

DEFICIENCIES IN THE LEGAL REGULATION AND JUDICIAL PRACTICE OF KAZAKHSTAN IN THE DOMESTIC APPLICATION OF TREATIES: ENTRY INTO FORCE AND PROVISIONAL APPLICATION

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The relevance of this article arises from a range of research challenges linked to the legal regulation and judicial practice of Kazakhstan in the field of domestic application of treaties. In particular, the article highlights a deficiency in the Normative Resolution of the Supreme Court of Kazakhstan «On the Application of Provisions of Treaties of the Republic of Kazakhstan» dated 10 July 2008 No. 1 (hereinafter – the 2008 Normative Resolution). Specifically, it lacks one of the legal conditions necessary for the domestic application of treaty provisions by national actors – namely, the concept of provisional application of treaties. The article also identifies judicial errors in the application of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property – a treaty which has not entered into force for Kazakhstan and therefore holds no binding legal status within its domestic legal system. *The subject of the study* encompasses the legal acts of Kazakhstan governing the application of treaty provisions by national actors, as well as the provisions of the 1969 Vienna Convention on the Law of Treaties (hereinafter – the 1969 VCLT). *The purpose of the research* is to develop recommendations for improving legislation and judicial practice concerning the domestic application of treaties in Kazakhstan, through the analysis of relevant legal frameworks, case law, and doctrinal sources. To achieve this goal, the article employs several *research methods*: the case law analysis method, the formal-legal method, and the method of legal hermeneutics. The analysis of judicial practice proved useful in identifying errors made by courts when applying treaty provisions. The formal-legal method was used to assess certain provisions of the 2008 Normative Resolution for their compliance with the 1969 VCLT. Legal hermeneutics was applied to interpret the 1969 VCLT provisions using commentaries and academic doctrine. *The novelty of the research* lies in the results of the analysis of Kazakhstan's legislation and case law on the domestic application of treaties, specifically in terms of their compliance with the provisions of the 1969 VCLT. Based on the identified issues, the article offers the following *recommendations*: (a) amend the 2008 Normative Resolution by introducing a provision requiring verification of the possibility of a treaty's provisional application as a condition for its domestic application; (b) to facilitate such verification, there is a practical need to establish a unified registry of provisionally applied treaties of Kazakhstan under the Ministry of Foreign Affairs; (c) Kazakhstani court decisions issued with reference to a non-binding treaty must be subject to reversal or revision; (d) to prevent future errors in the application of treaties, there is a need to develop a practical guide outlining the features of the domestic application of treaties that, by their nature, cannot be fully addressed through traditional legal instruments.

Keywords: Law of treaties; domestic application of treaties; conditions for domestic application of treaties; entry into force; provisional application; official publication; multilateral termination of provisional application; unilateral termination of provisional application; treaty depositary; calculation of the date of treaty entry into force.

Introduction

With the ongoing evolution of international law, the application of treaty norms by domestic legal actors in hybrid-monist states [1] has become a widespread and routine practice – Kazakhstan being no

exception [2, p. 7]. Between 2008 and 2023, Kazakhstan's judicial system has demonstrated extensive use of treaty provisions across a broad spectrum of legal fields, including civil, criminal, administrative, tax, labor, family, customs, private international, intellectual property, environmental, land, and international human rights law, among others [3]. Over this fifteen-year period, more than 40,000 court cases have referenced terms such as «convention», «international agreement», and «international covenant» [3]. Notably, tax and customs law have emerged as the most frequently addressed areas governed by treaty norms in domestic adjudication [4]. This growing reliance on treaties within the national legal order underscores the importance of examining how these instruments are applied in practice. As a key mechanism for implementing Kazakhstan's international obligations, the domestic application of treaties warrants careful analysis. In particular, it calls for the development of recommendations aimed at refining the legal framework and improving judicial practice in this increasingly significant area of law.

The domestic application of treaties in Kazakhstan is primarily governed by the Normative Resolution of the Supreme Court of Kazakhstan «On the Application of Provisions of Treaties of the Republic of Kazakhstan» dated 10 July 2008 No. 1 (hereinafter – the 2008 Normative Resolution), as well as by other legal instruments. However, one of the central concerns raised in this article is the absence within the 2008 Normative Resolution of a key legal condition for the application of treaty norms at the national level – namely, the provisional application of treaties. A second issue examined in this study relates to the recurring misapplication by Kazakhstani courts of certain provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property – a treaty which, crucially, is not in force for Kazakhstan and therefore lacks legal standing within the national system.

In response to these challenges, *the purpose of this research* is to develop practical and normative recommendations aimed at strengthening both the legal framework and judicial practice surrounding the domestic application of treaties in Kazakhstan. This goal is pursued through a close analysis of relevant national legislation, international law, case law, and scholarly commentary.

Materials and Methods

This study builds upon the work of several prominent scholars in the field of treaty law, whose contributions have been instrumental in shaping modern understanding of the domestic application of treaties. Among them are Mark Villiger (Switzerland), Oliver Dörr (Germany), Kirsten Schmalenbach (Austria), Jan Klabbers (Netherlands), Anthony Aust (United Kingdom), Anneliese Quast Mertsch (Germany), and René Lefeber (Netherlands). Their writings provided both theoretical insights and practical perspectives essential to the development of this research. Additionally, interpretative documents from the United Nations Treaty Section were consulted to clarify the meaning and scope of the provisions contained in the 1969 Vienna Convention on the Law of Treaties (hereinafter – the 1969 VCLT), which serves as a key reference point for assessing Kazakhstan's legal framework.

