

January 2012

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Recommended Citation

Fisnik Korenica and Dren Doli, *The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice*, 24 *Pace Int'l L. Rev.* 92 (2012)
Available at: <http://digitalcommons.pace.edu/pilr/vol24/iss1/3>

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THE RELATIONSHIP BETWEEN INTERNATIONAL TREATIES AND DOMESTIC LAW: A VIEW FROM ALBANIAN CONSTITUTIONAL LAW AND PRACTICE

Fisnik Korenica and Dren Doli*

ABSTRACT

This article addresses the issue of the relationship between treaties and the domestic legal order of Albania. At the outset, the article specifically questions the treaty-making and ratification powers under the auspices of Albanian constitutional law. The article then models the relationship between treaties and the Albanian domestic legal order, arguing that international treaties form part of the national legal order and are incorporated and directly applied in the domestic context, most of the time prevailing over inconsistent laws. The question of domestic constitutional review of international treaties and the mechanisms in place to ensure the prevalence of treaties over inconsistent domestic laws is also addressed. The article discusses the *pacta sunt servanda* principle and the *bonna fidei* application of international treaties within the Albanian Constitution. Finally, the article clarifies the relationship between international treaties and the domestic Albanian legal order, suggesting that constitutional justice must make use of these findings in order to sharpen the relationship concerned. This article thus affirms the congruous relationship between international treaties and the Albanian domestic legal order.

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INTRODUCTION: LOCATING THE QUESTION

The relationship between international law and national law has plagued the legal world from ancient times. One could argue that, though an old problem, the relationship retains relevance in the contemporary world. In light of the growing impact of international law on both domestic and international affairs, the search for an understanding of the relationship between international and national legal systems becomes essential in order to address many legal and political questions. As such, the latter serves as a basic point of reference for this article.

While many lawyers promote the importance of international law, they distinguish between domestic and international law, holding that the two systems have different targets and intentions. This attitude contributes to the view that international and domestic laws are independent legal systems that do not overlap. In contrast, the vast majority of lawyers around the world contend that international and domestic law, though differing on occasion, coincide in almost every aspect.¹ The latter view, as a result, has raised the question of the communication and rapport between the two legal orders. Thus, one can argue that due to the imperative points that assemble them, the relationship between international law and national law should be regulated, resolving most of the questions that arise regarding the dominance of one over the other. In this context, the modern drafters of constitutions face two main questions: whether international law must be incorporated into domestic law and, if incorporated, how to rank it within the domestic legal order.²

¹ *E.g.*, ANTONIO CASSESE, *INTERNATIONAL LAW* (2d ed. 2005); J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 *BRIT. Y.B. INT'L L.* 66 (1936). *See also* MALCOLM M. SHAW, *INTERNATIONAL LAW* (6th ed. 2008); Edwin Borchard, *The Relation between International Law and Municipal Law*, 27 *VA. L. REV.* 137 (1940); Ignaz Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 *INT'L & COMP. L.Q.* 1 (1963).

² *See* Antonio La Pergola, *The Relationship Between International and Domestic Law: Traditional Problems and New Trends*, in *European Comm'n for Democracy Through Law, The Relationship Between International and Domestic Law*, Doc. No. CDL-STD(1993)005 (Sept. 15, 1993) [hereinafter *Eur. Comm'n. for Democracy Through Law, International and Domestic Law*].

In principle, most scholars agree that the relationship between treaties and domestic law is regulated by specific constitutional rules.³ There are those, however, who argue that international legal precepts should always take precedence in regards to the regulation of the relationship between the two orders.⁴ In general, the question revolves around two issues: whether international law and domestic law should be part of a single system of law or whether international law and domestic law should be independent of one another. Hans Kelsen, for instance, has argued that they must be part of a single legal order, with international law prevailing over domestic.⁵

In the monistic doctrine, international law and national law always come together to form a single legal system.⁶ In monist models, a ratified international treaty forms part of the domestic legal order and is directly incorporated and often directly applied at the national level.⁷ Dualism, by contrast, views international and domestic law as two independent legal orders. Dualist models of the relationship between international law and domestic law propose that a treaty takes effect internationally after being signed by the head of state, but in order for it to have sway over domestic legal affairs, the treaty's text must be adopted through a law of parliament.⁸ Though the debate between monist and dualist theories offers

³ PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 68–70 (7th ed. 1997); see also Antonio Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS [COLLECTED COURSES] 331, 370–73 (1985).

⁴ A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist Versus Dualist Controversies*, 12 EUR. J. INT'L L. 309, 311 (2001) (arguing that the regulation of relationship between international and domestic law must rest with the former).

⁵ HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1945).

⁶ See generally MALANCZUK, *supra* note 3; SHAW, *supra* note 1.

⁷ See TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW (6th ed. 1998). See also SHAW, *supra* note 1, Francois Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT'L L. 325 (1998).

⁸ E.g., R. Balkin, *International Law and Domestic Law*, in PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 119 (Sam Blay et. al eds., 1997); MALANCZUK, *supra* note 3, at 45; Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 VAL. U. L. REV. 927 (2010).

no permanent solutions,⁹ it presents the groundwork for a logical investigation of the often fraught relationship of the theories. Hence, though not aimed at using monism and dualism unreservedly, one would at least apply these models in our case to the extent logical.

