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CONSTITUTION OF GEORGIA, PRIMACY OF INTERNATIONAL LAW AND EX POST CONSTITUTIONAL REVIEW OF TREATIES

ABSTRACT

Georgia belongs to a small group of states where it is permitted to contest the constitutionality of a treaty in force (*ex post* constitutional review). According to the primacy of international law, a state is not in a position to refuse to fulfil a treaty by referring to its national law, including the unconstitutionality of a treaty. On the other hand, based on the principle of the supremacy of the constitution, the primacy of international law in Georgia is not absolute at the national level, one of the manifestations of which is the *ex post* constitutional review of treaties. This Article analyses the relationship between the Constitution of Georgia and international law, and it is argued that the Georgian model of the *ex post* constitutional review of treaties, which may lead to the invalidity of a treaty in force or its norm at the national level, is incompatible with the primacy of international law and requires to modify the *ex post* review model in a manner that, instead of automatic invalidation, would defer to the executive or legislative branch of the government to eliminate the unconstitutionality.

I. INTRODUCTION

According to the Constitution of Georgia (hereinafter referred to as "the Constitution"), justice in Georgia is administered by the common courts. The establishment of specialised or military courts is permissible only within the system of the common courts, whereas the setting up of extraordinary courts is prohibited.[1] At the same time, the International Criminal Court (ICC) is also entitled to administer criminal justice in Georgia, due to the fact that Georgia has ratified the ICC's founding treaty – the Rome Statute. The Constitution does not contain any provision in this regard.[2] Is Georgia

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[1] Article 59, Constitution of Georgia (as amended in 2018) <https://matsne.gov.ge/en/document/view/30346?publication=36> [last accessed on 30 September 2022].

[2] The issue of the constitutionality of the ratification of the Rome Statute emerged in a number of states and was examined by the relevant national bodies of constitutional review. Consequently, some states amended their constitutions to allow the ratification of the Rome Statute. See International Committee of the Red Cross. Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts (Supreme Courts and Councils of State, 2003) <https://www.icrc.org/data/rx/en/assets/files/other/issues_raised_with_regard_to_the_icc_statute.pdf> [last accessed on 30 September 2022].

entitled to refuse to comply with the obligations arising from the Rome Statute on the ground that the Rome Statute is *prima facie* inconsistent with the Constitution?[3]

Pursuant to Article 4(5) of the Constitution,[4] "[t]he legislation of Georgia complies with the universally recognised principles and norms of international law. A treaty of Georgia shall take precedence over domestic normative act unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia." This provision ensures the supremacy of the constitution. It follows that under the constitutional law of Georgia, the question raised above could be answered in the affirmative, because a treaty of Georgia shall not come into conflict with the Constitution. On the other hand, the answer under international law is negative. The primacy of international law requires states to give preference to international law when their international obligations collide with their domestic legislation. Otherwise, an issue of state responsibility may arise.

In 2002, the Constitutional Court of Georgia (hereinafter referred to as "the Constitutional Court") adjudicated the only case to date, which *directly* concerned the constitutionality of the provision of a treaty that had entered into force for Georgia. However, the Constitutional Court ruled that the contested provision was in conformity with the Constitution.[5] Georgia belongs to a group of those few states[6] where the treaties may be subject to both *ex ante*[7] review of treaties which are not in force yet and *ex post*[8] review of treaties which entered into force for Georgia.[9] The relationship between the constitution, international law and a treaty is a specific part of the wider complex issue of the relationship between international and domestic law. While the latter is intensively researched and commented on both in theory and practice,[10] insufficient

[3] This outcome seems highly unlikely since, according to the complementarity principle of the Rome Statute, the ICC exercises its jurisdiction when the national judiciary is unwilling or unable to administer justice.

[4] Former Article 6(2) of the Constitution of Georgia before the amendments entered into force in 2018 <https://matsne.gov.ge/en/documetnt/view/30346?publication=34> [last accessed on 30 September 2022].

[5] Judgment of the Constitutional Court of Georgia on the Constitutional Submission of the Didube-Chughureti District Court, Case No 8/177/2, 21 May 2002 <https://www.constcourt.ge/ka/judicial-acts?legal=235> (in Georgian) [last accessed on 16 April 2022]. For details, see infra Part IV, Section 3 of the present Article.

[6] At the constitutional level, the possibility of ex post constitutional review of treaties is enshrined in the constitutions of Brazil, Mexico, Poland, Portugal, Serbia and Angola. In the case-law, this possibility exists in Belgium, Chile, Germany, Italy, Japan and the United States of America. See Mario Mendez, "Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice" (2017) 15 International Journal of Constitutional Law 84, 96.

[7] Ex ante constitutional review is also known as preliminary, preventive or a priori review.

[8] Ex post constitutional review is synonymous with subsequent, repressive or a posteriori review.

[9] Article 60(4)(e), Constitution of Georgia (as amended in 2018); Articles 19(1)(f), 23(5) and 38, Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944?publication=31> [last accessed on 30 September 2022].

[10] See e.g. Davíd T Björgvinsson, The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis (Elgar Publishing 2015); Dinah Shelton (ed), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Oxford University Press 2011). On

attention is paid to the interaction of the constitution and international law, in particular in light of *ex post* review of treaties.

Against this backdrop, drawing on the Constitution of Georgia, the present Article investigates the relationship between *ex post* constitutional review of treaties, the supremacy of the constitution and the primacy of international law. The Article consists of four main parts. In the first part, the main aspects of the relationship between international and domestic law are briefly reviewed, such as the content and scope of the primacy of international law, monistic and dualistic theories and the doctrine of direct effect of international legal norms. The second part, on the basis of Article 4(5) of the Constitution, explores the relationship of the Constitution of Georgia with international law, the scope of the primacy of international law in the legal system of Georgia, the content and effect of "universally recognised principles and norms of international law" and their application in the jurisprudence of the Constitutional Court. The third part, based on the analysis of Articles 27 and 46 of the Vienna Convention on the Law of Treaties, shows that, from the perspective of international law, declaring a treaty or its provision unconstitutional following the *ex post* constitutional review cannot justify the non-fulfilment of obligations arising from the treaty. In the fourth part, it is argued that the existing model of the *ex post* constitutional review of treaties in Georgia is rigid because, in the case of unconstitutionality, the treaty or its provision is automatically declared null and void and leaves no room for manoeuvring for the state as a subject of international law. Therefore, it is submitted that, instead of automatic invalidation, the *ex post* model of constitutional review should give some discretion to the executive and/or legislative authorities to eliminate the unconstitutionality of a treaty in force.

II. KEY ASPECTS OF THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

1. SUPREMACY OF THE CONSTITUTION VS. PRIMACY OF INTERNATIONAL LAW

A state has to strike balance between the two competing claims of legal superiority, which are simultaneously imposed on it by the constitution and international law.[11]

the relationship between international and domestic law in specific states, see Fulvio Maria Palombino (ed), Duelling for Supremacy: International Law vs. National Fundamental Principles (Cambridge University Press 2019). For case-law on the application of international law by national courts, see André Nollkaemper and others (eds), International Law in Domestic Courts: A Casebook (Oxford University Press 2018). On the interaction of the principle of the rule of law at the national and international levels, see Machiko Kanetake and André Nollkaemper (eds), The Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing 2016).

[11] For a detailed analysis of the compatibility of constitutional democracy with international legal obligations, see Carmen E. Pavel, Law beyond the State: Dynamic Coordination, State Consent, and Binding International Law (Oxford University Press 2021) 111-139.

As a starting point, it should be noted that the primacy of international law asserts its absolute inviolability only at the international level because at the national level it is constrained by the supremacy of the constitution.[12]

According to the fundamental principle of international law, international law takes precedence over domestic law.[13] This postulate, which is considered "a generally accepted principle of international law", dictates that "in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[14] Moreover, this principle is equally applicable to the constitution. As the Permanent Court of International Justice (PCIJ) found, "[...] a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[15] Therefore, a state is deprived of the legal possibility to refuse to fulfil an international obligation by referring to its own domestic law, including the constitution.

Although the likelihood of conflict between the constitution and international law, including treaties, is low,[16] there is a natural struggle between domestic and international law. This does not mean that these competing claims are mutually exclusive and that the state must make a choice in favour of one of them. International law requires the acceptance of its primacy only to the extent that a state is not allowed to violate the rule of international law, even with actions that are in full compliance with its constitution.[17] Such a conciliatory position of international law is reasonable because, due to sovereignty, each state establishes *ipso jure* the legal primacy of the constitution at the domestic level and international law would always yield to it. Since international law exists independently of the constitution, a state is compelled, to some extent, to accept the primacy of international law over domestic law, including the constitution, in matters that are regulated by domestic and international law at the same time. The

[12] Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law" (2009) 3 The Vienna Journal on International Constitutional Law, 170; André Nollkaemper, "Rethinking the Supremacy of International Law" (2010) 65 Zeitschrift für öffentliches Recht, 67-71.

