

States' Compliance to International Environmental Law Obligations: Study Based on Multilateral Environmental Agreements' Performance in Kenya

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Abstract: States within the international system have always cooperated to attain a common good. The most common tool used to attain their goals is often treaties that make up International Laws. Environmental conservation has emerged as a key concern in the recent years with regard to sustainable development. States that ratify these treaties have to fulfil their obligations to ensure success of their goals. This can only be done through effective compliance. This study sought to gauge the performance of two key multilateral environmental Agreements (MEAs); Montreal Protocol and United Nations Framework Convention on Climate Change (UNFCCC) within the domestic setup of a state party (Kenya). The study population consisted of 22 officials within the environmental sector selected through purposive and snowballing methods. Data was collected through one-on-one interviews and review of official documents and analysed through the use of computer software Nvivo. Effective Compliance in Kenya's International law obligations was found to be reliant on the existing tools within the treaties, cooperation between the two government tiers and grassroots support framework.

Keywords; Compliance, International Environmental Law, Multilateral Environmental Agreements, Obligations, States

I. INTRODUCTION

Globally, states have acknowledged the urgent need to address their environmental issues in a bid to attain sustainable development. It was this need that necessitated the convergence of the Stockholm Convention of 1972 and led to the emergence of the International Environmental Law (IEL) formed by Multilateral Environmental Agreements (MEAs). Sands, Peel, Fabra and MacKenzie (2003) define International Environmental Law as "rules and principles that govern the behaviour and relations between states and international organizations with regard to the environment." These agreements were negotiated by state actors to address different aspects of the environmental concerns but the bulk of the responsibility came in form of compliance to the arising obligations. Kenya, as an international actor has ratified 19 MEAs out of the 250 currently in force. Nevertheless, the 2018 State of the Environment report noted the persistence of the environmental issues such as desertification, illegal dumping, air and water pollution etc, despite massive ratification raising the question of whether Kenya might have succumbed to international forces and ratified treaties it lacked the capacity to comply in a bid to attain support for its national interests such as hosting the UNEP and HABITAT

headquarters. This persistence raised the question on whether MEAs' success was equivalent to massive ratification and universal success translated to domestic attainment of environmental goals and development. Additionally, concern on effective compliance was raised as an extension of the debate on the efficiency of the "carrot and stick" approach used by MEAs to curb non-compliance. In light of the aforementioned facts, the Montreal Protocol and the United Nations Framework Convention on Climate Change (UNFCCC) made up of the Paris Agreement and Kyoto Protocol, served to provide a comparison of Kenya's performance to her international obligations

Objectives of the study

This study was motivated by the general objective to assess the level of Kenya's compliance to International Environmental Law.

II. LITERATURE REVIEW

Various MEAs adopt different focus areas and approaches that form a global framework aimed at; addressing environmental concerns, promoting sustainable development and enhancing international cooperation (Steiner et al, 2003; Gehring, 2007; Carlarne, 2008). As mentioned earlier, all MEAs are founded on the 26 Principles of the 1972 Stockholm Declaration. i.e., Principle 21 tasks states to ensure their activities do not damage other states' environment while Principle 24 encourages negotiation and ratification of Multilateral Environmental Agreements (MEAs) by states as a measure to address the existing environmental concerns. Additionally, other key tenets adopted from this Declaration include; public education to enhance success under Principle 12, consideration of developing states in Principle 9 and, sustainable development agenda in Principle 8 (Stockholm Declaration, 1972). The IEL serves four key purposes of providing; a legal framework for the negotiation and implementation of new MEAs, reference for judicial bodies for interpretation and resolution of environmental disputes, guidelines for formulation of national policies especially those affecting the environment and, an integration point for the environment and other key sectors at both the domestic and global levels. Steiner et al. (2003) provided further perspective on the obligations of MEAs terming them "a means to resolve transboundary problems". This is an accurate summation as

environmental concerns cut across state lines and need a harmonized approach.

Henkin (1968) remarked that “almost all nations obey almost all principles of international law and almost all of their obligations almost all of the time.” Treaties as political instruments are used by states to achieve their national interests rather than common good. Chayes and Chayes (1991) highlighted that state compliance of international treaties is taken for granted. Hence, intent to comply may not be a sufficient push factor for ratification (Bafundo, 2006). These arguments acknowledge the anarchic nature of the international system which lacks legal authority to enforce obligations upon sovereign states. This includes the times they have legally bound themselves to an agreement thus sacrificing their sovereign authority (Epstein et al, 2014 citing; Stokke, 2011). Wolfrum (1998), argued that compliance can only be assessed through appraisal of existing laws of the state parties and their actual implementation. Non-compliance therefore, indicates the agreement’s failure to change the state’s behaviour and failure to enact cooperation in the global arena to achieve a common good (Meyer, 2014). These definitions introduce the aspect of ‘effectiveness’, defined as parties attaining the purposes of the treaty (Bafundo, 2006). Despite the fact that states *do* comply with their obligations, it does not imply that the MEA is ‘effective’ (Barrett, 2003). In a bid to curb non-compliance among states, most MEAs have adopted the ‘carrot and stick’ approach. The treaties provide state parties with incentives such as financial, technical and technological aid, delayed timelines for developing states and, research and transfer of information platforms. In tandem, to avoid states from going rogue in an already anarchic system, non-compliance mechanisms such as naming and shaming, trade controls and penalties are incorporated within the protocols.