The goal of this article is to explore and discuss the relationship between international treaties and domestic law in Albania. The article will begin by discussing constitutional law. Other international legal issues will be explored later. In general, the article will consider four topics: first, the treaty-making powers and the ratification procedure of Albanian constitutional law; second, the relationship between international treaties and domestic law, analyzing the model of employment and model of incorporation, the question of direct applicability, and the rank of incorporated treaties within the domestic legal order; third, the issue of the constitutional review of treaties, including the review of the consistency between laws and treaties; and fourth, the question of the principle of *pacta sunt servanda*. By evaluating both scholastic and technical arguments from literature and the law, particularly that of constitutional justice, the article will attempt to answer the questions posed through an investigation of the relationship between international treaties and domestic law in Albania. In this respect, the article argues that Albanian constitutional law and international law enjoy an agreeable relationship.

First, however, we need to clarify the term “treaty” and explain its position within the broader context of public international law. For the purposes of this article, the term “treaty” refers to a written agreement between two or more states entered into based on public international law.¹⁰ The term treaty refers to everything in opposition to customary international law. As a result, this article addresses the relationship between international treaties and Albanian domestic law, ignoring customary international law.

⁹ Carl Aage Nørgaard, *The Implementation of International Human Rights' Agreements within a Domestic Legal System*, in Eur. Comm'n. for Democracy Through Law, *International and Domestic Law*, supra note 2.

¹⁰ Vienna Convention on the Law of Treaties art.1(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

Also, digging deeper into the question of treaty-making powers and ratification procedures in the case of Albania directs us to two essential authorities that regulate the issue: the Constitution of Albania and the Law on the Making of International Treaties and Agreements of Albania ("LMITAA"). It is worth noting that these documents, and related controversies arising from the discrepancies between them, stem from the fact that LMITAA was adopted under the previous Albanian constitutional regime. The new Constitution of Albania, promulgated in 1998, however, has recognized LMITAA's legal effect.

TREATY-MAKING AND RATIFICATION UNDER THE CONSTITUTION OF ALBANIA

In monist legal systems, as in Albania's, the act of treaty ratification produces two effects in theory: 1) it makes the polity internationally responsible for respecting and applying ratified treaties, and 2) it makes the polity domestically responsible for applying the obligations from any signed treaties.¹¹ In contrast, in dualist legal systems, as in the United Kingdom, the obligations of a treaty only become domestically applicable after being adopted by the House of Commons in the form of a law.¹² Having explained the difference between how these two systems work, we can now discuss treaty making powers and procedures.

In the first case in point, the Constitution of Albania states:

The ratification and denunciation of international agreements by the Republic of Albania is done by law if they have to do with: a) territory, peace, alliances, political and military issues; b) freedoms, human rights and obligations of citizens as are provided in the Constitution; c) membership of the Republic of Albania in international organizations; d) the undertaking of financial obligations by the Republic of Albania; e) the approval, amendment, supplementing or repeal of laws. The Assembly may, with a majority of all its members, ratify other international agreements that are not contemplated in

¹¹ *E.g.*, MALANCZUK, *supra* note 3, at 130–147.

¹² *Id.* at 126.

paragraph 1 of this article.¹³

Based upon this provision, three arguments can be made. First, international agreements concerning the fields of territory, peace, alliances, political and military issues, human rights and freedoms, membership in international organizations, financial obligations, and treaties changing domestic laws should be ratified by the Albanian Parliament.¹⁴ In other words, any treaties pertaining to these areas cannot be legally binding without first going through a parliamentary ratification procedure. That is, the Albanian Parliament is vested with the power to provide the instrument of ratification in the aforementioned fields, with ratification acting as the main instrument of international law.¹⁵ Second, in addition to having the right to ratify treaties, the Albanian Parliament has the right to denounce them as well. Hence, only the Parliament can denounce an international treaty concerning one or more of these areas. Third, as prescribed by the Constitution, the instrument of ratification provided by the Parliament in these fields is produced by law. In this regard, the ratification procedure according to the Albanian Constitution can be attained only through an enacted law. The

¹³ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 121(1)–(2).

¹⁴ See Eur. Comm'n. for Democracy Through Law, *Draft Comparative Study of National Solutions to the Question of the Relationship Between International and Domestic Law and Recommendations Relating Thereto: Slovak Republic*, Doc. No. CDL(1993)052e-restr (Nov. 9, 1993) [hereinafter Eur. Comm'n. for Democracy Through Law, *Draft Comparative Study*] (noting, some constitutions, such as that of Slovakia, give the power of ratification of treaties to the President of the Republic. In order for the President of the Republic to ratify an international agreement, however, the President must first get the consent of the parliament).

¹⁵ See Eur. Comm'n. for Democracy Through Law, *Draft Comparative Study of National Solutions to the Question of the Relationship Between International and Domestic Law and Recommendations Relating Thereto*, Doc. No. CDL(1993)024e-restr (May 19, 1993) (by Constantin P. Economides) (noting that the Albanian Parliament is vested with the power to ratify treaties falling in the fields concerned. Ratification, as opposed to parliamentary approval, is an instrument of international law and signifies that the country has taken the international obligation over the ratified treaty. Some states vest the head of state or government with ratification powers, but prior to ratifying a treaty, the head of state or government must get the approval of the Parliament. In this case, the act of approval is a measure of domestic law and does not produce any international consequence).

law of ratification is issued in a regular law-making procedure, as provided for by the Constitution of Albania. In sum, ratifying treaties in these specified areas rests with the Albanian Parliament; ratification confers on the Parliament the right to make or refuse internationally binding obligations.