[13] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para 57.

[14] Greco-Bulgarian Communities, Advisory Opinion, 1930 PCIJ (ser. B) No. 17 (July 31), 32.

[15] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), 24.

[16] For details, see infra Part IV, Section 1.

[17] In this regard, a controversial position is brought forward by the Tagliavini Report. Without any convincing justification, the Report states that "domestic constitutional law could be invoked as a defence against obligations imposed on a state by international law if those obligations contradict core elements of the national constitution". See Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume II, 288. This finding has been rightly criticised. See André de Hoogh, "The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission" (EJIL: Talk! 4 January 2010) <https://www.ejiltalk.org/the-relationship-between-national-law-and-international-law-in-the-report-of-the-georgia-fact-finding-mission/> [last accessed on 30 September 2022].

competition between the constitution and international law is of a constantly growing nature due to the expansionism of modern international law, which is gradually penetrating in those areas that were traditionally perceived as the exclusive domestic jurisdiction of the state.

In the event of a conflict between domestic and international law, the state must give priority to international law. The state, as a subject of international law, is obliged to protect the primacy of international law. This obligation is reflected in Article 27 of the Vienna Convention on the Law of Treaties[18] (hereinafter referred to as "the Vienna Convention"), which stipulates that a state may not refer to its national law to justify the non-fulfilment of a treaty.[19] The law of the international responsibility of a state mirrors the same approach.[20] Otherwise, the effectiveness of international law would be at risk.

2. MONISM AND DUALISM

Traditionally, the relationship between domestic law and international law is analysed in light of the theories of monism and dualism.[21] According to the monist theory, domestic and international law are part of the same legal system. As a result, a binding norm of international law automatically becomes a part of domestic law (*principle of incorporation*), and in the case of a normative conflict between them, priority is given to international law. In contrast, the dualistic theory takes as its point of departure the qualitative distinctions between domestic and international law, treating them as two distinct legal systems.[22] Unlike the principle of automatic incorporation, dualism does not treat the norms of international law as part of domestic law *per se* and requires additional action by the state (for example, the promulgation of a legislative act), by which a norm of international law becomes a part of domestic law (*method of transformation*).[23] In short, both theories attempt to describe in oversimplified terms how international law, including a treaty, takes effect in domestic law.

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[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[19] Save for Article 46 of the Vienna Convention, referred to by Article 27. For details, see infra Part III, Section 2.

[20] Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Annex (RSIWA). Pursuant to Article 3 of RSIWA, the characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law. According to Article 32, the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations.

[21] See, inter alia, Alexander Orakhelashvili, Akehurst's Modern Introduction to International Law (8th edn, Routledge 2019) 57-58; James Crawford, Brownlie's Principles of Public International Law (9th edn, Oxford University Press 2019) 45-47; Malcolm N Shaw, International Law (8th edn, Cambridge University Press 2017) 97-100.

[22] For details, see Björgvinsson, supra note 10, 19-39, 55-88.

[23] ibid.

In practice, states validate treaties in domestic legal order by different methods, which makes it virtually impossible to identify purely monistic or dualistic states.[24] For example, monist states establish certain prerequisites, which shall be observed to enable the incorporation of norms (incorporation is not automatic). In some of the dualist states, the courts use treaties that have not been transformed into domestic law.[25] Although the dichotomy between monistic and dualistic theories is no longer relevant today, they may be relied on as a starting point for analysing the complex relationship between domestic and international law.

3. DIRECT EFFECT AND SELF-EXECUTING CHARACTER

Not every domesticated international law norm gives rise to enforceable rights and duties. Bringing an international legal norm into domestic law does not *ipso facto* transform it into the valid basis of a legal claim at the national level. It is necessary that a norm has a *direct effect*. In a broad sense, the doctrine of direct effect means that the norm of international law becomes operational at the national level and natural and legal persons can apply them.[26] Unlike incorporation and transformation, which determine *how* a norm of international law becomes part of domestic law, the doctrine of direct effect determines *when* such norm can be applied in domestic law.[27] Both a provision of a treaty and a norm of customary international law may have a direct effect.

The direct effect of a treaty norm is often equated with the concept of a self-executing norm.[28] While US courts employ the concept of self-executing norm, European courts apply the concept of direct applicability or direct effect with the same meaning.[29] In practice, the direct effect of a norm is usually contingent upon the self-executing character of a norm. In principle, this implies that the norm of a treaty shall be the source of rights,[30] i.e. a norm shall regulate the legal rights and obligations of natural or legal persons.

Based on state practice, several criteria are distinguished, which give a norm a direct effect in domestic law: validity, intent and completeness.[31] Validity refers to the extent

[24] Shelton, supra note 10, 11-12.
[25] Eleni Methymaki and Antonios Tzanakopoulos, "Sources and the Enforcement of International Law Domestic Courts — Another Brick in the Wall?" in Samantha Besson and Jean d'Aspremont (eds), The Oxford Handbook on the Sources of International Law (Oxford University Press 2017) 825-826.
[26] Björgvinsson, supra note 10, 89.
[27] For details, see Thomas Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law" (1992), 235 Recueil des Cours 303, 317.
[28] André Nollkaemper, National Courts and the International Rule of Law (Oxford University Press 2011) 118; Konstantin Korkelia and Irine Kurdadze, International Human Rights Law according to the European Convention on Human Rights (2004) 28-34 (in Georgian).
[29] Shelton, supra note 10, 11-13.
[30] See e.g. Stefan A Riesenfeld, "The Doctrine of Self- Executing Treaties and US v. Postal: Win at Any Price?" (1980) 74 American Journal of International Law 892, 896-897.
[31] Nollkaemper (2011), supra note 28, 130-138.

to which the norm has become part of domestic law. In considering the element of intention, it must be determined whether the parties to the treaty intended the treaty to have a direct effect at the national level. The completeness of the norm is present when the content of a treaty norm is clear, specific and unconditional. In the absence of the mentioned conditions, a national court may not consider the norm of international law as having a direct effect or self-executing character.[32] It is always appropriate to determine the direct effect of a treaty norm on a case-by-case basis and not *in abstracto*.

The legal system of Georgia adopts the principle of incorporation, as it does not require the implementation of additional legislative action to make a treaty norm a part of domestic law.[33] In this sense, Georgia largely leans towards the monistic approach. As for the direct effect and self-executing character of the treaty norm, Georgian legislation introduces the synonymous concept of these terms – direct applicability.[34] In Georgia, a treaty norm has a direct effect, i.e. it applies directly if: a) a treaty is officially published; b) a treaty determines the specific rights and obligations, and c) it does not require transposition in domestic legislation by adopting clarifying legislative acts.[35] By this provision, the legislation of Georgia, with minor changes, reflects the criteria that give a direct effect to a treaty norm. Based on these prerequisites, it may be argued that the legal system of Georgia distinguishes between "self-executing" and "non-self-executing" norms,[36] although it does not stipulate such terms. The legislation of Georgia, first of all, requires that a treaty be officially published. This requirement is intended to provide individuals with information, availability and predictability of a treaty norm.[37] As for the specific content of the norm and the absence of the need to adopt a clarifying normative act, these prerequisites almost invariably reflect the criteria established by the widespread state practice for the direct effect of a treaty.

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[32] See e.g. A and B v. Government of the Canton of Zurich, Appeal against the Regulation of 15 September 1999 adopted by the Canton of Zurich on the Tuition at Schools of Higher Education, Case No 2P.273/1999, BGE 126 I 242, ILDC 350 (CH 2000), 22 September 2000, Switzerland; Federal Supreme Court [BGer], cited in Nollkaemper and others, supra note 10, 205. The Federal Supreme Court of Switzerland examined if Article 13(2) of the International Covenant on Economic, Social and Cultural Rights (ICESR) on the availability of education was directly applicable. It found that Article 13(2) of the ICESR did not create enforceable rights, since, in the court's view, provisions of a program nature or catalogue of rights could not be invoked by the plaintiff to reason its own claim and needed additional clarification in the national legislation.

[33] Pursuant to Article 6 of the Law of Georgia on Treaties of Georgia, "[t]reaties shall be an integral part of the legislation of Georgia." This provision confirms that no additional legislative procedure is required to make a treaty a part of domestic legislation.

[34] ibid, Article 6(3).

[35] ibid.

[36] Korkelia, Kurdadze, supra note 28, 30.

[37] ibid, 70.