To identify real-world challenges and recurring issues in the domestic application of treaties by Kazakhstani courts, the study draws upon a series of illustrative judicial decisions. These cases offer concrete examples of how international legal norms are interpreted and sometimes misapplied within the national context. Methodologically, the study employs a range of specialized legal methods. The formal legal method is used to examine the compatibility of specific provisions of the 2008 Normative Resolution with the 1969 VCLT. Legal hermeneutics also plays an important role, particularly in interpreting the 1969 VCLT norms through scholarly commentary.

Discussion and Results

1. Entry into Force

1.1 Legal and Theoretical Foundations

The primary and fundamental condition for the domestic application of a treaty is its entry into force for the state whose authorities are to implement its provisions. In addition to the treaty's entry into force, its official publication is a mandatory requirement for its domestic applicability. The legal basis for this condition can be found in Article 24 of the 1969 VCLT, as well as in the national legal systems of monist or hybrid-monist states (hereinafter referred to as «states»). In this context, national legal systems include constitutional provisions [5] that require the official publication of a treaty text as a condition

for its application, as well as specific legal acts [6] that regulate the processes of treaty conclusion, implementation, amendment, and termination. These acts often reflect the provisions of the 1969 VCLT, while taking into account the specific features of the respective state's domestic legal procedures.

With regard to the entry into force of a treaty, Article 24 of the 1969 VCLT establishes four rules. The first paragraph of the article is the principal one and states that «a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree» [7]. Commenting on this provision, Oliver Dörr and Kirsten Schmalenbach observe that the formulation of conditions for a treaty's entry into force is the responsibility of the contracting parties, and such conditions are typically set out in the final clauses of the treaty [8, p. 394]. The most commonly encountered types of final clauses on entry into force were identified by British jurist Anthony Aust [9, pp. 163-167], and include:

- provisions requiring ratification (or another similar procedure) by both (or all) signatory states; provisions requiring ratification (or, in some cases, signature) by a minimum number of negotiating states [10];

- provisions requiring ratification (or, in some cases, signature) by specific states identified by number, name, or category [11];

- provisions requiring an exchange of instruments of ratification (in the case of bilateral treaties); provisions requiring each signatory state to notify the other(s) of the fulfillment of its constitutional requirements; provisions specifying a particular date for entry into force [12];

- provisions stating a date to be agreed upon by the parties [13];

- provisions stipulating entry into force upon signature by all negotiating states [14]; and other variations.

Paragraph 2 of Article 24 of the 1969 VCLT provides that, «failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States» [15]. In discussing this provision, former judge and section president of the European Court of Human Rights Mark Villiger notes that paragraph 2 neither specifies (nor is required to specify) an exact date for a treaty's entry into force, as this will occur once all negotiating States, including the last among them, have expressed their consent to be bound [16, p. 346]. From the perspective of contemporary treaty practice, Dörr and Schmalenbach rightly observe that this provision has largely lost relevance with respect to modern multilateral treaties deposited with the Secretary-General of the United Nations, as such treaties typically contain an explicit clause regarding their entry into force [8, p. 401]. In the context of bilateral treaties, the decisive factor is generally the date on which instruments of ratification are exchanged [8, p. 401].

Paragraph 3 of Article 24 of the 1969 VCLT regulates the entry into force of a treaty for a State that expresses its consent to be bound after the treaty has already entered into force. It provides that: «when the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides» [17]. Thus, where a State ratifies a treaty after its initial entry into force, the decisive date is the deposit of its instrument of ratification, unless the treaty specifies a different arrangement [8, p. 401]. As Dörr and Schmalenbach observe in their commentary on the Convention, treaties often stipulate that a certain period must pass following the deposit before the treaty takes effect for the State concerned, typically mirroring the period required for the treaty's initial entry into force. This mechanism ensures the depositary has sufficient time to perform its functions [8, pp. 401-402]. A clear example of such a provision appears in Article 126(2) of the 1998 Rome Statute of the International Criminal Court [18]. A distinctive interpretation of paragraph 3 of Article 24 of the 1969 VCLT is offered by Villiger. The judge observes that the undisputed rule in this case – reflecting the principle of non-retroactivity of treaties – is that a treaty enters into force for a given State on the day its consent to be bound is established; that is, for each new party, on the day it expresses its consent to be bound by the treaty. This follows from paragraph 1, although paragraph 3, for the sake of additional caution, also provides that a treaty may contain other provisions [16, p. 346].

The analysis of paragraph 4 of Article 24 of the 1969 VCLT is omitted, as it addresses only procedural matters – such as authentication of the text, expression of consent, entry into force, reservations, and depositary functions – which are not directly relevant to the domestic application of treaty norms.

Regarding the legal nature of the provision, Professor Jan Klabbers observes that paragraph 4 codifies an existing rule of customary international law [19].

Accurate calculation of the date on which a treaty enters into force constitutes a fundamental prerequisite for the correct application of its provisions. Specific rules govern this process, and national legal actors must adhere to them when determining the applicable date. Where a treaty stipulates that «the Convention shall enter into force thirty days after the deposit of a ratification instrument with the Secretary-General of the United Nations», the counting of time commences on the day following the deposit of the final required instrument [20]. It follows that if the final instrument is deposited on 16 March, the thirty-day period begins on 17 March, and the treaty enters into force on 15 April [20]. Conversely, where a treaty provides that «the Convention shall enter into force three months after the deposit of a ratification instrument», the calculation starts on the date of the deposit itself [20]. Thus, if the deposit occurs on 15 March, the Convention enters into force on 15 June, exactly three months later [20]. Where the deposit takes place on a day that has no corresponding date three months later – such as 31 March – the Convention enters into force on the last day of the relevant month, in this case, 30 June. Similarly, if the deposit occurs on 30 November, the Convention enters into force on 28 February, or on 29 February in a leap year [20].

