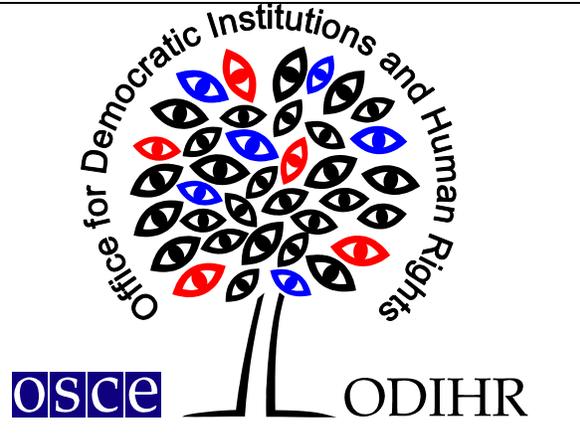


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N O N P A P E R

Note
on Article 20 of the Law on International Treaties of the
Republic of Kazakhstan

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1. INTRODUCTION

1. *In June 2005, the OSCE ODIHR was approached by the OSCE Center in Almaty with a request to provide a Note clarifying the issue of the relationship between international treaty and domestic law norms in view of the fact that Kazakhstan had earlier passed a Law on International Treaties which provided for the possibility of suspending or terminating a treaty in the case of conflict with the provisions of the domestic law.*

2. SCOPE OF REVIEW

2. This Note succinctly analyzes the relationship between the international treaty and domestic law norms in Kazakhstan with particular reference to Article 20 of Kazakhstan's Law on International Treaties.
3. This Note is not for distribution.

3. EXECUTIVE SUMMARY

4. Article 20 of the Law on International Treaties of the Republic of Kazakhstan provides that *"in the case of conflict of the international treaty provisions with the provisions of the legislation of the Republic of Kazakhstan, the treaty shall be amended, suspended or terminated."*
5. In accordance with the Vienna Convention on the Law on Treaties, acceded to by the Republic of Kazakhstan in 1994, all international treaties binding upon Kazakhstan are governed by international law, not by domestic law. Article 20 of the above-mentioned Law would therefore need to be reconsidered.

4. ANALYSIS AND RECOMMENDATIONS

6. Article 20 of the Law on International Treaties of the Republic of Kazakhstan provides that *"in the case of conflict of the international treaty provisions with the provisions of the legislation of the Republic of Kazakhstan, the treaty shall be amended, suspended or terminated."*
7. One of the core premises the relationship between international treaties and the domestic law is that treaties are governed by the international – and not domestic –

law. This is made clear by the Vienna Convention on the Law of Treaties¹ (hereafter 'Vienna Convention') which defines the term "treaty" for the purposes of the Convention to mean a written international agreement between States governed by international law². Accordingly, an international court or tribunal called on to interpret a treaty would apply the relevant principles of the international law and not the domestic law of the State parties to the treaty. The Republic of Kazakhstan acceded to the Vienna Convention on 15 January 1994. Therefore, Article 20 of its Law on International Treaties of the Republic of Kazakhstan shall be viewed through the prism of international law.

8. Another point, which derives from the distinction made above, lies with the international obligation to apply treaties in good faith. This is also made clear in the Vienna Convention, which states that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*".³ The principles of free consent and of good faith as well as the *pacta sunt servanda* rule are universally recognized. It is worth noting that the only limit to the *pacta sunt servanda* rule is to be found in the notion of "peremptory norm of general international law" (or *jus cogens*).
9. A final point arising in the relationship between international treaties and the domestic law is that States must ensure that their national legal framework permits them to meet their treaty obligations. While it is a matter for States to determine how to go about the implementation of their treaty obligations, a failure to implement appropriately may have serious consequences for a State under international law. Such a failure could lead to a dispute with another State, resulting in proceedings before an international court or tribunal.
10. Moreover, a failure to get it right domestically is no defense internationally. A State cannot plead provisions of its own law or deficiencies in that law in answer to a claim

¹ Vienna Convention on the Law of Treaties (23 May 1969), United Nations, *Treaty Series*, vol. 1155, p.331, signatories: 45; parties: 105. Full text of the Convention is available at <http://www.un.org/law/ilc/texts/treatfra.htm> [last visited on 15 September 2005].

² *Id.* Article 2(1).

³ Vienna Convention on the Law of Treaties (1969), Article 26, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), article 26 [available at <http://www.un.org/law/ilc/texts/trbtstat.htm> - last visited on 15 September 2005].

it is in breach of a treaty obligation. In this regard, Article 27 of the Vienna Convention, in part, provides that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁴

11. The solid legal link between Articles 26 and 27 of the Vienna Convention is not even weakened in the case of severance of diplomatic relations between the parties to a given treaty⁵ unless “the existence of diplomatic or consular relations is indispensable for the application of the treaty”.
12. Under the three rules outlined in paragraphs 8, 9 and 10 above, any claim that domestic law shall prevail over international treaties freely entered into by a given country can only be regarded as inadmissible. In the case of a conflict between the domestic law and an international treaty, it is the domestic law, which needs to be reconsidered, not the international norm. The presence or absence of a particular provision within the legal framework of a state cannot be used as an argument to evade an international obligation.
13. Furthermore, it is to be noted that Article 20 of the Law under consideration directly contradicts Article 4 of the Constitution of the Republic of Kazakhstan which stipulates that “[i]nternational treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.”⁶
14. This provision clarifies the relationship between domestic law and international treaties. In particular, it makes clear that international treaties have legal effect surpassing that of ordinary legislation. Further, it provides that international norms may have a direct legal effect in Kazakhstan’s legal order and therefore do not require any special procedure for their application in the domestic legal order. However, international norms might not always be directly applicable. In order to operate directly in the domestic sphere, such norm may need to be “transformed” into the domestic law by a legal act of the State. This may be the case, for instance, when it is not possible to assert the international norm directly before the relevant authorities in

⁴ Vienna Convention on the Law of Treaties, Article 27.

⁵ *Id.*, Article 63.

⁶ Constitution of the Republic of Kazakhstan, Article 4.

accordance with the State procedural rules. Whether a given international norm is or is not directly applicable usually depends on its degree of precision and/or on the area of law concerned.