III. THEORITICAL FRAMEWORK

Institutionalism was created as a hybrid of different mainstream theories such as utilitarian and constitutional liberalism, neo-realism and functionalism by its key proponent, Robert Keohane (Richardson, 2008). Keohane (2002, cited in Richardson, 2008) termed Institutionalism as a theory that addresses “governance in a partially globalized world”. It is a theory that not only addresses cooperation and global institutions but incorporates the character of the contemporary anarchic international system and institutional order. Ruggie (1982) outlined the theory as a description of the international order and key institutions whose functions are not influenced by the key state actor (superpower) but rather “a fusion of power with legitimate social purpose”. Ikenberry (2001) cites it as a theory that describes how power within the international system is exercised through laws and institutions. Therefore, powerful states are also obligated to binding international instruments which take into consideration the ‘voices’ and needs of weaker states (Richardson, 2008).

Institutionalism was founded on three key assumptions. First, states as the principal actors are rational and egoistic actors

who can cooperate to achieve their personal interests (Keohane, 1984; Richardson, 2008; Snidal, 1985). Secondly, interstate cooperation can only occur when the states have significant common interests (Keohane & Martin, 1995). Finally, the international system is anarchic in nature (Aceves, 1997). Much as states are focused on achieving maximum gains through cooperation it is often hampered by non-compliance (Devitt, 2011). Moreover, the need to understand its application to IEL in Devolved states necessitates the definition of its operational terms. ‘Institution’ refers to the regulative features such as rules and obligations that provide a framework within which states interact while ‘organization’ refers to “the formal apparatus” used (Aceves, 1997; Goodman & Jinks, 2003). In this regard, the IEL as an international institution capitalizes on its organizations in form of MEAs to enhance cooperation between states in attaining its environmental goals e.g., the Montreal Protocol for Ozone protection.

IV. METHODOLOGY

The study utilised the Embedded research design that incorporates both qualitative and quantitative research methods (Leedy and Ormrod, 2016, p. 332). The case study method aided the researcher narrow down the research parameters (Kombo and Tromp, 2006) and select two universally acclaimed MEAs for a comparative analysis. The study area selected was Kenya as it is a major international actor and party to both environmental agreements under analysis. The target population included legislators, judicial officers and environmental officers at the national and grassroots levels. The study incorporated non-probability sampling techniques particularly purposive and snowballing. The use of non-probability sampling techniques gave room to understand and gain clarity on a study subject and population as well as reduce financial and time constraints (McCombes, 2019). The researcher used Mugenda and Mugenda’s (1999) principle of using a sample size of between 10-50% for the target population. Table 1 below outlines the target population, actual sample size used, sampling technique and instrument of data collection used.

		Target population		Sample size	Sampling technique	Instruments
Level	Organization	Category				
Grassroots	County govt	Legislature		6	Purposive sampling complemented by Snowballing sampling	Interviews
		Executive		3		
		Judiciary		1		
National	Executive	National Ozone Unit		1		
		NEMA		1		
	Legislature	National Assembly		2		
		Senate		4		
	Judiciary	Environment & Lands Court		4		
TOTAL	-	-	-	22		

The key methods of data collection were one on one interview for primary data and review of official documents for secondary data. Key documents reviewed included environmental action plans, Kenya's status reports to the Ozone secretariat, reports from the executive committee on the Multilateral Fund, rulings of the Environment and Lands courts and environmental acts tabled at both the Senate, National and county assemblies. Data analysis process was aided by the use of computer software Nvivo. Its capacity to sort data based on relevance, generate matrixes to summarize certain data aspects and, compare and integrate data made it most convenient for this study. Ethical considerations of voluntary participation, honesty, confidentiality and copyrighting were observed.

V. FINDINGS

The study identified that Kenya has ratified several MEAs in a bid to address climate change and atmosphere protection which accounted for 20% of the responses collected. Table 2 below shows the environmental challenges, their causes and MEAs ratified in response by Kenya.

Challenge	Causes	MEAs
Global warming and climate change	<ul style="list-style-type: none"> Poor waste management Pollution Deforestation 	<ul style="list-style-type: none"> Montreal Protocol UNFCCC Vienna Convention

The Table 3 below shows when Kenya ratified the Montreal Protocol and its subsequent amendments as well as the constituent treaties that make up the UNFCCC thus undertaking the arising obligations.