III. RELATIONSHIP BETWEEN THE CONSTITUTION OF GEORGIA AND INTERNATIONAL LAW

1. GENERAL OVERVIEW

The Constitution of Georgia belongs to a group of "entirely new or radically modified constitutions", which unites the constitutions adopted after the collapse of the Soviet Union in the 1990s, as well as of some European states.[38] One of the common features of this new wave of constitutions is the regulation of the relationship between international law and national law at the constitutional level.[39] In general, such constitutions are described as "international law friendly".[40] The positive attitude of the Constitution of Georgia towards international law is by its acceptance of the primacy of universally recognised principles and norms of international law and treaties over the national legislation.

In terms of relationship towards (customary) international law, the Constitution of Georgia can fall under the first group of the typology proposed by *Antonio Cassese*, who described the four types of constitutions:[41] a) constitutions that explicitly refer to "generally recognised rules of international law", declaring them as part of domestic law and, in some cases, give them precedence over "ordinary" domestic legislation; b) constitutions that ignore the status of international law at the national level; c) constitutions that profess "qualified recognition of international law" in the sense that they selectively refer only to generally recognised rules or international custom; and d) constitutions that refer to the UN Charter or the principles contained therein instead of international law. The components of the constitutions that correspond to the first group are fully included in Article 4(5) of the Constitution of Georgia.

The primacy of international law reflected in the new constitutions is not absolute as it does not apply to the constitution.[42] In those states (including Georgia), whose constitutions require the compliance of national law with international law, international law is superior to national law but is situated on a lower hierarchal level than the constitution.[43] Therefore, the primacy of international law is qualified. That is the reason

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[38] Vladlen S Vereshetin, "New Constitutions and the Old Problem of the Relationship between International Law and National Law" (1996) 7 European Journal of International Law 29, 31-32.

[39] Eric Stein, "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" (1994) 88 American Journal of International Law, 427.

[40] Konstantin Korkelia, "New Trends Regarding the Relationship Between International and National Law (With a Special View Towards the States of Eastern Europe)" (1997) 23(3-4) Review of Central and East European Law, 227, 233-235.

[41] Antonio Cassese, Modern Constitutions and International Law, 192 Recueil des Cours 368 et seq (1985).

[42] Vereshetin, supra note 38, 41.

[43] Korkelia, supra note 40, 239. According to a different opinion, in the case of inconsistency between the Constitution and universally recognised international legal norms, priority should be given to the norm of international law. See Irine Kurdadze, "Stages of Development of Scientific Concepts on Correlation

why the Constitution of Georgia is considered a constitution that directly establishes the supremacy of constitutional law over international law or its part.[44] International law's claim to absolute primacy, especially over the state's constitutional law or basic constitutional principles, has always been contested at the national level and has never been upheld by states.[45] The Constitution of Georgia affirms this tendency, for it requires not only the compliance of treaties with the Constitution but also allows the *ex post* constitutional review of treaties in force.

2. ARTICLE 4(5) OF THE CONSTITUTION OF GEORGIA: PRESUMPTION OF COMPLIANCE

The position of the Constitution of Georgia towards international law is not unequivocal. Article 4(5) of the Constitution does not directly establish the primacy of international law in relation to national legislation, as it does not use such terms as: "primacy", "supremacy", "precedence", etc. A different approach was introduced in the Act on the Restoration of State Independence of Georgia, adopted in 1991 (hereinafter referred to as "the Act of Independence"), which accepted "[t]he primacy of international law" over the domestic legislation of Georgia and "the direct effect of its norms" declared "as one of the basic constitutional principles" of Georgia.[46] The Constitution of Georgia refrained from using similar wording. On the one hand, the Act of Independence established that only the Constitution of Georgia is the supreme law on the territory of Georgia. On the other hand, it accepted the primacy of international law over Georgian legislation. In addition, it declared the direct applicability of international legal norms as one of the main constitutional principles of Georgia.

The Act of Independence is qualitatively a document of a political nature and the acceptance of the primacy of international law in this manner could not be of fully normative character. Therefore, it is plausible to assume that by accepting the primacy of international law in the Act of Independence, Georgia, as a newly formed sovereign subject of international law, determined the value principle of international relations and foreign policy and did not intend to produce normative results as such. It is also interesting to note that in the Act of Independence the direct applicability of international legal norms in Georgia was declared as one of the main constitutional principles of Georgia. This provision once again confirms that Georgia interacts with international law through a monistic approach.

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between International and Domestic Law and Contemporary Events" (2008) 1 Journal of International Law (TSU), 29.

[44] Peters, supra note 12, 187.

[45] Nollkaemper, supra note 12, 67-71.

[46] Act of Restoration of State Independence of Georgia, Gazette of the Supreme Council of the Republic of Georgia, 1991, No 4, Article 291 <https://matsne.gov.ge/en/document/view/32362?publication=0> [last accessed on 16 April 2022].

Article 4(5) of the Constitution reiterated the bottom line of the supremacy of international law established by the Act of Independence.[47] However, the Constitution refused to accept the primacy of international law in similar bold terms. Unlike the Act of Independence, the Constitution focused on *compliance* of Georgian legislation with international law. The Constitution's emphasis on compliance, rather than accepting the primacy, implies that national legislation *depends on* those principles.[48] Putting emphasis on the requirement of compliance with international law rather than an unequivocal acceptance of the primacy of international law may intend to reinforce the supremacy of the Constitution at the domestic level. Accordingly, the Constitution established through the presumption that the legislation of Georgia complies with the universally recognised principles and norms of international law – the Constitution does not use the wording "shall comply".[49] This approach, formulated in Article 4(5) of the Constitution of Georgia, may be referred as the acceptance of the primacy of international law in the form of *the presumption of compliance*. At the same time, the Constitution circumscribed the concept of international law and specified that Georgian legislation shall comply not with general international law but with universally recognised principles and norms of international law.

What is the relationship between the Constitution of Georgia and international law? Does the "Legislation of Georgia" include the Constitution itself, i.e. shall the Constitution comply with the universally recognised principles and norms of international law? Although the constitution is the supreme domestic law, the reference to "national legislation" usually excludes constitutions, as the constitution asserts its own supremacy and, therefore, requires all legislative acts to comply with it.[50] On the other hand, grammatical interpretation of Article 4(5) of the Constitution leads to the conclusion that the presumption of compliance with international law applies to the Constitution as well because the Constitution of Georgia is part of the "legislation of Georgia".[51] This observation is also supported by the fact that the Constitution places only treaties of Georgia on a lower hierarchical level, and not the universally recognised principles and norms of international law. As a result, it seems reasonable to conclude

[47] Irine Kurdadze, "The Primacy of Universal and Regional International Law and Georgia" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 44 (in Georgian).
[48] Korkelia, supra note 40, 237.
[49] Cf. According to Article 8 of the Constitution of Georgia (as amended in 2018), a constitutional agreement relationship between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia "shall be in full compliance with the universally recognised principles and norms of international law in the area of human rights and freedoms" (emphasis added).
[50] Korkelia, supra note 40, 236.
[51] According to Article 7(1) of the Organic Law of Georgia on Normative Acts, normative acts of Georgia are divided into legislative and subordinate normative acts, which make up the legislation of Georgia. Article 7(2)(a) of the same Act states that the Constitution of Georgia belongs to the legislative acts of Georgia. Hence, it is part of the legislation of Georgia.

that international law is above the Constitution of Georgia, however, in light of the supremacy of the constitution, the soundness of this conclusion is questionable.

The reason for these contradictory conclusions is the formalist understanding of the supremacy of the constitution and the primacy of international law. In fact, the supremacy of the constitution applies only to the domestic legal system. The primacy of international law actually requires that international law be the superior force at the international level. Accordingly, the primacy of international law, in principle, has a claim of superiority at the *international level* because the supremacy of the constitution does not leave space for international law to ensure its own primacy at the national level.[52] Through the supremacy of the constitution, the state itself determines the scope and content of international law at the *national level*. As *André Nollkaemper* observes, "domestic reluctance to embrace the supremacy of international law at the domestic level is as old as international law itself."[53] Nevertheless, the supremacy of the constitution takes into account the objective of the primacy of international law and, instead of blocking it *in toto*, grants international law priority usually to "ordinary" legislation at the national level.

This pattern of operation is also reflected in the presumption of compliance in the Constitution of Georgia, which establishes the compliance of "ordinary" legislation of Georgia with international law. When it comes to deciding the legal superiority between the Constitution or legislation with constitutional status and international law, the supremacy of constitution imperatively determines the superiority of the Constitution. This is further evidenced by the possibility of *ex post* constitutional review of treaties.