1.2 Analysis of Kazakhstan's Legislation and Judicial Practice

The entry into force of a treaty and its official publication, as prerequisites for the domestic application of treaty norms, are explicitly regulated under the legislation of Kazakhstan. For the purpose of analyzing the presence of these requirements within Kazakhstan's domestic legal framework, we applied the 2008 Normative Resolution. Paragraph 5 of the Resolution affirms that the entry into force and official publication of a treaty are necessary conditions for the domestic application of its provisions. It states: «In accordance with paragraph 4 of Article 4 of the Constitution of the Republic of Kazakhstan, and based on the meaning of Article 24 of the Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan», only those treaties of the Republic of Kazakhstan that have entered into force and have been officially published shall be applied. Treaties that have not been officially published, insofar as they pertain to the rights, freedoms, and obligations of citizens, shall not be subject to application» [21].

Although the legal regulation pertaining to the condition under consideration does not exhibit any inherent deficiencies, domestic judicial practice in Kazakhstan includes cases in which the provisions of a treaty not yet in force for Kazakhstan have been repeatedly applied. Specifically, this concerns the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by General Assembly resolution 59/38 of 2 December 2004 (hereinafter – the 2004 UN Convention). Kazakhstan expressed its consent to be bound by the treaty through ratification, as formalized by the adoption of the Law of the Republic of Kazakhstan «On the Ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property» dated 27 October 2009, No. 195-IV. According to Article 30(1) of the 2004 UN Convention, «The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations» [22]. As of today, only 24 instruments of ratification, acceptance, approval, or accession have been deposited with the UN Secretary-General [23]. Accordingly, the 2004 UN Convention will enter into force on the thirtieth day following the deposit of the requisite instruments of consent by six additional States.

An analysis of domestic judicial practice concerning the application of treaty provisions demonstrates that the provisions of the 2004 UN Convention, which has not yet entered into force, were repeatedly utilized by courts of various instances in Kazakhstan during the period from 2017 to 2022 [3].

For example, in *Tungatarov J.S. v. the Embassy of the Hashemite Kingdom of Jordan* [24], regarding the recovery of an amount under a lease agreement and compensation for material damages caused by the defendant's unlawful actions, the Civil Chamber of the Court of Astana found that, by a ruling of the Esil District Court of Astana dated 10 January 2017, the claim was rejected due to the jurisdictional immunity of the Embassy of the Hashemite Kingdom of Jordan. A private appeal was filed against this ruling, in which Tungatarov J.S. requested its cancellation on the grounds of its unjustifiability. After hearing the claimant's explanations, the Civil Chamber found that the ruling of the court should be overturned

based on several provisions of the civil procedural legislation of Kazakhstan and Articles 1, 2(c), and 10(1) of the 2004 UN Convention [24]. The court cited that, according to Article 10(1) of the 2004 UN Convention, «if a state enters into a commercial transaction with a foreign individual, and under the applicable rules of private international law, disputes arising from this commercial transaction are subject to the jurisdiction of the courts of another state, that state may not invoke immunity from jurisdiction in proceedings concerning such a commercial transaction» [25]. The applicability of the provisions of the 2004 UN Convention cited in the ruling was justified solely by the existence of Kazakhstan's ratification law, but the status of the treaty's entry into force was not taken into account. In fact, the Civil Chamber should have restricted its review in the provisions of Kazakhstan's civil procedural legislation, which govern situations where the rules on the jurisdictional immunity of foreign states do not apply: Articles 485(2) [26] and 488 [27] of the 2015 Civil Procedure Code of the Republic of Kazakhstan (hereinafter – the 2015 CPC RK).

Another example, which illustrates rather an indirect reference than direct application of the 2004 UN Convention, can be found in *Yergazyiyev M.M. v. Suleimenov S.O* [28]. A judge of the Civil Chamber of the Court of Astana, having reviewed Yergazyiyev M.M.'s private appeal against the ruling of the Almaty District Court of Astana dated 7 November 2017, established that Yergazyiyev had filed a claim against the respondent Suleimenov S.O. seeking compensation for moral harm in the amount of 300,000 tenge, due to the public nature of the respondent's actions, who was serving as a security officer at the Consulate of the People's Republic of China in the Republic of Kazakhstan. On the same grounds, the district court had previously refused to accept the claim. However, the fact that the respondent Suleimenov S.O. was employed by the Consulate of the People's Republic of China in the Republic of Kazakhstan as a security officer did not preclude the jurisdiction of the district court of Astana over the matter [28]. In the reasoning for overturning the ruling of the Almaty District Court of Astana, the judge, alongside referring to the relevant provisions of civil procedural law, also noted that «the provisions of Art. 5 of the 2004 UN Convention, as well as Art. 38 of the 1961 Vienna Convention on Diplomatic Relations, may be applied by the court when resolving the substance of the parties' dispute» [28].