Albania's Constitution, as seen in Article 121, also gives the Parliament the right to ratify treaties that do not fall in the areas mentioned in the provision.¹⁶ As a result, the Parliament is vested with the power to prohibit the President and/or the government from ratifying a treaty falling outside the concerned areas, unless the Parliament itself gives authorization. Article 121, thus, has the effect of giving the Parliament discretionary power over the President and/or government by affirming a treaty's provisions solely through the act of signing. This result leaves questions unanswered: how does a treaty falling outside the parameters laid out in the provision become ratified? According to the Constitution of Albania, who has the authority to negotiate and formulate treaties? Of course, treaty-making refers only to the act of negotiating and formulating a treaty, not to the act of ratification. So, who holds treaty-making powers and procedures in Albanian domestic law?

From a constitutional perspective, treaty-making power is linked to the prerogative of signing a treaty. The Albanian Constitution establishes two different and possibly contradictory situations with regard to the power to sign treaties on behalf of the Republic of Albania. On the one hand, while laying out the powers of the President, Article 92 of the Constitution establishes that the President "signs international agreements according to the law."¹⁷ On the other hand, Article 121(3) of the Constitution states: "[t]he Prime Minister notifies the Assembly whenever the Council of Ministers signs an international agreement that is not ratified by law."¹⁸ There seems to be an overt conflict between these provisions pertaining to treaty-making powers as far as the signing of treaties is concerned. To this extent, the Constitution

¹⁶ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 121.

¹⁷ *Id.* art.92(h).

¹⁸ *Id.* art.121(3).

references two authorities that “sign treaties,”¹⁹ adding that it does not demarcate the border of competence between the two. Article 92 designates the President as the authority who signs international treaties. Article 121(3), however, seems to endorse the Council of Ministers as the body authorized to sign treaties, albeit passively.

Let us now observe the problem from the perspective of the LMITAA. LMITAA, which was issued by the former constitutional regime of Albania, contains numerous provisions that conflict with one another.²⁰ Yet, its legal force is recognized by the current Constitution.²¹ For one thing, LMITAA draws a distinction between the signing power of the President of the Republic and that of the Council of Ministers. As opposed to the current constitution, LMITAA states that if Albania itself is subject to a treaty, then the right to negotiate and sign it rests solely with the President.²² On the other hand, if the government is subject to a treaty, then the President of the Council of Ministers retains that right.²³ In either case, the foreign minister counter-signs on any treaty.²⁴ As a result, one can argue that Article 4 of LMITAA complicates many issues. It conflicts with the current Constitution.

In the first case, the division between the President of the Republic and the Council of Ministers, with regard to the right to negotiate and sign treaties, is far from being demarcated by

¹⁹ The same overt situation appears in the Constitution of Croatia also. The latter, in Article 139, establishes that: “[i]nternational agreements which are not subject of ratification by the Croatian Parliament are concluded by the President of the Republic at the proposal of the Government, or by the Government of the Republic of Croatia.” USTAV REPUBLIKE HRVATSKE [CONSTITUTION OF THE REPUBLIC OF CROATIA] Apr. 2, 2001, art. 139. Therefore, the Croatian Constitution does not demarcate the border of power between the government and President of Republic as far as the signing of treaties that need no parliamentary ratification is concerned. ANTHONY MOORE, POLICE AND JUDICIAL CO-OPERATION IN THE EUROPEAN UNION: FIDE 2004 NATIONAL REPORTS 28 (Anthony Moore ed., 2004).

²⁰ THE LAW ON MAKING INTERNATIONAL TREATIES AND AGREEMENTS OF ALBANIA [LMITAA] art. 4.

²¹ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.178(1).

²² LMITAA art. 4.

²³ *Id.*

²⁴ *Id.*

LMITAA. LMITAA attempts to increase a distinction between treaties in which the subject is the Republic of Albania and treaties in which the subject is the government of Albania.²⁵ The problems here seem obvious. One issue is how the Republic of Albania, in its legal terminology, encompasses the government of Albania. LMITAA, both logically and legally, cannot demarcate the signing of treaties power of the President of Republic, on the one hand, and the Council of Ministers, on the other. An attempt to do so results in an awkward and naïve solution.

Although LMITAA offers only confusion in this regard, the Albanian Constitutional Court has ruled at least once on this issue and, therefore, has paved the way for some clarification. In *Socialist Party v. Council of Ministers*, the Albanian Constitutional Court ruled that a treaty could not be negotiated and signed unless the President of the Republic has provided authorization on negotiating and signing it.²⁶ In fact, the Court ruled that doing so was unconstitutional.²⁷ Further, the Court argued that the lack of presidential authorization contradicts the Constitution and LMITAA as well as that the power to negotiate and sign treaties does not only derive from Article 92 of the Constitution, but from LMITAA.²⁸ By turning to the President's duty to represent the unity of the people, the Constitutional Court ruled that in order for a treaty to be constitutionally binding, it must be negotiated and signed on the authorization of the President of the Republic.²⁹ The Court reasoned that Article 92 gave the President the right to sign treaties and disregarded Article 121, which conferred this power to the Council of Ministers.³⁰

In light of *Socialist Party* case, one could argue that the case was settled.³¹ In the end, the power to negotiate treaties

²⁵ *Id.*

²⁶ Gjykatës Kushtetuese [Constitutional Court] Apr. 15, 2010, 52 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1875.