3. CONTENT AND EFFECT OF THE "UNIVERSALLY RECOGNISED PRINCIPLES AND NORMS OF INTERNATIONAL LAW"

Article 4(5) of the Constitution of Georgia, within the presumption of compliance, refers to "universally recognised principles and norms of international law", instead of general international law. The Constitution uses the same wording in the context of the Constitutional Agreement,[54] the right to equality[55] and, with a subtle variance, the rights of foreigners and stateless persons.[56] The purpose and content of defining international

[52] The exception is the law of the European Union, which has the ability, unlike general international law, to ensure its own higher hierarchical status in the internal law of the member states, in the areas which the member states have transferred the sovereign right to regulate to the European Union (for example, the single market, environmental protection, transport, etc.).

[53] Nollkaemper (2010), supra note 12, 68.

[54] Article 8, Constitution of Georgia (as amended in 2018).

[55] ibid, Article 11.

[56] Article 33(3) of the Constitution of Georgia (as amended in 2018) sets forth that "Georgia shall grant asylum to citizens of other states and stateless persons in compliance with universally recognised norms of

law with such a category are not obvious. At first glance, referring to a specific category of international law, instead of international law in general, creates the impression that the Constitution intends to bring more clarity. However, such concretisation not only fails to present the content of international law more clearly but also raises a logical question as to which international law Georgia's legislation complies with. In this regard, it is rightly noted that this category does not explain and vaguely conveys the concept of international law.[57] Also, it is correctly argued that the qualifying criteria of "universally recognised" refers not only to the principle of international law but also the norm of international law must be "universally recognised".[58] In practice, it is always difficult to determine whether a principle or norm is "universally recognised" or not, because this criterion does not only involve determining the number of states that accept a particular norm or principle but also requires to assess the qualitative element, in what manner and to what extent the content of a specific principle or norm is shared by the states.

"Universally recognised principles and norms of international law" is not *stricto sensu* a source of international law as established by Article 38 of the Statute of the International Court of Justice (ICJ) and does not have a strictly defined normative content. A reference to international law with such formula is typical of a new type of constitutions.[59] It is difficult to find an international legal analogue of this concept.[60] In the Georgian legal scholarship, universally recognised principles and norms of international law are interpreted to denote customary international law,[61] on the one hand, and exclusively imperative, *jus cogens* norms of international law, on the other.[62] These assertions overlap to some extent but are not identical in scope: whereas *jus*

international law, in accordance with the procedures established by law" (emphasis added). This provision refers only to "norms" and omits "principles". Presumably, this is a legislative defect and the omission of the "principles" is not intended to produce different legal consequences.

[57] Paata Tsnobiladze, "Interaction between National Legislation and International Law" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 49 (in Georgian).

[58] ibid, 49-50.

[59] See e.g. Korkelia, supra note 40, 227-240.

[60] The similar wording is used in the tenth principle of the 1975 OSCE Helsinki Final Act, which refers to fulfilment in good faith of obligations under international law. According to this principle, the states will fulfil in good faith not only the obligations arising from treaties but also from "the generally recognised principles and rules of international law". See Final Act of the Conference for Security and Co-operation in Europe (Helsinki, 1 August 1975). While this instrument is not legally binding, it may be relied on in interpreting international law. See Michael Wood and Daniel Purisch, "Helsinki Final Act (1975)" in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (online edn, 2011) paras 19-21.

[61] Konstantin Korkelia, "Customary International Law in the Legal System of Georgia" in Konstantin Korkelia and Irakli Sesiashvili (eds.), Georgia and International Law (Collection of Articles) (Georgian Young Lawyers' Association 2001) 65 (in Georgian).

[62] Tsnobiladze, supra note 57, 49-50, 53.

cogens norms are usually, at the same time, part of customary international law, not all norms of customary international law have the *jus cogens* status. Therefore, it may be concluded that under universally recognised principles and norms of international law the Constitution of Georgia includes both "ordinary" customary international law and a specific group of customary international law norms with a special status, such as *jus cogens* norms.

Similar concepts such as "general" or "fundamental" principles of international law are known to international law. The content of the "principles of international law" is also vague. According to the *Lotus* case, the term "principles of international law" may refer to international law that is applied between all states.[63] This definition is not informative as it does not elaborate on the content of this concept and focuses only on its universal character. Traditionally, this category includes the principles that were codified in the Friendly Relations Declaration, adopted by the UN General Assembly in 1970.[64] Paragraph 2 of the Declaration states that the Declaration includes "basic principles of international law" and enumerates the seven principles.[65] Along with the Declaration, it is pointed out that the Helsinki Final Act of 1975 also codified three additional principles – the territorial integrity of states, the inviolability of borders, and respect for human rights and fundamental freedoms.[66] It is worth noting that introducing the principles of territorial integrity and the inviolability of borders as separate principles in the Helsinki Final Act was unexpected, as the former was perceived as the intrinsic concept of sovereign equality, and the latter of the prohibition of the threat or use of force.[67] As for the respect of human rights and fundamental freedoms, the reflection of this principle in the Helsinki Final Act was promoted by the Western states, advocating that the protection of human rights had a regional security dimension and was not only an internal matter of the state.[68] Although the Friendly Relations Declaration and the Helsinki Final Act set out a total of ten principles, it would be incorrect to argue that these two documents cover all the basic principles of international law, as in modern international law scholars are discussing the emergence of other principles, including the principle of human rights protection, the principles of international humanitarian law,

[63] S.S. Lotus (France v. Turkey.), 1927 PCIJ (ser. A) No. 10 (Sept. 7), 16.

[64] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), Annex.

[65] These principles are the following: prohibition of the threat or use of force; settlement of international disputes by peaceful means; non-intervention in matters within the domestic jurisdiction of states; duty of states to co-operate; self-determination of peoples; sovereign equality of States; fulfilment of the international obligations in good faith.

[66] Final Act of the Conference for Security and Co-operation in Europe (Helsinki, 1 August 1975).

[67] Commentators point out that the enumeration of these principles as independent principles followed from the Soviet Union's recognition of the de facto borders in Europe. See Wood, Purisch, supra note 60, para 9.

[68] Wood, Purisch, supra note 60, para 10.

the principle of prevention of harm to the environment, the freedoms in common areas, and the principles regulating the global economy.[69] Instead, the Declaration should be seen as the culmination of a reassessment of the principles of the UN Charter,[70] and the three additional principles of the Helsinki Final Act as the specific manifestations of the foreign policy positions influenced by the Cold War.

In the international legal scholarship, general principles of international law are interpreted with alternative meanings. According to *Ian Brownlie*, this concept may consist of three groups of normative rules: a) rules of customary international law; (b) general principles of law (as set out in Article 38(1)(c) of the ICJ Statute); or c) certain logical postulates that derive from the existing practice of international law.[71] *Levan Aleksidze* averred that in international law a "principle" is a legally binding general rule, which must be complied with by the entire system of international law (fundamental principles) and the norms of individual branches of international law (branch-specific principles).[72] An international legal norm is a more specific rule of conduct, which is intended to specify the content of a general principle. Based on this assertion, *Levan Aleksidze* introduced a certain hierarchy, starting with the generally recognised basic principles at the top, followed by the principles of separate branches of international law; norms that specify the branch-specific principles; and, finally, local international legal principles and norms that are applied between states belonging to a specific group.[73] *Antonio Cassese* distinguished two groups of principles of international law. The first group includes the behaviour that is generated by the generalisation of the norms of conventional and customary international law. The second group unites the principles of separate branches of international law.[74]

Due to the vague content of principles and norms, it is often difficult to assess their applicability at the national level, especially due to the paucity of the relevant case-law. However, there are rare occasions when a constitutional court interpreted the principles of international law mentioned in the constitution. For example, the Slovenian Constitutional Court, in the course of the *ex ante* constitutional review of the treaty on cross-border cooperation between Slovenia and Croatia, determined that the "generally accepted principles of international law" mentioned in the Slovenian Constitution

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[69] Jorge E Viñuales, "Introduction: The Fundamental Principles of International Law – An Enduring Ideal?" in Jorge E Viñuales (ed), The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law (Cambridge University Press 2020).

[70] ibid, 3.

[71] Crawford, supra note 21, 34. Under this category, Ian Brownlie suggested the following principles: consent, reciprocity, equality of states, good faith, the finality of judgments of international courts, the principle of domestic jurisdiction, etc.

[72] Levan Aleksidze, Modern International Law (ed. by Ketevan Khutsishvili, World of Lawyers 2013) 12-13 (in Georgian).

[73] ibid.