In *Burambaev M.D. v. the Embassy of the Federative Republic of Brazil in Kazakhstan* [29], concerning reinstatement and recovery of wages for the period of forced absence from work, the Yesil District Court of Astana, when considering the issue of the embassy's jurisdictional immunity, applied the provisions of Article 11 of the 2004 UN Convention alongside the norms of civil procedural legislation not due to a conflict between the provisions of the treaty and national law, but solely to strengthen the legal argumentation. It should be noted that the provision of Article 11 of the 2004 UN Convention applied by the court is also reflected (transformed) within Article 490 of the 2015 CPC RK. The court's ruling to terminate the proceedings on the basis of the embassy's jurisdictional immunity was motivated by paragraph 3(2) of Article 490 of the 2015 CPC RK, which provides that «a foreign state (in this case, the embassy) enjoys jurisdictional immunity in Kazakhstan in employment disputes where the subject matter is the conclusion or renewal of an employment contract» [30]. The court also referred to subparagraph (c) of paragraph 2 of Article 11 of the 2004 UN Convention, which contains a similar provision, as codified in paragraph 3(2) of Article 490 of the 2015 CPC RK: «a State may invoke immunity from jurisdiction before a court of another State which would otherwise be competent in a proceeding relating to an employment contract... if the subject of the proceeding is recruitment, renewal of employment, or reinstatement of the person concerned» [31]. We believe that even if the 2004 UN Convention had entered into force, the court should have limited itself to the application of paragraph 3(2) of Article 490 of the 2015 CPC RK, since there is no contradiction (conflict of norms) between the mentioned norm of the 2015 CPC RK and subparagraph (c), paragraph 2, Article 11 of the 2004 Convention in the context of the present dispute. It should also be emphasized that Brazil, as the respondent in *Burambaev v. the Embassy of Brazil*, is not bound by the 2004 UN Convention in any way, as the state has not even executed «a simple signature» of the treaty.

2. Provisional Application

2.1 Legal and Theoretical Foundations

Another condition for the domestic application of a treaty is the verification of the possibility of its provisional application prior to its entry into force for the state whose organs may be expected to apply its provisions. In other words, if a treaty has not yet entered into force, it is necessary to verify the possibility of its provisional application, as provided for in Article 25 of the 1969 VCLT.

The legal nature and continued relevance of the provisional application of treaties can be explained by several underlying factors. As noted by Anneliese Quast Mertsch, Associate Legal Officer at the United Nations International Residual Mechanism for Criminal Tribunals, one such factor is the temporal gap that often arises between the conclusion of treaty negotiations and the treaty's formal entry into force [32, p. 64]. This typically occurs in cases where the treaty does not become binding immediately upon signature but is instead subject to subsequent acts of ratification, acceptance, approval, or other forms of consent [32, p. 64]. A further factor is that states may, for practical or political reasons, be unwilling to delay the implementation of the treaty's provisions until its formal entry into force [32, p. 64]. In such circumstances, provisional application becomes a valuable legal mechanism, allowing the treaty's provisions to be applied in the interim period while domestic procedures related to consent are still ongoing. As René Lefeber rightly observes, in practice, provisional application is generally employed where entry into force is contingent upon constitutional approval and ratification by at least one of the negotiating parties [33, p. 81].

Having outlined the general features and legal relevance of provisional application, the analysis now turns to the interpretation of specific elements of Article 25 of the 1969 VCLT. Paragraph 1 provides that «a treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating states have in some other manner so agreed» [34]. The phrase «a treaty or a part of a treaty» suggests that not only the treaty as a whole, but also its amendments or later protocols, may be subject to provisional application – even if the original treaty is not applied in this way [33, p. 84]. Importantly, subparagraphs (a) and (b) do not establish a specific date from which the obligation to provisionally apply the treaty begins [33, p. 85]. It is therefore up to the treaty itself, or the form of agreement reached between the negotiating states, to define that date. In practice [35], provisional application by a state often begins either on the date the treaty is adopted or on the date it is signed by that state [32, p. 64].

As stated in subparagraph (b) of paragraph 1 of Article 25 of the 1969 Vienna Convention on the Law of Treaties, «a treaty or a part of a treaty is applied provisionally pending its entry into force if ... the negotiating States have in some other manner so agreed» [36]. This wording makes clear that provisional application does not necessarily need to be set out in the text of the treaty itself [8, p. 414]. It may also be provided for in a protocol, annex, or similar instrument that forms an integral part of the treaty [8, p. 414]. A notable example is the Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe, dated 19 November 1990, whose preamble states that «the States Parties hereby agree to the provisional application of certain provisions of the Treaty» [37]. Aust has described the 1947 General Agreement on Tariffs and Trade (GATT) as the most prominent example of provisional application [38], which remained in effect for decades through the Protocol of Provisional Application [9, p. 173]. In their analysis of the Convention, Dörr and Schmalenbach point out that, due to the functional nature of such arrangements, they may be concluded through simplified means – such as an exchange of letters or by consensus – since subparagraph (b) does not establish any particular procedure for their conclusion [8, p. 414].