²⁷ *Id.*

²⁸ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 92.

²⁹ Gjykatës Kushtetuese [Constitutional Court] Apr. 15, 2010, 52 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1875.

³⁰ *Id.*

³¹ *Id.*

and to sign them rested with the President of the Republic.³² Additionally, should the Council of Ministers wish to negotiate and ratify treaties, it must first obtain presidential authorization or confirmation to proceed.³³ We cannot go so far, however, as to argue that LMITAA's insistence on having every treaty counter-signed by the foreign minister is unconstitutional. This statement would rest on the idea that the power to sign a treaty, as provided by the Constitution, cannot be shared with and constrained by the foreign minister, which would leave Article 4 of LMITAA itself utterly unconstitutional and, thus, in conflict with the ruling of the Albanian Constitutional Court. While the power to make and sign treaties rests with the President of the Republic and the Council of Ministers, the Foreign Minister still plays an important role in facilitating the process of treaty-making.³⁴

But what happens once a treaty is negotiated and signed? In light of the Albanian Constitution, LMITAA, and the case law of the Albanian Constitutional Court, we argue that after a treaty is signed, it then goes to the Parliament for ratification as long as it falls within the fields prescribed in Article 121. If the treaty does not fall within the fields prescribed in Article 121, this provision and the Parliament does not require that it be ratified; it is *ipso iure*, ratified when signed by the President of Republic.

The Constitution also explores the question of whether local governmental institutions have the right to enter into international treaties. Article 109(4) states:

The organs of local government units have the right to form unions and joint institutions with one another for the representation of their interests, to cooperate with local units of other countries, and also to be represented in international organizations of local powers.³⁵

In this respect, Article 109(4) seems to imply that local government institutions have the constitutional right to join with other international organizations whose field of work is

³² *Id.*

³³ *Id.*

³⁴ THE LAW ON FOREIGN SERVICE OF ALBANIA [LFSA] art.16(d).

³⁵ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.109(4).

local governance. While the question of whether the local governments can be a party to an international treaty remains unresolved in Article 109(4), LMITAA addresses this issue head-on by claiming that local governments may be party to a treaty that falls within the field of local governance,³⁶ provided that the Foreign Ministry has given its assent.³⁷ Still, LMITAA does not clarify whether the local government can actually sign the treaty. In light of the Constitution and LMITAA, therefore, one could argue that although local governments are given the capacity to be parties to international treaties, any treaty should still be signed and ratified by central institutions once the local governments have finished negotiating it.³⁸

The issue of the publication of treaties in the domestic context is also important in light of legal certainty. Article 117(3) of the Albanian Constitution establishes that “[i]nternational agreements that are ratified by law are promulgated and published according to the procedures that are provided for laws. The promulgation and publication of other international agreements is done according to law.”³⁹ Treaties ratified by a law should be published in the Official Gazette. By extension, one could argue that a treaty cannot become domestically binding unless it is published in the Official Gazette.

What happens, then, to a treaty that, according to the Constitution, does not have to be ratified by a law of the Parliament? The Constitution, as noted above, determines that this remains to be concretized by the law governing the making of treaties. As a result, LMITAA does not contain any provision about the publication of treaties. Given the gap in LMITAA, it would seem plausible to suggest that treaties that do not have to be ratified through a law are not published

³⁶ THE LAW ON MAKING INTERNATIONAL TREATIES AND AGREEMENTS OF ALBANIA [LMITAA] art. 3.

³⁷ *Id.*

³⁸ The Bosnian Constitution, as an example, allows the federal units to enter into international treaties if the approval of the central institutions is taken. See generally Eur. Comm’n for Democracy Through Law, *Opinion on Responsibilities for the Conclusion and Implementation of International Agreements under the Constitution of Bosnia And Herzegovina*, Doc. No. CDL-INF(1999)009 (June 21, 1999).

³⁹ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.117(4).

anywhere.⁴⁰ A broad interpretation of Article 122 of the Constitution, however, reveals that each treaty must be published prior to becoming binding. Article 122 suggests that in order to become binding, even treaties that do not need parliamentary ratification also must be published.⁴¹

THE RELATIONSHIP BETWEEN INTERNATIONAL TREATIES AND DOMESTIC LEGAL ORDER

As indicated above, the ways in which international treaties become incorporated into the domestic legal structure are complex and often confusing. Still, the question of the relationship between treaties and national law remains at the heart of domestic constitutional order. While the discussion thus far has proven how interesting this topic can be, theoretically, it also retains importance with regard to the actual practice of Albanian law. The case law of the Albanian Constitutional Court proves to be compelling because it provides a means of bridging the gap between theory and practice.

Thus, three questions remain unanswered, namely: 1) Are treaties and domestic law part of a single legal order, or do they belong to two independent orders?; 2) If they do form a single order, do treaties become automatically incorporated into the domestic legal system upon ratification? If so, can a legal or natural citizen rely directly on the any right or obligation deriving from the treaty? Does this lead to direct-applicability and/or direct-effect?; and 3) If treaties become automatically incorporated into the domestic order upon ratification, what then is the relationship between those treaties and any other laws within the domestic legal order?⁴² Do the ratified treaties take higher precedence, or are they

⁴⁰ Some constitutions, such as Russia's Constitution, do not explicitly require the publication of ratified treaties, which can lead to contesting of legal certainty. See Gennady M. Danilenko, *The New Russian Constitution and International Law*, 3 AM. J. INT'L L. 451 (1994).