[74] Antonio Cassese, International Law (Oxford University Press 2001) 152.

included the principle of *uti possidetis*: "[t]his principle of international law which had developed during the gaining of the independence of former American and African colonies is a generally accepted principle of international law and is, as such, also binding on Slovenia."[75]

To conclude, "universally recognised principles and norms of international law" in the Constitution of Georgia refers to customary international law, including *jus cogens* norms, as these categories meet the element of "universal recognition" and derive from international law. It is therefore highly unlikely that this notion encompasses "general principles of law", as set out in Article 38(1)(c) of the ICJ Statute.[76] The element of "universal acceptance" is an important criterion because customary international law may be of a special kind (regional, local or even bilateral),[77] the incorporation of which in the presumption of compliance of the Constitution of Georgia is illogical, unless Georgia is a participant of the special custom under consideration. As for the purpose of reference by the Constitution to the "universally recognised principles and norms of international law", instead of general international law, it may intend to exclude that part of international law that does not belong to customary international law, that is, the only source of which is a treaty. This does not apply to those norms of international law that are codified in treaties but have the status of customary international norms and, independently of treaties, exist simultaneously in customary international law.

4. CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

In *Avtandil Chachua v. the Parliament of Georgia*, the Constitutional Court of Georgia gave a direct effect to the principles and norms of international law.[78] The case concerned

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[75] Opinion No. Rm-1/00 of 19 April 2001, Off. Gaz. RS, No. 43/01 and Collection of Decisions, X/1, 78, cited in Mirjam Škrk, "The Relationship Between International Law And Internal Law in the Case-Law of the Slovene Constitutional Court" in Budislav Vukas and Trpimir Sosic (eds), International Law: New Actors, New Concepts – Continuing Dilemmas: Liber Amicorum Božidar Bakotić (Brill | Nijhoff 2010) 51-52.

[76] This is by reason of the fact that "the general principles of law" are interpreted as principles derived from national legal systems, which are different from "the general principles of international law". However, the position on this issue is not unanimous among the authors. See Imogen Saunders, General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice (Hart Publishing 2021) 95-96. See also Article 21 of the Rome Statute, which differentiates between "the principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems".

[77] See the conclusions of 2018 prepared by the UN International Law Commission and adopted by the UN General Assembly on the Identification of Customary International Law, UNGA, A/RES/73/203, 20 December 2018, Annex, Article 16.

[78] Judgment of the Constitutional Court of Georgia in Avtandil Chachua v. the Parliament of Georgia, No 2/80-9, 3 November 1998 <https://www.constcourt.ge/ka/judicial-acts?legal=80> (in Georgian) [last accessed on 30 September 2022].

the constitutionality of the collective dismissal of judges. The Court examined whether the article of the Organic Law on Common Courts on the collective dismissal of judges contradicted the universally recognised principles and norms of international law, which the Constitution required to be complied with. What is interesting in this decision is the methodology by which the Court identified the universally recognised principles and norms of international law regarding the removal of judges.

The Constitutional Court relied on the three non-binding documents which, by their essence, belonged to "soft law".[79] Initially, the Constitutional Court referred to the Basic Principles on the Independence of the Judiciary adopted on 6 September 1985[80] and held that "it is a universally recognised provision that elected or appointed judges have a guaranteed term of office until mandatory retirement or expiration of term. The mentioned article of the Constitution of Georgia requires the compliance of the legislation with this principle".[81] To strengthen the reasoning, the Court also referred to two documents of the Council of Europe: the Memorandum of the Committee of Ministers of the Council of Europe of 13 October 1994[82] and the European Statute of Judges adopted in Strasbourg on 8-10 July 1998.[83] Placing considerable interpretative weight on these documents, the Court determined that "international law does not provide for the possibility of the collective dismissal of judges of all systems of courts of the country."[84] Accordingly, the Court decided that the article of the Organic Law, which provided for the collective dismissal of judges, violated the universally recognised principles and norms of international law, which were required to be complied with by the Constitution of Georgia.

The methodology applied by the Court to identify principles and norms is problematic. First, the Court did not explain in a systematic and general way what content this concept carries in the Constitution of Georgia or international law. In addition, the Court did not ascertain the international legal status of those documents (binding character, soft law, reflecting customary international law). Therefore, it is unclear on what basis these documents could be considered a source of universally recognised principles and norms

[79] On the "soft law" as the source of international law, see Hugh Thirlway, The Sources of International Law (2nd edn, Oxford University Press 2019) 186-194.

[80] Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[81] Avtandil Chachua v. the Parliament of Georgia, supra note 78, para 4.

[82] Rec. No. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges and Explanatory Memorandum (1994), CoE, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

[83] European Charter on the Statute of Judges and Explanatory Memorandum, CoE, Strasbourg, 8-10 July 1998.

[84] Avtandil Chachua v. the Parliament of Georgia, supra note 78, para 4.

of international law. Finally, the Court seemed to attempt to reason the "universally recognised" nature of the ban on collective dismissal of judges, by observing that this rule "virtually has no analogues in the history of other democratic countries, if we do not consider some countries in the former Soviet Union space, in which this process was carried out in a completely different way and for the most part concerned the judges of the Soviet Union period".[85]

If the "universally recognised principles and norms of international law" in the Constitution of Georgia suggest only the rules of customary international law,[86] and if we assume that the Court implicitly used the rule of customary international law, the reasoning of the Court is still troublesome,[87] as identifying customary international law (determining state practice and *opinio juris*) is one of the most complex issues in international law.[88] Solely the non-binding documents of the UN and the Council of Europe are not a sufficient source for identifying customary international law.

Despite these shortcomings, this decision is interesting for the purposes of this article because it demonstrated that the universally recognised principles and norms of international law have a direct effect, i.e. they are directly applied in the domestic law of Georgia.

IV. UNCONSTITUTIONAL TREATIES FROM THE PERSPECTIVE OF THE VIENNA CONVENTION

Under the Vienna Convention, it is appropriate to analyse the issue of unconstitutional treaties by the systematic examination of three provisions of the Convention: Article 26 – *pacta sunt servanda*, Article 27 – a treaty must be performed regardless of the provisions of domestic law, and Article 46 – in strictly defined cases, a state may withdraw its consent to a treaty when the consent is based on a violation of domestic law on the authority to conclude a treaty. Yet, Article 27 can be considered as a particular manifestation of *pacta sunt servanda* with a clearly defined content. Therefore, Articles 27 and 46 of the Convention are sufficient for analysing the constitutionality of treaties from the perspective of the Vienna Convention.

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[85] ibid, supra Part II, Section 3.

[86] For the criticism of the methodology applied by the Constitutional Court in the present case, see Korkelia (2001) supra 61, 73-78.

[87] See supra note 77.

[88] Initially, Pakistan tabled the amended article on pacta sunt servanda, which introduced wording similar to the current Article 27 in the Vienna Convention, in order not to allow states to evade international obligations by invoking the internal law. Ultimately, the Convention's drafting committee decided that the pacta sunt servanda should have remained an independent article, and Pakistan's amendment was added as a separate Article 27. See Mark E Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Brill | Nijhoff 2009) 371.

1. ARTICLE 27 OF THE VIENNA CONVENTION AND THE CONSTITUTION

According to the first sentence of Article 27 of the Vienna Convention, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This rule is not absolute as the second sentence of Article 27 states that this rule does not apply to the cases provided for in Article 46 of the Convention.[89] The purpose of Article 27 of the Vienna Convention is to ensure that the state fulfils its international obligations in good faith and to exclude the possibility of invoking a trivial argument of domestic law as a basis for the non-fulfilment of such obligation. Article 27 of the Vienna Convention does not refer directly to the constitution but – in general – to the internal law of the state. It goes without saying that the "internal law" under Article 27 also refers to the constitution, as it sits at the apex of internal law. Therefore, even if a treaty is unconstitutional, the state is obliged to continue to fulfil its obligations under it. Article 27 was adopted by 73 votes against two, confirming that this article was generally acceptable to states. On the other hand, 24 states abstained, as some of them did not want to embrace the primacy of international law over their domestic law in this fashion.

The inclusion of Article 27 in the final text of the Vienna Convention caused opposition from some states. For example, Costa Rica and Guatemala have expressly excluded the applicability of Article 27 to their constitutions. According to the interpretative declaration of Costa Rica, Article 27 does not include the provisions of Costa Rica's Constitution and refers only to legislation subordinate to the Constitution.[90] Guatemala made a reservation upon ratification that Article 27 does not refer to the Constitution of Guatemala, which takes precedence over all normative acts and treaties.[91] The "blocking" of Article 27 in respect of constitutions by those states did not go without a reaction from the other parties to the Vienna Convention. Finland[92] and Sweden[93] opposed the reservation of Guatemala, and the United Kingdom did not accept the reservation of either Guatemala or Costa Rica.[94] At the same time, these states explicitly

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[89] See infra Part III, Section 2.