Pursuant to the terminology of the 1969 VCLT, the term «negotiating state» as it appears in Article 25 is defined as «a State which took part in the drawing up and adoption of the text of the treaty» [39]. It is important to note that provisional application of a treaty is not necessarily undertaken by all negotiating states [33, p. 84]. In practice [40], the most common condition for a negotiating state to begin applying a treaty provisionally is its signature of the treaty prior to its entry into force [33, p. 84]. This form of signature should not be understood as a «definitive signature» [41] – that is, a «signature» in the sense of Article 12 of the Convention (i.e., «consent to be bound by a treaty expressed by signature») – but rather as a «simple signature» [42], in the context of Article 14(c), meaning a signature subject to

ratification. Another possible condition for a negotiating State to commence provisional application is its consent to the adoption of the treaty text [33, pp. 84-85; 43]. In certain cases, a state may be granted the possibility of opting out of provisional application [33, p. 85]. Including such a clause in a treaty may be beneficial where a state is unable to agree to provisional application for constitutional reasons, yet the negotiating parties seek to encourage that State to sign the treaty or to vote in favour of adopting its text [33, p. 85; 44].

Paragraph 2 of Article 25 of the 1969 VCLT, which defines the legal framework for the unilateral termination of the provisional application of treaties, provides that «unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that state notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty» [45]. A detailed examination by Dörr and Schmalenbach reveals that this provision addresses the risk of abuse or the indefinite continuation of provisional application, allowing for unilateral withdrawal unless the treaty itself or an agreement among the negotiating States provides otherwise [8, p. 416]. In the same vein, René Lefeber rightly notes that the provision does not constrain the freedom of treaty-making, as it applies only «unless the treaty otherwise provides or the negotiating States have otherwise agreed» [33, p. 87]. Accordingly, states involved in the drafting of the treaty text may, beyond regulating the termination of provisional application upon the treaty's entry into force, agree on additional modalities. These may include: multilateral termination of provisional application if the treaty fails to enter into force by a specified date [33, p. 87; 46]; unilateral termination, with a deferred date of effect [33, p. 87; 47]; or transitional measures for States that unilaterally deposit a declaration of non-participation in the treaty [33, p. 87; 48].

2.2 Analysis of Kazakhstan's Legislation and Treaty Practice

The provisional application of a treaty, as one of the conditions for its domestic application, is not regulated by the 2008 Normative Resolution adopted «for the purpose of ensuring the correct and uniform application of provisions of treaties of the Republic of Kazakhstan» [49]. The absence of such a condition clearly reflects a gap in the current regulatory framework, especially considering that Kazakhstan's legislation does not prohibit the provisional application of treaties – so long as such application does not contradict the laws in force within the country [50].

To implement the requirement of verifying whether a treaty is provisionally applied, it is practically necessary to have a dedicated resource that enables legal practitioners to access up-to-date information on treaties of Kazakhstan that are being applied on a provisional basis. In fact, the legal foundation for such a resource is already established in Article 24 of the 2005 Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan», which provides that «treaties of the Republic of Kazakhstan applied on a provisional basis shall be published, upon submission by the Ministry of Foreign Affairs of the Republic of Kazakhstan, in the Bulletin of Treaties of the Republic of Kazakhstan and on the official website of the Ministry of Foreign Affairs of the Republic of Kazakhstan» [51]. However, this provision has not been effectively implemented in practice, which creates difficulties for domestic legal actors in verifying the current status of treaty application. A relevant example of such a specialized resource is the online portal of the Commonwealth of Independent States, where the depositary lists six treaties [52] that are provisionally applied by Kazakhstan in accordance with Article 25 of the 1969 VCLT [53].

Conclusion:

Based on the stated objective of this study – to improve Kazakhstan's domestic legal framework for the application of treaties and the practice of their implementation by national legal actors – the following recommendations have been formulated:

1. Judicial decisions in which Kazakhstani courts applied provisions of the 2004 United Nations Convention that is not in force are subject to annulment or revision. This position is supported by Paragraph 10 of the 2008 Normative Resolution, which states that «in the administration of justice, courts shall take into account that ... the incorrect application by a court of provisions of treaties of the Republic of Kazakhstan may constitute grounds for the annulment or revision of a judicial act» [54].

2. Although the domestic legal framework governing the conditions for the entry into force of treaties and their official publication does not exhibit any deficiencies, judicial practice reveals that courts at various levels have repeatedly applied provisions of the 2004 United Nations Convention that has not yet entered into force. This trend highlights the need to develop a practical guide clarifying the particularities of the domestic application of treaties that, by their nature, cannot be regulated within the scope of traditional legislation. Such a guide would serve as a reference tool for national legal actors in applying treaty provisions to the regulation of domestic legal relations.

3. In view of the shortcomings in the legal regulation of the conditions for the domestic application of treaties in Kazakhstan, it is necessary to introduce an amendment to the 2008 Normative Resolution to include a provision addressing the requirement to assess the possibility of applying a treaty on a provisional basis, in cases where a treaty of Kazakhstan containing potentially applicable provisions has not yet entered into force.

4. Based on the substance of conclusion 3 and in order to enable national legal actors to assess the possibility of applying a treaty on a provisional basis, there is a practical need to establish, within the Ministry of Foreign Affairs of the Republic of Kazakhstan, a unified register of treaties provisionally applied by Kazakhstan.

Ж.Қ. Әлекбай, Maqсут Narikbayev University Құқық жоғары мектебінің Senior Lecturer және PhD докторанты (Астана, Қазақстан Республикасы): Халықаралық шарттарды ішкі құқықта қолдану саласындағы Қазақстандағы құқықтық реттеу мен сот практикасының кемшіліктері: күшіне енуі және уақытша қолданылуы.