MEA	Constituents (Amendments & Protocols)	Entry into Force	Ratified (by Kenya)
Montreal Protocol	Montreal Protocol	1989	1988
	London Amendment	1992	1994
	Copenhagen Amendment	1994	1994
	Montreal Amendment	1999	2000
	Beijing Amendment	2002	2013
	Kigali Amendment	2016	-
UNFCCC	UNFCCC	1994	1994
	Kyoto Protocol	2005	2005
	Doha Amendment to Kyoto Protocol	2020	2014
	Paris Agreement	2016	2017

With regard to the Montreal Protocol, Kenya has been cited twice for non-compliance. First in 2001 for reporting data on CFCs consumption that was above her approved individual baselines for the year 1999/2000 (Decision XIII/16). The 2nd allegations arose in 2006 under Decision XVIII/28 where, as a developing state operating under Article 5, paragraph 1, the reported annual consumption for CFCs exceeded the

maximum allowable level i.e., Kenya reported 162.210 ODP-tonnes as opposed to the maximum allowed 119.728 ODP-tonnes baseline. In response, Kenya gazetted the Controlled Substances Regulations as Legal notice No. 73 of 2007 as part of the compliance process. This willingness to comply saw Kenya become a beneficiary to US\$4,579,057 funding from the Multilateral Fund. However, to date, Montreal Protocol domestication is limited to the one aforementioned Legal notice. At the grassroots level, the level of awareness is minimal at best and tend to be with officials in the environment sector.

The UNFCCC enjoys both national and grassroots popularity and participation. This might be due to Kenya's agricultural reliance and the physical evidence of climate change. Kenya passed the Climate Change Act of 2016 as part of the domestication process. With the advent of Devolved system of governance, county governments have also initiated climate change programs such as Climate smart initiatives, forest cover restoration etc, and passed local climate change bills to aid the national government's efforts to fulfil her obligations.

"In an effort of working towards achieving the National policy of 10% tree cover by 2022, the department has allocated Kshs 5 million for the production and purchase of indigenous and bamboo seedlings...." Kericho County budget estimates for the financial year 2021/2022.

Proceeding from the discussions above, public awareness and participation arise as key aspects in the performance of environmental treaties. Compared to the Montreal Protocol whose awareness was limited to the environmental sector, the UNFCCC seems to be embraced at the grassroots which increases its success rate as the county governments also tailor their climate change acts to suit their circumstances within the framework of the 2016 Climate Change Act. Additionally, the study also highlighted the question of prioritization and domestic governance cooperation. The UNFCCC was prioritized by the national government who sought the support of the Council of Governors. This cooperation assured mutual support in terms of legislation and resource allocation hence the grassroots climate change bills and programs.

VI. CONCLUSION

Global success of a Multilateral Environmental Agreement (MEA) starts with universal ratification as that implies its objectives have been adopted by all state actors within the international system. However, effective compliance is the actual determinant of success as it will assess whether the MEA actually attains its goals of environmental conservation. At the domestic level, compliance starts with domestication as this is what incorporates it into the state's laws. In Kenya, MEAs are made part of the domestic laws by an Act of Parliament. Kenya has attempted to play her role in environmental conservation through fulfilling the international obligations it has undertaken but seems to face a few challenges based on the noncompliance citations it has received within the Montreal Protocol. Some of the challenges

ascertained include; insufficient capacity, lack of public awareness and participation, lack of sufficient legislation, inadequate cooperation between the national and county governments as well as the issue of prioritization.

VII. RECOMMENDATIONS

Drawing from the findings and conclusion above, the study makes the following recommendations:

States should capitalize on the assistance provided by the various MEAs to further enhance its capacity in addressing the existing environmental concerns. This assistance can be channelled into increasing public awareness and participation particularly the Montreal Protocol.

Multilateral Environmental Agreements should incorporate measures to ensure uniformity, curb non-compliance and cater for the situation of developing states i.e., delayed timelines, financial, technical and technological assistance. These measures have propelled the universal success of the Montreal Protocol hence can be used as a blueprint for other MEAs.

Based on the success of the UNFCCC compliance in Kenya, national and county governments should work in tandem with regard to environmental management. This can be done through cooperation in policy formulation and implementation, resource allocations, capacity building, conservation programs and public education campaigns.

With regard to domestic governments. The national government should incorporate the lower tier governments in prioritization of environmental programs and policy formulation processes. This can be done by increasing the levels of engagement between the national executive and board of local governments i.e., Council of Governors (COG).

VIII. LIMITATIONS

This study has several limitations. The study was conducted within Kenya therefore; it is set up within a Devolved system of governance. The findings may not be as applicable to other states that have different systems of governance.

Moreover, the study focused on two universally acclaimed MEAs. Their success may not be replicated within other MEAs in force. Their domestic performance was also based on Kenya which may differ within other state parties.

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