[90] Costa Rica, Vienna Convention on the Law of Treaties, Reservations and Declarations <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> [last acces–sed on 30 September 2022].

[91] ibid, Guatemala.

[92] ibid, Finland. According to Finland's position, Guatemala's reservation, among other things, calls into question the fundamental point of international treaty law, especially in light of the fact that Article 27 of the Vienna Convention is a well-established rule of customary international law. Therefore, Finland considered that Guatemala's reservation is contrary to the object and purpose of the Vienna Convention and such a reservation is not permitted.

[93] ibid, Sweden. In Sweden's view, when a state gives its consent to be bound by a treaty, the state must be ready to make appropriate legislative changes to fulfil its obligations under the treaty.

[94] ibid, United Kingdom of Great Britain and Northern Ireland (13 October 1998). The United Kingdom

indicated that this fact would not preclude the entry into force of the Vienna Convention bilaterally.

2.ARTICLE 46 OF THE VIENNA CONVENTION AND THE CONSTITUTION

Article 46 of the Vienna Convention deals with the issue of the extent to which the international legal validity of a treaty can be affected by the fact that the state expressed its consent to be bound by a treaty in violation of its internal law. According to Article 46 of the Convention:

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

Article 46 is worded in a negative manner: a state cannot refer to a violation of domestic law unless strictly defined preconditions are met. The negative wording emphasises the exceptional nature of Article 46. At the same time, Article 46 reinforces the principle of Article 27 that compliance with the requirements of domestic law does not affect the validity of the treaty.[95] A state may only invoke Article 46 when it has expressed its consent to the treaty (a) in violation of a provision of its internal law (b) regarding competence to conclude treaties as invalidating its consent and (c) such violation shall be manifest and (d) shall concern a rule of its internal law of fundamental importance.

For the purposes of Article 46, "internal law" includes all the national legislative acts in force. Interestingly, in the initial draft of Article 46, reference was made only to "constitution" instead of "internal law".[96] Subsequently, however, "constitution" was replaced by "internal law" so that the latter included not only the written constitutions but also the state's constitutional practice and all rules of public law. A violated provision of internal law shall concern the competence to conclude treaties. There is a divergence of opinion as to what is meant by "competence to conclude treaties". Pursuant to the broad interpretation, this concept refers to both *procedural* and *substantive* restrictions

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expressly stated that the rule of customary international law codified in Article 27 of the Vienna Convention applied both to the constitution and to other types of legislation. The same position was observed with respect to the reservation of Costa Rica.

[95] Thilo Rensmann, "Article 46" in Oliver Dörr and Kirsten Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary (2nd edn, Springer 2018) 845.

[96] ibid.

on concluding a treaty,[97] and according to the narrow interpretation, only procedural restrictions are included.[98] Procedural restrictions may involve the conclusion of a treaty by an unauthorised representative of the state or failure to implement the relevant constitutional procedure. A substantial limitation can be derived from fundamental human rights and freedoms.

A violation of the competence to conclude a treaty must be of "manifest" character. The Convention defines the "manifest" nature of the violation as follows: "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[99] The violation must be "manifest" to the other state party to a treaty. In addition, the provision of internal law shall meet the criterion of "fundamental importance". The purpose of introducing this element was to exclude by-laws and administrative acts and to limit the substance of internal law to the basic constitutional rules.[100] The latter does not denote the norm written in the constitution in a formal sense but includes the essential rules of constitutional law, which are important for the political-institutional functioning of the state and for the relationship between the state and people.

Meeting the high standard of Article 46 in practice is often difficult, as evidenced by the failure of arguments based on Article 46 in international litigation. For example, in *Cameroon v. Nigeria*, Nigeria argued before the ICJ that the international agreement between Nigeria and Cameroon, signed by the Head of State of Nigeria, was not valid as no subsequent ratification of the agreement by Nigeria took place. The ICJ, referring to Article 46 of the Vienna Convention, explained that the internal rules of the state on the conclusion of international agreements are "constitutional rules of fundamental importance".[101] Nevertheless, in the case of Heads of State, the restrictions imposed on them by domestic law are not obvious within the meaning of Article 46(2), unless such restrictions are published. The rationale behind this is that the Head of State *ex officio* represents the state. On Nigeria's alternative argument that Cameroon knew or should have known of the inability of the Nigerian Head of State to enter into a binding agreement, the Court held that "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States."[102]

[97] ibid. See also Villiger, supra note 88, 589.

[98] E.g. the Venice Commission considers that Article 46 of the Vienna Convention refers only to national procedures for the entry into force of a treaty. See European Commission for Democracy through Law (Venice Commission), Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, CDL-AD(2016)005, 11/12 March 2016, 21, para 78.

[99] Article 46(2) of the Vienna Convention.

[100] Rensmann, supra note 95, 851.

[101] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, para 265.

[102] ibid, para 266.

Accordingly, Nigeria's consent to conclude international agreement was valid under international law, even though a Head of State alone, without further constitutional procedures, could not enter into such an agreement.

The ICJ affirmed these findings in the subsequent case. In *Somalia v. Kenya*,[103] Somalia argued that Somalia's internal law required the ratification of the Memorandum of Understanding concluded with Kenya. Referring to the judgment in *Cameroon v. Nigeria*, the ICJ found that the requirements of Somalia's domestic law would not be clear to Kenya because the Somali Minister had full powers to enter into a binding treaty on behalf of Somalia. This observation was bolstered by the fact that the obligation to ratify was not expressly mentioned either in the Minister's authorisation document or in the text of the Memorandum of Understanding. In addition, after the Somali Parliament rejected the Memorandum of Understanding, the Somali Prime Minister did not dispute the letter sent to the UN Secretary-General. Also, Somalia never informed Kenya of the insufficiency of consent expressed by the Minister. Bearing these circumstances in mind, the ICJ held that the Memorandum of Understanding, which failed to be ratified under domestic law, was nevertheless valid and binding on Somalia under international law.[104] The ICJ also found that, according to customary international law, a state, to which it became aware that its consent to the treaty was incompatible with domestic law but still did not express a protest, is presumed to have acquiesced the validity of consent.[105]

Article 46 of the Vienna Convention has to some extent alleviated the tension between state sovereignty and the fulfilment of treaties. Article 46 reinforces Article 27 and creates an additional guarantee to the fulfilment of treaty obligations. In addition, it considers the interest of the states and allows them, in exceptional cases, to request the annulment of a treaty on the basis of a violation of the national legislation on the competence to conclude treaties.

V. CONSTITUTIONAL REVIEW OF TREATIES

In practice, three models of constitutional review of treaties are distinguished: 1) a model in which both *ex ante* and *ex post* reviews are possible; 2) a model in which only *ex ante* or only *ex post* review is allowed; 3) a model in which any kind of constitutional review of treaties is prohibited.[106] As already mentioned, the first model applies to Georgia, as a treaty may be subject to both types of constitutional review.

[103] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, ICJ Reports 2017, paras 47-49.
[104] ibid, paras 47-49.
[105] ibid, para 49.
[106] Mendez, supra note 6, 96.

After the adoption of the Constitution of Georgia, the issue of possible contradiction of a treaty with the Constitution soon became a subject of academic interest.[107] Also, more scholarly attention is paid to the issue of constitutional review of treaties by the Constitutional Court of Georgia.[108] On the one hand, this is welcome, as the constitutional review of treaties remains one of the unstudied issues in the foreign scholarship of comparative constitutional and international law.[109] On the other hand, being cognizant of the fact that a treaty is primarily regulated by international law,[110] while the constitution determines its status in domestic legislation, it is noticeable that little consideration is given to the international legal perspective when discussing the constitutional review of treaties.

1. CONFLICT BETWEEN A TREATY AND CONSTITUTION

For the need to review the constitutionality of a treaty to arise, there must be a contradiction between a treaty and the constitution, which is the case when they regulate the same issue differently. A *prima facie* incompatibility between the wordings of provisions is not sufficient for a treaty to be considered unconstitutional since, through interpretation, the conflicting provisions in many occasions may be reconciled. In this regard, the principle of consistent interpretation plays an important role. Consistent interpretation refers to the interpretation of domestic law in such a way as not to jeopardise the fulfilment of an international obligation.[111] This principle enjoys almost universal support from national courts, as it is used both in states with a continental and a common law system, as well as in countries with a monistic and dualistic approach.[112] For that reason, it is often pointed out that the principle of consistent interpretation may even be a general rule of international law.[113]

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[107] Konstantin Korkelia, International Treaty in International and National Law (Tbilisi State University Press 1998) 225-240 (in Georgian).