Мақала тақырыбының өзектілігі Қазақстанда халықаралық шарттарды ішкі құқықта қолдану саласындағы құқықтық реттеу мен сот тәжірибесінен туындайтын бірқатар ғылыми-зерттеу мәселелеріне негізделеді. Атап айтқанда, зерттеуде Қазақстан Республикасы Жоғарғы Сотының 2008 жылғы 10 шілдедегі №1 «Қазақстан Республикасының халықаралық шарттарының нормаларын қолдану туралы» нормативтік қаулысының (бұдан әрі – 2008 жылғы НҚ) халықаралық шарттардың нормаларын ұлттық құқық субъектілерінің қолдануы үшін қажетті құқықтық шарттардың бірі ретінде «халықаралық шартты уақытша қолдану» мүмкіндігі ескерілмегені көрсетілді. Сонымен қатар, бұл жұмыста күшіне енбеген халықаралық шарт болып табылатын 2004 жылғы Мемлекеттердің және олардың мүлкінің юрисдикциялық иммунитеттері туралы БҰҰ Конвенциясының жекелеген нормаларын қолдану барысында қазақстандық соттардың жіберген қателіктері көрсетілген. *Зерттеу пәні* – ұлттық құқық субъектілерімен халықаралық шарт нормаларын қолдануды реттейтін Қазақстан Республикасының құқықтық актілері мен 1969 жылғы Халықаралық шарттар құқығы туралы Вена конвенциясының нормалары (бұдан әрі – 1969 жылғы ХШҚВК). *Зерттеу мақсаты* – ұлттық құқықта халықаралық шарттарды қолдану саласындағы заңнама мен сот тәжірибесін жетілдіруге бағытталған ұсынымдар әзірлеу. Бұл мақсатқа қол жеткізу үшін тиісті құқық нормалары, сот практикасы мен ғылыми доктрина кешенді түрде зерттеледі. Мақсатқа жету барысында қолданылған *зерттеу әдістеріне* сот тәжірибесін талдау әдісі, формальды-құқықтық әдіс және құқықтық герменевтика жатады. Сот тәжірибесін зерттеу халықаралық шарт нормаларын қолданудағы сот қателіктерін анықтауға мүмкіндік берді. Формальды-құқықтық әдіс 2008 жылғы НҚ-ның кейбір нормаларын 1969 жылғы ХШҚВК-на сәйкестігі тұрғысынан талдау үшін пайдаланылды. Құқықтық герменевтика 1969 жылғы ХШҚВК нормаларын түсіндіру үшін ғылыми еңбектер мен түсіндірмелерді қолдану арқылы жүзеге асырылды. *Зерттеудің ғылыми жаңалығы* – Қазақстандағы халықаралық шарттарды ішкі құқықта қолдану тәжірибесі мен заңнамасын 1969 жылғы ХШҚВК нормаларына сәйкестігі тұрғысынан талдау нәтижелерінде көрініс табады. Зерттеуде қарастырылған мәселелерді ескере отырып, *келесі ұсынымдар әзірленді*: а) 2008 жылғы НҚ-ға халықаралық шарттардың мемлекет ішінде қолданылуының бір шарты ретінде шарттың уақытша қолданылу мүмкіндігін тексеру қажеттігін регламенттейтін толықтырулар енгізу; ә) ұлттық құқық субъектілерінің халықаралық шарттың уақытша қолданылу мүмкіндігін тексеруін қамтамасыз ету үшін Қазақстан Республикасы Сыртқы істер министрлігінің құзыретінде уақытша қолданылатын халықаралық шарттардың бірыңғай тізілімін қалыптастыру; б) Қазақстан соттары күшіне енбеген халықаралық шарт нормаларын қолдана отырып қараған істердің күшін жою немесе өзгерту; в)

ұлттық құқық субъектілерінің халықаралық шарт нормаларын қолдануда қателіктерге жол бермеуі үшін, өз табиғаты бойынша дәстүрлі құқықтық акті аясында реттелуі мүмкін емес халықаралық шарттардың ішкі құқықта қолданылу ерекшеліктерін түсіндіретін практикалық нұсқаулық әзірлеу.

Түйінді сөздер: Халықаралық шарттар құқығы; халықаралық шарттарды ішкі құқықта қолдану; халықаралық шарттарды ішкі құқықта қолдану шарттары; күшіне ену; уақытша қолдану; ресми жариялау; халықаралық шартты уақытша қолдануды көпжақты тоқтату; халықаралық шартты уақытша қолдануды біржақты тоқтату; халықаралық шарттар депозитарийі; халықаралық шарттың күшіне ену күнін есептеу.

Ж.Қ. Әлекбай, Senior Lecturer и докторант PhD Высшей школы права Maqsut Narikbayev University (Астана, Республика Казахстан): Недостатки правового регулирования и судебной практики Казахстана в области внутригосударственного применения международных договоров: вступление в силу и временное применение.