⁴¹ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 122.

⁴² See generally Ige F. Dekker & Ramses A. Wessel, *Governance by International Organizations: Rethinking the Normative Force of International Decisions*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 215–23 (G. W. Werner ed., 2004).

internally constructed and passed as predominately domestic laws? To explain these questions, we must broadly review the Albanian constitutional spirit and provisions and then turn to the accompanying literature.

Before addressing these questions, however, it is worth noting that Article 5 of the Constitution of Albania establishes: "The Republic of Albania applies international law that is binding upon it."⁴³ Although Article 5 does not directly treat the status of international law in the domestic legal order, its importance cannot be ignored. It obliges the polity to apply binding international law. Article 5, nevertheless, does not regulate the manner in which the law is enacted. Instead, it institutes the obligation to apply binding international law. Article 5, then, makes the polity liable for those elements of international law that should be implemented domestically and those that must be put into practice internationally through interacting with international actors.

In light of the scope of Article 5, we can begin to address the question of whether treaties and Albanian domestic law form a single or two independent legal orders. Article 116 of the Constitution of Albania is instructive. It states that "normative acts that are effective in the entire territory of the Republic of Albania are: a) the Constitution; b) ratified international agreements; c) the laws; [and] d) normative acts of the Council of Ministers."⁴⁴ In other words, international treaties are legally effective within Albanian territory and, therefore, make ratified treaties part of the domestic legal order. By its language, Article 116 suggests that there is established in Albania a monist system that unites international treaties and the domestic legal order. Furthermore, this view is clarified by Article 122(1), which asserts:

Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment,

⁴³ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 5.

⁴⁴ *Id.* art. 116.

supplementing and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, is done with the same majority.⁴⁵

Article 122(1) begins to provide solutions to the issues brought up in this article. It complements Article 116 and clarifies the fact that international agreements become part of the domestic legal order upon ratification, furthering the impression that a monist system prevails and the doctrine of incorporation applies.⁴⁶ In sum, the ratified treaty *ex proprio vigore* becomes part of the Albanian domestic legal order. Consequently, given the *expressis verbis* constitutional determination, a ratified treaty, through its own power, penetrates the Albanian domestic legal order without necessitating any additional domestic legislative action.⁴⁷ Having addressed this question, we can now turn to the issue of direct applicability and direct effect.

Does Article 122(1) provide some clarity in regards to the direct applicability and direct effect of international treaties? It does by claiming that ratified treaties that have been published in the official gazette are directly applicable.⁴⁸ The result is that no legal act need be issued to make a treaty enforceable; it is directly integrated in the domestic legal order and can be directly employed⁴⁹ by all legal and natural persons explicitly, an outcome which also stands in harmony with Article 26 of LMITAA.⁵⁰

The only exception to the direct applicability of treaties established by Article 122(1) arises in a situation in which a

⁴⁵ *Id.* art.122(1).

⁴⁶ Most of the world's constitutions incorporate treaties into the domestic legal order. See Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions*, 88 AM. J. INT'L L. 427, 431 (1994).

⁴⁷ See the analogous case of Bulgaria. Hristo Danov, *Bulgaria*, in Eur. Comm'n for Democracy Through Law, *Constitutional Courts and European Integration*, 19, Doc. No. CDL-STD(2002)036 (Sept. 19, 2002) [hereinafter Eur. Comm'n for Democracy Through Law, *Constitutional Courts*].

⁴⁸ Most European countries apply the principle of direct applicability of treaties in the domestic legal order. See Stein, *supra* note 43, at 431.

⁴⁹ Constantin Economides, *The Elaboration of Model Clauses on the Relationship Between International and Domestic Law*, in Eur. Comm'n. for Democracy Through Law, *International and Domestic Law*, *supra* note 2.

⁵⁰ THE LAW ON MAKING INTERNATIONAL TREATIES AND AGREEMENTS OF ALBANIA [LMITAA] art. 26.

treaty is not self-executing, or where a law to concretize the treaty is required.⁵¹ Non-self-executing treaties cause many sensitive issues, but since the Albanian Constitution does not make clear when a treaty is considered self-executing, a legal or natural person cannot rely directly on a treaty in determining if it is directly applicable,⁵² especially since most treaties do not advertise their own self-executing nature.⁵³ Consequently, it is left to the local courts' jurisdiction to decide whether, by the standards of Article 122(1), a treaty is self-executing.⁵⁴ The local court can deem a treaty as not directly applicable and, thus, refuse to apply it without having specific national legislation on the books, which, in turn, can lead to legal uncertainty.⁵⁵

Some constitutions, such as that of South Africa, oblige domestic courts, *inter alia*, to interpret the question of the self-execution of treaties in line with international legal standards.⁵⁶ This kind of provision lessens the risk of refusing to apply an international treaty when it is not considered self-executing domestically and if no domestic legislation to concretize it has been issued.

Moreover, the third problem that this article raises is the position that ratified treaties hold within the domestic legal hierarchy. In principle, allowing treaties to be incorporated into the domestic legal order on the basis of parity with laws would lead to many conflicts and challenges.⁵⁷ Hence, the

⁵¹ Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 162 (1993) (making this broad argument in reference to the US experience).

⁵² This argument is based on the debate developed in Danilenko, *supra* note 40, at 465.

⁵³ Benvenisti, *supra* note 51, at 162.

⁵⁴ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.122(1).