[108] See e.g. Besik Loladze, Zurab Macharadze, Anna Pirtskhalashvili, Constitutional Adjudication (2021) 87-88, 227-242 (in Georgian); Paata Javakhishvili, "Constitutional Review of Treaties in Georgia" in Mariam Jikia, Paata Javakhishvili, Ketevan Guguchia (eds), Current Issues of Modern International Law (Collection of Scientific Papers) (Universal 2020) 71-101 (in Georgian); Joni Khetsuriani, "Constitutional Court's Control over the International Agreements of Georgia" (2012) 4(35) Justice and Law, 16-35 (in Georgian).

[109] Mendez, supra note 6, 84–85.

[110] Being "governed by international law" is one of the essential elements of the definition of a treaty under Article 2(1)(a) of the Vienna Convention. Article 3(a) of the Law of Georgia on Treaties of Georgia defines a treaty in an identical manner.

[111] Cassese, supra note 41, 398

[112] André Nollkaemper, "The Effects of Treaties in Domestic Law" in Christian J Tams, Antonios Tzanakopoulos, Andreas Zimmermann (eds), Research Handbook on the Law of Treaties (Elgar Publishing 2014) 146-147.

[113] Björgvinsson, supra note 10, 104.

At the outset, it is worth noting that in practice the likelihood of a normative conflict between the norms of a treaty entered into by the state and the norms of the constitution is low.[114] However, such a possibility still exists, especially in the field of human rights law.[115] The low probability of conflict is due to several circumstances: first, courts usually follow the principle of consistent interpretation and interpret treaties in such a way as not to violate the state's international obligations. In addition, states have preventive mechanisms for avoiding collisions (in the case of Georgia, such a rule can be considered *ex ante* constitution review of treaties). Finally, it should be considered that most of the provisions of the constitutions do not concern the subject of treaties or are formulated so broadly that they leave room for harmonisation. However, there are normative conflicts that may not be resolved merely by interpretative devices.

2. CONSEQUENCES OF THE UNCONSTITUTIONALITY OF TREATIES

When discussing the unconstitutionality of a treaty or its provision, two cases should be distinguished. On the one hand, if a treaty that has not yet entered into force is in conflict with the constitution, the relevant party should try to get the other party to agree to make appropriate amendments to the text of the treaty and then give its consent. It is relatively difficult to take this route in the case of multilateral treaties, when the number of parties may be high. A feasible alternative for a state in this situation may be to make an appropriate reservation (if not prohibited) or an explanatory statement. One of the solutions is to amend the constitution. On the other hand, when it was determined that the treaty is unconstitutional after its entry into force, the situation becomes more complicated because the other party or parties to the treaty have a legitimate expectation that all parties to the treaty will properly fulfil their obligations under the treaty.

If declaring a treaty unconstitutional leads to refraining from its conclusion or denunciation of an already ratified treaty, international law is indifferent to this circumstance and an unconstitutional treaty is still legally valid under international law. This situation is due to the fact that for international law, a decision of a national court or national legislation is only a "fact",[116] which international law takes into account in exceptional cases.[117] Consequently, international law (of which a treaty is a part) is indifferent to the constitution, even though it has been given the status of the supreme legislative act of the state.

[114] Korkelia (1998), supra note 107, 208-209.
[115] Korkelia, Kurdadze, supra note 28, 38-39.
[116] Case concerning Certain German Interests in Polish Upper Silesia, PCIJ Ser. A No. 7, 1931, 19.
[117] Prominent examples of such cases in international law are the determination of citizenship for the purposes of diplomatic protection and the determination of the rights of shareholders of a legal entity. See Daniel Peat, Comparative Reasoning in International Courts and Tribunals (Cambridge University Press 2019) 51.

3. EX POST CONSTITUTIONAL REVIEW OF TREATIES IN GEORGIA

The issue of the constitutionality of a treaty of Georgia is adjudicated and decided by the Constitutional Court of Georgia.[118] The Constitutional Court recognises the exclusive competence of the Georgian government to conduct international relations but, at the same time, limits it by the Constitution, including human rights.[119] Checking the constitutionality of a treaty in Georgia is made possible by the fact that a treaty entered into force by Georgia is an integral part of Georgian legislation.[120] In the hierarchy of normative acts, a treaty is assigned a lower rank than the Constitution and, like all other legal acts, shall comply with it.[121] Such subordination of a treaty aims to ensure the supremacy of the Constitution. It should be noted here that the Constitution of Georgia is silent on the relationship between the Constitution itself and international law.

As mentioned in the introduction of this paper, the case-law of the Constitutional Court of Georgia is familiar with the case when the Court discussed the issue of the constitutionality of the provision of the treaty that had entered into force for Georgia.[122] The case concerned an employment dispute between a Georgian citizen and the International Committee of the Red Cross (ICRC). The ICRC refused to appear in the common court as a defendant, by virtue of relying on the article of the Headquarters Agreement between the Government of Georgia and the ICRC, which provided for the immunity of the ICRC against any form of litigation. Accordingly, the Constitutional

[118] Article 19(1)(f) of the Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944?publication=31> [last accessed on 30 September 2022]. For a comprehensive overview of procedures for the constitutional review of treaties in Georgia, see Loladze and others, supra note 108, 87-88, 227-242.

[119] Judgment of the Constitutional Court of Georgia in The Public Defender of Georgia v. the Parliament of Georgia, No 1/1/468, 11 April 2012 < https://matsne.gov.ge/ka/document/view/1640006?publication=0> (in Georgian) [last accessed on 30 September 2022]: "International relations is a special privilege of the Government. However, when acting in the international arena, concluding agreements or fulfilling international obligations, the government is limited by the rights and freedoms recognised by the Constitution, including its Chapter II. Any obligation imposed by the international agreement, which will limit the rights recognised by the Constitution on the territory of Georgia, must meet the requirements established by the Constitution".

[120] Article 6, Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022].

[121] Article 7(3), Organic Law of Georgian on the Normative Acts of Georgia <https://matsne.gov.ge/ka/document/view/90052?publication=34> (in Georgian) [last accessed on 30 September 2022].

[122] Judgment of the Constitutional Court of Georgia on the Constitutional Submission of the Didube-Chughureti District Court, Case No 8/177/2, 21 May 2002 <https://www.constcourt.ge/ka/judicial-acts?legal=235> (in Georgian). See also Decision of the Constitutional Court of Georgia in The Citizen of Georgia Irina Sarishvili-Chanturia v. the Parliament of Georgia, No 2/14/156, 4 October 2002 <https://www.constcourt.ge/constc/public/ka/judicial-acts?legal=181> [last accessed on 5 May 2022]. In this case, the issue of the constitutionality of the treaty that entered into force for Georgia was raised indirectly, because the plaintiff disputed not the treaty itself but the constitutionality of the resolution of the Parliament of Georgia by which the treaty was ratified.

Court had to adjudicate whether this treaty provision contradicted the right established by the Constitution of Georgia, according to which every person could apply to the court to protect their rights and freedoms. The Constitutional Court found that there was no conflict between a treaty provision and the Constitution, as the immunity of the ICRC was of a functional nature and did not extend to labour disputes with its employees. Thus, through a consistent interpretation, the Court managed to avoid invalidating the treaty provision in force.

What would happen if the Constitutional Court determined that the provision of the treaty in force was unconstitutional? In general, such conflict is sensitive because the supreme legislative act of the state is opposed to a legal norm established at the international level.[123] The answer to the question depends on the legal system. Since a provision of the ratified treaty exists simultaneously in two normative spaces – in the internal law of the state and in international law – different outcomes are produced: an unconstitutional provision ceases to be valid at the national level but maintains legal validity at the international level. Otherwise, the effectiveness of international law would be jeopardised. The state could easily refer to domestic law, including the constitution, and would no longer fulfil its treaty obligation.

In the jurisprudence of the Constitutional Court of Georgia, there has not yet been a case of declaring a treaty or its provision unconstitutional. If the Constitutional Court determines that a treaty or its provision contradicts the Constitution of Georgia, a different result is obtained depending on which type of constitutional review (*ex ante* or *ex post*) the Court carries out. In the case of *ex ante* review (when a treaty is not in force), declaring a treaty or its part unconstitutional leads to the inadmissibility of ratification.[124] In the case of *ex post* review, an unconstitutional treaty or its provision is declared null and void.[125]

If a treaty is found to be inconsistent with the Constitution in the course of *ex ante* review, giving consent to be bound by it, is allowed only after the relevant amendments are made to the Constitution according to the established procedure.[126] In state practice, there are cases when the states made amendments to their constitution before giving their consent to be bound by treaties.[127] It may be argued that in such cases,

[123] European Commission for Democracy Through Law (Venice Commission), Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, CDL-AD(2014)036, 8 December 2014, 35.
[124] Article 23(5) of the Organic Law of Georgia on the Constitutional Court of Georgia <https://matsne.gov.ge/ka/document/view/32944%23?publication=31> (in Georgian) [last accessed on 30 September 2022].
[125] ibid.
[126] Article 21(3), Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022].
[127] See supra note 2 on the amendments made to the constitutions upon ratification of the Rome Statute. See also Decision of the Constitutional Court of Slovenia on the constitutionality of the Agreement Establishing

the supremacy of the constitution to some extent becomes qualified, as due to foreign political expediency, the state refuses the rigid understanding of the supremacy of the constitution and amends it due to the increased interest in ratifying a specific treaty.