Актуальность настоящей статьи обусловлена рядом исследовательских проблем, вытекающих из правового регулирования и судебной практики Казахстана в области внутригосударственного применения международных договоров. В частности, в статье продемонстрирован недостаток Нормативного постановления Верховного Суда Казахстана «О применении норм международных договоров РК» от 10 июля 2008 года N 1. (далее – НПВС 2008 года) в части отсутствия одного из правовых условий применения норм международных договоров субъектами национального права как «временное применение международного договора». Кроме того, в работе представлены ошибки отечественных судов в части применения ряда норм Конвенции ООН о юрисдикционных иммунитетах государств и их собственности 2004 года, являющейся недействующей для Казахстана международным договором. *Предметом исследования* выступают правовые акты Казахстана, регулирующие применение норм международных договоров субъектами национального права, и нормы Венской конвенции о праве международных договоров 1969 года (далее – ВКПМД 1969 года). *Целью исследования* является выработка рекомендаций по усовершенствованию законодательства и судебной практики в области внутригосударственного применения международных договоров путем изучения релевантного права, судебной практики и доктрины. Для достижения установленной цели статьи были использованы такие *исследовательские методы*, как метод изучения судебной практики, формально-юридический метод и метод юридической герменевтики. Изучение судебной практики было полезно при выявлении ошибок судов в применении норм международных договоров. Формально-юридический метод был применен в части анализа некоторых норм НПВС 2008 на предмет соответствия ВКПМД 1969 года. Юридическая герменевтика была использована в части толкования норм ВКПМД 1969 года путем применения комментариев и доктрины. *Новизной исследования* выступают результаты анализа законодательства и судебной практики Казахстана в области внутригосударственного применения международных договоров на предмет соответствия нормам ВКПМД 1969 года. Исходя из представленных исследовательских проблем в качестве *выводов исследования* были выработаны следующие рекомендации: а) внести дополнения в НПВС 2008 года в части регламентации одного из условий внутригосударственного применения международных договоров о необходимости проверки возможности действия международного договора на временной основе; б) для реализации субъектами национального права проверки возможности действия международного договора на временной основе имеется практическая необходимость сформировать единый реестр временно действующих международных договоров Казахстана в рамках министерства иностранных дел; в) дела, рассмотренные судами Казахстана, с применением норм не действующего международного договора подлежат отмене или изменению; г) для предотвращения ошибок субъектов национального права в части применения норм международных договоров имеется необходимость сформировать практический инструмент (руководство), раскрывающий особенности внутригосударственного применения международных договоров, которые по своей природе не могут быть регламентированы в рамках традиционного правового акта.

Ключевые слова: Право международных договоров; внутригосударственное применение международных договоров; условия внутригосударственного применения международных договоров; вступление в силу; временное применение; официальное опубликование; многостороннее прекращение временного применения международного договора; одностороннее прекращение временного применения международного договора; депозитарий международных договоров; расчет даты вступления международного договора в силу.

References and notes:

1. Note: The term «hybrid-monist states» refers to states whose legal systems incorporate elements of both monist and dualist approaches to the reception of international law within the national legal order. The concept was introduced by Professor Michael Van Alstine of the University of Maryland.

2. David Sloss, *The Role of Domestic Courts in Treaty Enforcement* (Cambridge University Press 2009).

3. BestProfi, 'Judicial practice' (Electronic resource, 2008-2023) <https://bestprofi.com/> accessed 2 October 2025.

4. Note: It should be noted that the number of cases cited does not in itself confirm the correct or direct application of treaty provisions in each instance.

5. Note: For instance, para. 4 of art. 4 of the Constitution of Kazakhstan, adopted by national referendum on August 30, 1995, states: «All laws and treaties to which the Republic is a party shall be published. The official publication of normative legal acts concerning the rights, freedoms, and duties of citizens is a mandatory condition for their application».

6. The Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan» dated 30 May 2005, No. 54 (hereinafter referred to in all footnotes as the 2005 Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan»), and the Normative Resolution of the Supreme Court of Kazakhstan «On the Application of Provisions of Treaties of the Republic of Kazakhstan» dated 10 July 2008, No. 1 (hereinafter referred to in all footnotes as the 2008 Normative Resolution).

7. Para. 1 of art. 24 of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to in all footnotes as the 1969 VCLT).

8. Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012).

9. Anthony Aust, *Modern Treaty Law and Practice* (Second edn, Cambridge University Press 2007)

10. Note: An example presented by Anthony Aust: «The four Geneva Conventions of 1949, their Additional Protocols of 1977, and other treaties on international humanitarian law require only two ratifications for entry into force».

11. Note: An example presented by Aust: «The 1968 Treaty on the Non-Proliferation of Nuclear Weapons provided that it would enter into force upon ratification by forty signatory states, including the ratification by the three depositary states: the Soviet Union, the United Kingdom, and the United States of America».

12. Note: An example presented by Aust: «Article 16 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer stipulated that the Protocol would enter into force on 1 January 1989, provided that by that date it had been ratified by eleven states or regional economic integration organizations, along with the fulfillment of several other conditions».

13. Note: An example presented by Aust: «The 1998 Lockerbie Agreement (between the Netherlands and the United Kingdom), concerning the conduct of a Scottish trial in the Netherlands for those accused of the Lockerbie bombing, provided that it would enter into force on a date to be agreed upon».

14. Note: An example presented by Aust: «The 1995 Dayton Agreement or the 1945 London Agreement, which established the Nuremberg Tribunal».

15. Para. 2 of art. 24 of the 1969 VCLT.

16. Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Koninklijke Brill NV 2009).

17. Para. 3 of art. 24 of the 1969 VCLT.

18. Para. 2 of art. 126 of the 1998 Rome Statute of the International Criminal Court: «For each State that ratifies, accepts, approves, or accedes to this Statute after the deposit of the sixtieth instrument of ratification, acceptance, approval, or accession, the Statute shall enter into force on the first day of the month following the sixtieth day after the deposit by such State of its instrument of ratification, acceptance, approval, or accession».

19. Jan Klabbbers, 'Treaties, Conclusion and Entry into Force' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) (cited in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 403).

20. United Nations, Treaty Section, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (United Nations Publications 1999) para 236.