⁵⁵ United States courts, for instance, show a tendency to refuse to consider treaties self-executing, thus refusing to apply them unless domestic legislation concretizing the treaty is passed. See Benvenisti, *supra* note 51, at 162. For the South African experience in this regard, see John Dugard, *International Law and the South African Constitution*, 1 EUR. J. INT'L L. 77, 83 (1997).

⁵⁶ Dugard, *supra* note 55, at 84.

⁵⁷ Vladen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT'L L.

Albanian Constitution allows no room for such challenges. First, Article 116, which establishes that treaties exist alongside the Constitution and laws,⁵⁸ and Article 122(2), which establishes that “[a]n international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it,”⁵⁹ resolve the issue of how treaties become incorporated into domestic law.

Additionally, the phrasing of Article 116 leads to the conclusion that treaties ratified by parliamentary law (as opposed to treaties that need no parliamentary ratification) stand below the Constitution in stature, but above individual laws.⁶⁰ Though this hierarchy cannot be taken as a safe basis for arguing the position of treaties over one another, one cannot dismiss Article 116, as Article 122(2) clarifies by unequivocally confirming that treaties ratified by law prevail over any laws not compatible with them.⁶¹

In assessing Article 122(2), one can argue two points: 1) that it only ranks treaties that are ratified by a law—i.e. those that need to be ratified by Parliament—within the fields specified in Article 121(1);⁶² and 2) that it makes treaties prevail over laws that are inconsistent with them without specifying whether or not this includes only the laws issued prior to the ratification of the treaty or those passed subsequently as well. In sum, Article 122(2) ranks treaties that have been ratified by a law of the Parliament over inconsistent laws,⁶³ but simultaneously sets treaties that are considered ratified by the signature of the President of the Republic of Albania on the same level with the laws of the country. As a result, the case law of ordinary courts of Albania

29, 37 (1996).

⁵⁸ KUSHTETUTA E REPUBLIKËS SE SHQIPËRISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 116.

⁵⁹ *Id.* art.122(2).

⁶⁰ Some jurisdictions set treaties over inconsistent laws by establishing the *lex posterior derogat priori* rule. This only rules out inconsistent laws at the time of ratification of the treaty; however, it does not rule out subsequent laws. *See Economides, supra* note 49.

⁶¹ Most constitutions, however, admit this. *Id.*

⁶² The Estonian Constitution, for instance, asserts that all treaties prevail over laws. *See Uno Lõhmus, Estonia, in Eur. Comm’n. for Democracy Through Law, Constitutional Courts, supra* note 47, at 35.

⁶³ *La Pergola, supra* note 2.

proves that Albanian courts have accepted the idea of treaties prevailing over laws.⁶⁴

The last issue that remains is the question of the place of international organizations' norms within the Albanian domestic legal order. Article 122(3) of the Constitution addresses this issue by stating: "[t]he norms issued by an international organization have superiority, in case of conflict, over the laws of the country if the agreement ratified by the Republic of Albania for its participation in the organization expressly contemplates their direct applicability."⁶⁵

Article 122(3), therefore, mandates that the norms of international organizations in which Albania is a party—assuming that the treaty of accession provides for the direct applicability of the norms concerned—have superiority over internal laws.⁶⁶ In this context, the norms issued by international organizations stand equal to international treaties ratified by a parliamentary law. Moreover, the term "norm" unreservedly refers to a judicial decision by an international judicial body. Admittedly, Article 122(3) eases the integration in a supranational organization, whose communitarian norms must have prevalence over the laws of the member state. With this in mind, Article 122(3) leaves the gate open for the option of joining a supranational institution, like the European Union, without the constitutional implications allowing primacy of the European Communities' law.

At the same time, Article 123 establishes, "The Republic of Albania, on the basis of international agreements, delegates to international organizations state powers for specific issues."⁶⁷ The Assembly may decide that the ratification of such an

⁶⁴ Gjykata e Lartë [Supreme Court] Sept. 27, 2002, 3 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1649; Gjykata e Lartë [Supreme Court] Oct. 5, 2002, 5 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1769.

⁶⁵ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.122(3).

⁶⁶ Many constitutions, such as that of Slovakia, do not regulate the issue of international organizations' norms in the face of domestic law. Eur. Comm'n. for Democracy Through Law, *Draft Comparative Study*, *supra* note 14.

⁶⁷ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.123(1).

agreement be done through a referendum.”⁶⁸ As such, Article 123 authorizes the polity to transfer parts of the country’s sovereignty to an international organization, an act that must be accomplished through an international treaty.

The transfer of state powers to international organizations, according to the *Statute of Rome* case heard in Albanian Constitutional Court,⁶⁹ cannot undermine the country’s constitutional identity,⁷⁰ meaning that permission to delegate state powers to an international organization is limited to the extent that it does not deform the constitutional and sovereign identity of the Albanian polity. Building upon this provision, the Constitutional Court has argued that Albania enters into international agreements only as a sovereign party,⁷¹ thus supplementing Article 123. It is important to note that the issue of delegating sovereignty may not, in light of the *Statute of Rome* case, limit the sovereign character of the polity or its ability to enter into treaties because delegation of sovereignty to international organizations may not be imposed externally.

