subject to ratification, acceptance or approval, "definitive signature" establishes the consent of the state to be bound by the treaty. Most bilateral treaties dealing with more routine and less politicized matters are brought into force by definitive signature, without recourse to the procedure of ratification. [Art.12, Vienna Convention on the Law of Treaties 1969]

Deposit

After a treaty has been concluded, the written instruments, which provide formal evidence of consent to be bound, and also reservations and declarations, are placed in the custody of a depositary. Unless the treaty provides otherwise, the deposit of the instruments of ratification, acceptance, approval or accession establishes the consent of a state to be bound by the treaty. For treaties with a small number of parties, the depositary will usually be the government of the state on whose territory the treaty was signed. Sometimes various states are chosen as depositaries. Multilateral treaties usually designate an international organization or the Secretary-General of the United Nations as depositaries. The depositary must accept all notifications and documents related to the treaty, examine whether all formal requirements are met, deposit them, register the treaty and notify all relevant acts to the parties concerned. [Arts.16, 76 and 77, Vienna Convention on the Law of Treaties 1969]

Entry into force

Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of states to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of states must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries have expressed their consent or the conditions have been satisfied. A treaty enters into force for those states which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally. [Art.24, Vienna Convention on the Law of Treaties 1969]

Exchange of letters/notes

States may express their consent to be bound by an "exchange of letters/notes". The basic characteristic of this procedure is that the signatures do appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of both letters or notes, each of the parties having in their possession one letter or note signed by the representative of the other party. In practice, the second letter or note, usually the letter or note in response, will typically reproduce the text of the first. In a bilateral treaty, letters or notes may also be exchanged to indicate that all necessary domestic procedures have been completed. [Art.13, Vienna Convention on the Law of Treaties 1969]

Full powers

"Full powers" means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting, authenticating the text of a treaty, expressing the consent of a state to be bound by a treaty, or for accomplishing any other act with respect to that treaty. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their state for the purpose of all acts relating to the conclusion of a treaty and do not need to present full powers. Heads of diplomatic missions do not need to present full powers for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited. Likewise, representatives accredited by states to an international conference or to an international organization or one of its organs do not need to present full powers for the purpose of adopting the text of a treaty in that conference, organization or organ. [Art.2 (1) (c) and Art.7 Vienna Convention on the Law of Treaties 1969]

Modification

The term "modification" refers to the variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable. If the treaty is silent on modifications, they are allowed only if the modifications do not affect the rights or obligations of the other parties to the treaty and do not contravene the object and the purpose of the treaty. [Art.41, Vienna Convention on the Law of Treaties 1969]

Notification

The term "notification" refers to a formality through which a state or an international organization communicates certain facts or events of legal importance. Notification is increasingly resorted to as a means of expressing final consent. Instead of opting for the exchange of documents or deposit, states may be content to notify their consent to the other party

or to the depositary. However, all other acts and instruments relating to the life of a treaty may also call for notifications. [Arts.16 (c), 78 etc,. Vienna Convention on the Law of Treaties 1969]

Objection

Any signatory or contracting state has the option of objecting to a reservation, inter alia, if, in its opinion, the reservation is incompatible with the object and purpose of the treaty. The objecting state may further declare that its objection has the effect of precluding the entry into force of the treaty as between objecting and reserving states. [Art.20-23, Vienna Convention on the Law of Treaties 1969]

Provisional application and provisional entry into force of treaties

Provisional Application

The growing use of *provisional application* clauses in treaties is a consequence of the need felt to give effect to treaty obligations prior to a state's formal ratification of/accession to a treaty. The obligations relating to provisional application are undertaken by a conscious voluntary act of the state consistent with its domestic legal framework.

Provisional application of a treaty that has entered into force

The provisional application of a treaty that has entered into force may occur when a state undertakes to give effect to the treaty obligations provisionally although its domestic procedures for ratification/accession have not yet been completed. The intention of the state would be to ratify/accede to the treaty once its domestic legal requirements have been met. Provisional application may be terminated at any time. In contrast, a state which has consented to be bound by a treaty through ratification/accession or definitive signature, is governed by the rules on withdrawal specified in the treaty concerned (Arts. 54, 56, Vienna Convention on the Law of Treaties 1969). [Art. 25, Vienna Convention on the Law of Treaties 1969]

Provisional application of a treaty that has not entered into force

Provisional application of a treaty that has not entered into force may occur when a state notifies that it would give effect to the legal obligations specified in that treaty *provisionally*. These legal obligations are undertaken by a conscious voluntary act of the state consistent with its domestic legal framework. Provisional application may be terminated at any time. In contrast, a state which has consented to be bound by a treaty through ratification/ accession or definitive signature, is governed by the rules on withdrawal specified in the treaty concerned (Arts. 54, 56, Vienna Convention on the Law of Treaties 1969).