21. Para. 5 of the 2008 Normative Resolution.

22. Para. 1 of art. 30 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by GA Res. 59/38 of 2 Dec. 2004 (hereinafter cited in all footnotes as the 2004 UN Convention).

23. United Nations, Status of UN Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004 (Treaty Collection, 29-04-2025) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en accessed 29 April 2025.

24. Ruling in the case of *Tungatarov J.S. v. the Embassy of the Hashemite Kingdom of Jordan* No. 7199-17-00-2a/862 of the Court of the city of Astana dated 2 March 2017.

25. Para. 1 of art. 10 of the 2004 UN Convention.

26. Para. 2 of art. 485 of the Civil Procedure Code of the Republic of Kazakhstan dated 31 October 2015 No. 377-V ZRK (hereinafter referred to in all footnotes as the 2015 CPC RK): «A foreign state shall not enjoy immunity from jurisdiction in the Republic of Kazakhstan in disputes arising out of civil-law transactions unrelated to entrepreneurial activity, which the state has entered into or is otherwise connected with, other than in the exercise of sovereign authority».

27. Art. 488 of the 2015 CPC RK: «A foreign state shall not enjoy immunity from jurisdiction in the Republic of Kazakhstan in disputes concerning compensation for damage caused by that state to life and/or health, or for harm caused to property, where the claim arises from an act (or omission) or from an event that occurred wholly or partly within the territory of the Republic of Kazakhstan».

28. Ruling in the case of *Yergazyiyev M.M. v. Suleimenov S.O.* No. 7199-17-00-2a/6444 of the Court of the city of Astana dated 15 December 2017.

29. Ruling in the case of *Burambaev M.D. v. the Embassy of the Federative Republic of Brazil in Kazakhstan* No. 7140-19-00-2/13132 of the Court of the city of Nur-Sultan dated 19 February 2020.

30. Subpara. 2 of para. 3 of art. 490 of the 2015 CPC RK.

31. Subpara. (c) of para. 2 of art. 11 of the 2004 UN Convention.

32. Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Koninklijke Brill NV 2012).

33. Rene Lefeber, *The Provisional Application of Treaties*. In: Jan Klabbbers and Rene Lefeber (eds), *Essays on the Law of Treaties* (Kluwer Law International 1998).

34. oPara. 1 of art. 25 of the 1969 VCLT.

35. Note: See, for example, para. 1 of art. 67 of the 1974 Agreement on an International Energy Program, as amended on 17 February 2018; Para. 1 of art. 45 of the 1994 Energy Charter Treaty; Art. 18 of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

36. Subpara. (b) of para. 1 of art. 25 of the 1969 VCLT.

37. Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe of 19 November 1990.

38. Protocol of Provisional Application of the General Agreement on Tariffs and Trade of 30 October 1947.

39. Subpara. (e) of para. 1 of art. 2 of the 1969 VCLT.

40. Note: See para. 1 of art. 45 of the 1994 Energy Charter Treaty.

41. United Nations, Treaty Section, Treaty Handbook (United Nations Publications 2018) para 3.1.4: «Some treaties provide that States can express their consent to be legally bound solely upon signature. This method is most commonly used in bilateral treaties and rarely used for multilateral treaties. In the latter case, the entry into force provision of the treaty expressly provides that a State can express consent to be bound by definitively signing the treaty, i.e., signing without reservation as to ratification, acceptance or approval».

42. Treaty Handbook (n 41) para 3.1.3: «Multilateral treaties usually provide for signature subject to ratification, acceptance or approval – also called simple signature. In such cases, a signing State does not undertake positive legal obligations under the treaty upon signature. However, signature indicates the State's intention to take steps to express its consent to be bound by the treaty at a later date».

43. Subpara. (a) of para. 1 of art. 7 of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted by General Assembly resolution 48/263 of 28 July 1994.

44. Subpara. (a) of para. 2 of art. 45 of the 1994 Energy Charter Treaty, subpara. (a) of para. 1 of art. 7 of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

45. Para. 2 of art. 25 of the 1969 VCLT.

46. Para. 3 of art. 7 of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

47. Subpara. (a) of para. 3 of art. 45 of the 1994 Energy Charter Treaty (60 days); para. 2 of art. 68 of the 1974 Agreement on an International Energy Program (60 days); para. 5 of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade of 1947 (60 days).

48. Subpara. (b) of para. 3 of art. 45 of the 1994 Energy Charter Treaty.

49. Preamble of the 2008 Normative Resolution.

50. Para. 1 of art. 12 of the 2005 Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan».

51. Art. 24 of the 2005 Law of the Republic of Kazakhstan «On Treaties of the Republic of Kazakhstan».

52. Protocol on Amendments to the Treaty of the Member States of the Commonwealth of Independent States on Interstate Search for Persons of 10 December 2010; Protocol on Amendments to the Agreement on the Rules for Determining the Country of Origin of Goods in the Commonwealth of Independent States of 20 November 2009 (Nos. 1-4); Protocol on the Phased Elimination of Restrictions in Mutual Trade among the Member States of the Commonwealth of Independent States.

53. Commonwealth of Independent States, Information for the period from 8 December 1991 to 12 December 2024 on treaties of Kazakhstan applied on a provisional basis (Unified Register of Legal Acts and Other Documents of the CIS) <https://cis.minsk.by/reestr2/depository-information/7a18b617-a20c-4b02-bad2-a8b35c7bc8d0> accessed 12 December 2024.

54. Para. 10 of the 2008 Normative Resolution.

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