Still, the delegation of sovereignty for purposes of modern integration is an approach that has been *de facto* acknowledged by the Albanian constitutional justice.⁷² On the other hand, Article 123 of the Constitution lets us contend that, though the transfer of powers to an international organization is permitted, the power transferred does automatically prevent the Albanian polity from issuing norms for the transferred power. Overall, Article 123 makes it possible for the polity to enter into international treaties that contain the duty to

⁶⁸ *Id.* art.123(3).

⁶⁹ See Eur. Comm’n for Democracy Through Law, *Draft Report on Case-Law Regarding The Supremacy Of International Human Rights Treaties*, 4–5, Doc. No. CDL-DI(2004)005 (Oct. 22, 2004).

⁷⁰ The French Constitutional Council, while reviewing the constitutionality of the Statute of Rome, found that the case conflicts with the Constitution (contrary to how the Albanian Constitutional Court ruled); hence, the Constitutional Council of France ruled that the Constitution must be amended. See, Eur. Comm’n for Democracy Through Law, *Draft Report on the Constitutional Issues Raised by the Ratification of the Rome Statute*, Doc. No. CDL-AD(2008)031 (Oct. 10, 2008).

⁷¹ Gjykatës Kushtetuese [Constitutional Court] Sept. 23, 2002, 32 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1299.

⁷² *Id.*

delegates sovereign powers to an international organization,⁷³ which coincides with the needs of current trends in global integration.⁷⁴

THE ISSUE OF TREATIES' CONSTITUTIONAL REVIEW AND LEGAL CONSISTENCY WITH PREVAILING TREATIES

Following Article 122(1) of the Constitution of Albania, it seems clear that international treaties take precedence over Albanian laws, but that treaties must still be subordinate to the Constitution.⁷⁵ This notion raises important questions regarding the existence of mechanisms that review the constitutionality of treaties, since they must be constitutional.⁷⁶ This rule is also complicated by the fact that, while treaties remain subordinate to the Constitution, Article 122(1) makes it clear that treaties prevail over the laws of the country, which leaves the need for a mechanism that can assure that laws inconsistent with treaties are avoided.

This part of the article, therefore, addresses two matters: 1) the issue of the constitutional review of treaties; and 2) the issue of assuring the precedence of treaties over inconsistent laws. In principle, one could argue that several mechanisms exist that can assure the consistency between treaties and

⁷³ For the requirement of the Venice Commission in this regard, see Eur. Comm'n for Democracy Through Law, *Opinion on the Constitution of Serbia*, Doc. No. CDL-AD(2007)004 (Mar. 19, 2007) [hereinafter Eur. Comm'n for Democracy Through Law, *Constitution of Serbia*].

⁷⁴ Louis Lopez Guerra, *Concluding Report*, in Eur. Comm'n for Democracy Through Law, *European Integration and Constitutional Law*, Doc. No. CDL-STD(2000)030 (Sept. 30, 2000). The Constitution of Turkey, for instance, does not allow the transfer of sovereignty. See, Christian Rumph, *Turkish Constitutional Law and the European Union from a European Point of View*, in Eur. Comm'n for Democracy Through Law, *Constitutional Implications of Accession to the European Union*, Doc. No. CDL-STD(2002)03 (Nov. 10, 2001).

⁷⁵ We use here the term "treaty" as a treaty ratified by law in light of Art. 122(1) of the Constitution of Albania, thus leaving aside treaties that need no parliamentary ratification, given that in the latter case, treaties presumably have the rank of laws.

⁷⁶ The Croatian Constitution, for instance, assigns no power to the Constitutional Court to check the constitutionality of treaties. See, Eur. Comm'n. for Democracy Through Law, *The Constitutional Court of the Republic of Croatia and International Law*, Doc. No. CDL(96)34 (May 29, 1996) (by S. Rodin).

domestic legislation. These consist of an *a priori* control of the constitutionality of treaties, an incorporation of a clause into the laws that establishes that the law will be applied only if it is in harmony with binding treaties, an interpretation of laws in the spirit of treaties so that they remain consistent with treaties and their targets, and an *a posteriori* control of the constitutionality of treaties alongside an *a priori* control of the consistency of the draft-laws with binding international treaties.⁷⁷

As far as the first question is concerned, the Constitution of Albania authorizes the Constitutional Court to decide questions of “compatibility of international agreements with the Constitution, prior to their ratification.”⁷⁸ In such cases, the procedure before the Constitutional Court can be initiated only by one of the following: “a) the President of the Republic; b) the Prime Minister; c) no less than one-fifth of the deputies; f) the People’s Advocate; g) organs of the local government; h) organs of religious communities; [or] i) political parties and other organizations.”⁷⁹ If the Constitutional Court decides to bring the case in a plenary session, then the ratification procedure is immediately suspended.⁸⁰ After that, the Court is obliged to reach a decision within a month, but if the treaty is considered unconstitutional, its ratification is prohibited.⁸¹

As observed above, the review of constitutionality of international treaties rests with the Constitutional Court.⁸² Still, the Parliament, the President, and the government can review the constitutionality of a treaty during the treaty-

⁷⁷ Economides, *supra* note 49.

⁷⁸ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 131.

⁷⁹ *Id.* art.134; LAW ON THE ORGANIZATION AND FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA [LOFCCA] Feb. 10, 2000, art. 52.

⁸⁰ LOFCCA art. 52.

⁸¹ *Id.* The Estonian Constitution, for instance, prohibits the polity from entering into treaties that conflict with the Constitution; this prohibition is another mode of upholding the supremacy of the Constitution vis-à-vis treaties. See Löhmus, *supra* note 62, at 39.