On the other hand, the legislation of Georgia does not provide *expressis verbis* for the possibility of amending the constitution if the *ex post* constitutional review reveals that a treaty already in force is unconstitutional.[128] The absence of such possibility may be explained by the fact that the unconstitutionality of a treaty or its part results in declaring it null and void. The legal significance of nullity implies that a treaty or its part is invalid for Georgia not from the moment of finding them unconstitutional but from the moment of giving consent to be bound by them. Accordingly, it would be legally illogical to consider the possibility of amending the Constitution due to a treaty which had never been valid.

If the organ of constitutional review declares a treaty in force invalid on the grounds of unconstitutionality, this will create complications for the state as a subject of international law in relations with the parties to the treaty and may even lead to responsibility under international law. Therefore, declaring a treaty or its provision unconstitutional is not an optimal approach. Instead, a court should endeavour to harmonise the domestic legal order of the state (including the constitution) with international obligations,[129] including by applying the principle of consistent interpretation.

4. HARMONISATION OF EX POST CONSTITUTIONAL REVIEW OF TREATIES WITH INTERNATIONAL LAW

How appropriate is the possibility of *ex post* constitutional review of treaties, which may threaten the effectiveness of international law and give rise to the international responsibility of the state? Arguing the inappropriateness of the *ex post* constitutional review of treaties is attainable from the perspective of both constitutional law and international law.[130] The constitutional law-based argument emphasises that the state may be so constrained by the constitution as to deprive it of the ability to conduct

an Association between Slovenia and the European Communities, Constitutional Review, Official Gazette RS No 40/97, ILDC 532 (SI 1997), 5 June 1997, based on which Slovenia made the first-ever amendment to its Constitution so that individuals and legal entities from EU member states could purchase real estate in Slovenia.

[128] Article 21, Law of Georgia on the Treaties of Georgia <https://matsne.gov.ge/ka/document/view/33442?publication=16> (in Georgian) [last accessed on 30 September 2022]. This article concerns only a treaty which has not yet been entered into by Georgia.

[129] European Commission for Democracy Through Law (Venice Commission), Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, CDL-AD(2002)016, 5-6 July 2002, para 9.

[130] Mendez, supra note 6, 96 et seq.

foreign relations effectively. However, the primary objection still relates to compliance with international law. From the perspective of international law, the argument against *ex post* constitutional review is based on the opinion that *ex post* review of treaties in force is perceived as an open attack on the primacy of international law, as it produces results inconsistent with international law. In light of this, the state may completely reject the idea of *ex post* review of treaties.[131]

To overcome these contradictions, *Mario Mendez* suggests[132] that the concept developed by *Mark Tushnet* on the "strong" and "weak" forms of judicial review be utilised.[133] Introducing "strong" and "weak" forms of judicial review in the context of *ex post* constitutional review of treaties means the following: in the context of the "strong" form of constitutional review, declaring an unconstitutional treaty or its norm invalid by the court is equally mandatory for other branches of government, whereas in the case of the "weak" judicial review, the court issues only a declaratory decision on the inconsistency of the treaty with the constitution, and directs the obligation to eliminate the defect entirely to the executive or legislative authorities. In the Georgian scholarship, it is proposed that the obligation to denounce a treaty should be imposed by the Constitutional Court on the branch of the government that gave consent to be bound by it.[134] However, it should be noted that the obligation to denounce a treaty may not be the optimal solution, as it may have repercussions for the state under international law. It is more desirable to leave some discretion to the executive and/or legislative authorities to determine the form of response. This is what the "strong" and "weak" forms of judicial review allow.

If the *ex ante* review is not sufficient and the state has to withdraw from the treaty already in force due to unconstitutionality, the state can exercise *ex post* review in the form of a "weak" or non-binding declaratory decision, when the executive or legislature must decide for themselves whether or not to respond to the court's decision.[135] The state can also opt for a modified version of the "strong" form of *ex post* constitutional review of treaties, meaning that, instead of declaring the treaty or its provision null and void, it directly obliges the executive or legislative authorities to bring the treaty into conformity with the Constitution, whether it is an amendment to the treaty or the Constitution, making a reservation or starting the procedure for termination. In such a case, a treaty norm, despite its unconstitutionality, is still valid at the national level,

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[131] For this reason, ex post review of treaties was rejected by Luxembourg and Colombia. See Mendez, supra note 6, 99.

[132] Mendez, supra note 6, 99-105.

[133] Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press 2008).

[134] Joni Khetsuriani, The Authority of the Constitutional Court of Georgia (Favorite Style 2016), 187-188 (in Georgian).

[135] Mendez, supra note 6, 99-100.

provided that the state takes, in line with the court's ruling, appropriate steps within a specific time period to eliminate the deficiency.[136] Consequently, the supremacy of the constitution will not be violated, and the state will also manage to respect the primacy of international law.

It would be desirable for the Constitutional Court of Georgia to be granted similar authority in the above-described "weak" or the modified "strong" form when exercising *ex post* constitutional review of treaties. It should be noted that the Constitutional Court carries out strictly "strong" constitutional review because the result of *ex post* constitutional review of treaties (invalidity) leaves no room for the state to act as a subject of international law. Therefore, it would be more reasonable to bestow the Constitutional Court a power similar to the above-mentioned modified version of the "strong" form of review. Even in the light of the fact that the nullity gains effect only in the national law, the state loses a legal basis for the fulfilment of the international obligation at the national level, which may cause practical difficulties. Hence, it would be appropriate if the decision of the Constitutional Court of Georgia, instead of invalidation, would lead to the obligation of the executive and/or legislative authorities to determine themselves the ways of eliminating the contradiction between a treaty and the constitution. As a result, it will be possible to uphold the Constitution and international law at the same time. Granting such authority to the Constitutional Court will be only an acknowledgement of the reality that the authority of constitutional review, which exists in respect of domestic legislative acts, cannot be identically applied to treaties.

VI. CONCLUSION

According to the Constitution of Georgia, the primacy of international law at the national level is not absolute, as it does not apply to the Constitution itself. This approach, which is shared by the majority of states, intends to reaffirm the supremacy of the constitution at the national level. As a result, the primacy of international law in domestic law is qualified. This approach is reflected in Article 4(5) of the Constitution of Georgia, which, within the framework of the presumption of compliance, accepts the superiority of "universally recognised principles and norms of international law" over the "ordinary" legislation only. In addition, these principles and norms, which include international customary law, including *jus cogens* norms, have a direct effect in the legal system of Georgia as they apply directly.

Unlike the national legal system, the supremacy of the constitution cannot limit the primacy of international law in the international legal system. The principle

[136] ibid.

of international law, which is reflected in Article 27 of the Vienna Convention, unequivocally determines that the state is legally deprived of the right to justify the non-fulfilment of a treaty by invoking the internal law, including a treaty's conflict with the Constitution (except for the cases defined strictly by Article 46 of the Vienna Convention). Therefore, the non-fulfilment of a treaty declared unconstitutional in domestic law may give rise to the international responsibility of the state, because the unconstitutionality of the treaty in force does not produce legal consequences under international law.

Against this background, the Georgian model of *ex post* review of treaties may lead to declaring an unconstitutional treaty or its provision null and void. In addition, in contrast to the *ex ante* review of treaties, Georgian legislation does not envisage *expressis verbis* possibility to amend the constitution in order to eliminate unconstitutionality. Although the nullity of a treaty or its provision is valid only at the national level and does not lead to invalidity at international law, such possibility is incompatible with the primacy of international law. Therefore, it is desirable that the Constitutional Court of Georgia exercises *ex post* review of treaties in a "weak" or modified "strong" form, which instead of nullification would recommend or oblige the executive or legislative branch to bring the unconstitutional treaty into compliance with the Constitution. The rationale behind this step would be consistent with the simple truth that the authority of constitutional review in regard to domestic legislative acts cannot be simply copy-pasted in respect of treaties.