Provisional application may continue even after the entry into force of the treaty in relation to a state applying the treaty provisionally until that state has ratified it. Provisional application terminates if a state notifies the other states among which the treaty is being applied provisionally of its intention of not becoming a party to the treaty. [Art. 25 (2), Vienna Convention on the Law of Treaties 1969]

Provisional entry into force

There are also an increasing number of treaties, which include provisions for *provisional entry into force*. Such treaties provide mechanisms for entry into force provisionally, should the formal criteria for entry into force not be met within a given period. Provisional entry into force of a treaty may also occur when a number of parties to a treaty which has not yet entered into force, decide to apply the treaty as if it had entered into force. Once a Treaty has entered into force provisionally, it is binding on the parties, which agreed to bring it into force provisionally.

The nature of the legal obligations resulting from provisional entry into force would appear to be the same as the legal obligations in a treaty that has entered into force, as any other result would create an uncertain legal situation. It is the criteria for formal entry into force that have not been met but the legal standard of the obligations remains. [Art. 25 (1), Vienna Convention on the Law of Treaties 1969]

Ratification

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. [Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]

Registration and publication

Article 102 of the Charter of the United Nations provides that "every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it". Treaties or agreements that are not registered cannot be invoked before any organ of the United Nations. Registration promotes transparency and the availability of texts of treaties to the public. Article 102 of the Charter and its predecessor, Article 18 of the Pact of the League of Nations, have their origin in one of Woodrow Wilson's Fourteen Points in which he

outlined his idea of the League of Nations: "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always openly and in the public view". [Art.80, Vienna Convention on the Law of Treaties 1969]

Reservation

A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made. [Arts.2 (1) (d) and 19-23, Vienna Convention of the Law of Treaties 1969]

Revision

Revision has basically the same meaning as amendment. However, some treaties provide for a revision additional to an amendment (i.e., Article 109 of the Charter of the United Nations). In that case, the term "revision" refers to an overriding adoption of the treaty to changed circumstances, whereas the term "amendment" refers only to a change of singular provisions.

Signature ad referendum

A representative may sign a treaty "ad referendum", i.e., under the condition that the signature is confirmed by his state. In this case, the signature becomes definitive once it is confirmed by the responsible organ. [Art.12 (2) (b), Vienna Convention on the Law of Treaties 1969]

Signature Subject to Ratification, Acceptance or Approval

Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

6. Choice of Options: Factors to Consider

Factors to consider in deciding which legal instruments to opt for

1. The legal nature of the instrument

    - The legal nature of the agreements and the consequences for the parties will be different based on the type of agreement entered into. For example a formal treaty format is likely to be stricter in the legal obligations it may entail as compared to a declaration which can reflect a less ambitious commitment to what is being agreed up on. A protocol usually follows from a prior agreement such as the UNFCCC convention. However, a party that has a fundamental reservation on the principles included on the parent agreement may have problems in the signing of a protocol that follows it.

    - The procedures of approval and coming into force of a treaty may also inform the decision on the form. The level of political backing behind the international agreement can have a bearing on the decision of the form as well. For example a government with opposing domestic attitude towards the substance of the agreement may opt towards a less obligatory form of agreement such as a declaration than a proper treaty.

2. Time considerations

    - The urgency of the matter under consideration may also significantly impact the decision to follow a certain legal instrument. As agreements with stringer requirements and legalistic language are difficult to be agreed upon, states may decide to go for a less legally binding form of agreement.

3. Institutional issues

    - An established machinery of enforcement is a great plus for any international endeavor. The existence of an already functional and strong organization may sway the decision towards a protocol within the existing system rather than a completely new agreement which may take some time to get off the ground.

4. Effectiveness of the choice for the achievement of the purpose
    - The seriousness and nature of the issue under consideration is another important consideration.

5. Change in circumstances
    - For instance if there is a fundamental change has occurred, a new treaty makes more sense than a protocol to an existing agreement. Additionally, important states wanting to agree on new negotiated terms as opposed to agreeing to an existing agreement and a new treaty can better accommodate a protocol.

6. The conclusion of this paper after the length meanings and implications of the three optional legal forms: "a protocol, another legal instrument or an agreed outcome with legal force", urgency African countries to examine to content of the 2015 agreement. It should be noted all the three options are legally binding, however, the content and the form of legal obligation are important equally important to provide clarity in choosing from the three options.

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