⁸² Though the Constitution prevails over laws, one should not aim at interpreting the Constitution against international law. For the suggestions of the Venice Commission, see Eur. Comm’n for Democracy Through Law, *Constitution of Serbia*, *supra* note 73.

making and ratification process—independent of the Constitutional Court's jurisdiction—and make it comply with the constitution of the polity. In view of that, there is evidence that shows that the Parliament itself has been involved in ruling out laws that contradict international treaties.⁸³

The power of the Constitutional Court to control the constitutionality of a treaty, however, is limited. As observed above, the Albanian Constitutional Court only has preventive jurisdiction over the constitutionality of treaties,⁸⁴ which means it cannot call a treaty unconstitutional after the ratification instrument has been provided on behalf of the Republic of Albania. The power to exercise preventive control over the constitutionality of a treaty, as a result, assures that an international obligation is constitutionally reviewed prior to ratification, and that, when ratified, it cannot be banned anymore.⁸⁵ The preemptive constitutional review of treaties, as such, contributes to legal certainty—as opposed to repressive constitutional control.⁸⁶

On the other hand, one can observe that the number of actors that can raise the issue of the constitutionality of a treaty before the Constitutional Court is pretty broad, with only individuals barred from raising the question. Overall, it is possible to review treaties' constitutionality under the auspices of the Constitution of Albania within the Constitutional Court's jurisdiction, but yet the Parliament, the President of the Republic, and the government can control the constitutionality of treaties in the treaty-making and ratification phase as well.

In exceptional cases, the Constitutional Court can still use the prerogative of annulling an international treaty *a posteriori*⁸⁷ by declaring unconstitutional the law used to ratify

⁸³ Gjykatës Kushtetuese [Constitutional Court] Sept. 23, 2002, 32 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1299.

⁸⁴ For more about the suggestion to establish only *a priori* constitutional review of treaties, see Eur. Comm'n for Democracy Through Law, *Constitution of Serbia*, *supra* note 73.

⁸⁵ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art. 131; *cf.* Eur. Comm'n for Democracy Through Law, *Constitution of Serbia*, *supra* note 73.

⁸⁶ See Tomasz Dybowski, *The Role of the Constitutional Tribunal in the Interpretation of International Law in Poland*, in Eur. Comm'n for Democracy Through Law, *International and Domestic Law*, *supra* note 2.

⁸⁷ Eur. Comm'n for Democracy Through Law, *Constitution of Serbia*,

the treaty under the jurisdiction of controlling the constitutionality of laws themselves.⁸⁸ This step, however, would constitute a breach of Article 46 of the Vienna Convention on the Law of Treaties⁸⁹ and could be seen as judicially arbitrary and a misuse of power by the court. Such action would only invalidate the treaty obligation domestically, though it would not discharge the international liability of the state for the application of that treaty.⁹⁰

As noted above, the second issue begs the question of consistency between laws and treaties or, more particularly, whether or not the Albanian constitutional system assures that laws contradicting treaties are ruled out from the domestic legal order. This question is directly linked to the prescription of Article 122(1), which asserts that treaties prevail over inconsistent laws.⁹¹ As such, Article 131 of the Constitution allows the Constitutional Court of Albania, *inter alia*, to rule on the: “a) compatibility of the law with the Constitution or with international agreements as provided in article 122; and b) compatibility of normative acts of the central and local organs with the Constitution and international agreements.”⁹² The right to initiate control over the consistency of a law with an internationally binding treaty belongs to the President of the Republic, the Prime Minister, at least one-fifth of the deputies of Parliament, the Chairman of the High State Audit, the People’s Advocate, local authorities, religious institutions, political parties, and other organizations.⁹³

To this extent, one could argue that, in light of Article 131, the Constitutional Court is vested with *a posteriori* jurisdiction to rule out laws and other normative acts that contradict any international treaty binding in Albania. This provision further empowers the standing of treaties over laws as laid out in

supra note 73.

⁸⁸ See Danilenko, *supra* note 40; see also Balkin, *supra* note 8.

⁸⁹ See Eur. Comm’n for Democracy Through Law, Constitution of Serbia, *supra* note 73.

⁹⁰ See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (2003); see also Guerra, *supra* note 74.

⁹¹ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.122(1).

⁹² *Id.* art. 131.

⁹³ LAW ON THE ORGANIZATION AND FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA [LOFCCA] Feb. 10, 2000, art. 49.

Article 122(1) by providing the mechanism to ensure that domestic laws incompatible with treaties are ruled out. At the same time, the number of actors authorized to initiate the procedure for controlling the consistency of laws with an international treaty is very broad, leading to the conclusion that the process of seeking to address questions of consistency is rather open from a constitutional justice point of view.

Within the Constitution of Albania, however, there is an exception to the principle of preventive control of constitutionality of treaties. Article 180 of the Albanian Constitution—adopted in 1998—establishes that treaties ratified prior to its adoption remain in force, but vests the Council of Ministers with the power to bring before the Constitutional Court treaties ratified before 1998 and in conflict with the new Constitution.⁹⁴ As a result, the Constitutional Court can ban treaties ratified before 1998 with an *a posteriori* jurisdiction if it finds them unconstitutional.⁹⁵ This exception is the only one provided for, however, in terms of the review of a treaty's constitutionality after its ratification. Still, the solution found in Article 180 puts treaties ratified prior to 1998 into conformity with the new constitutional order and its supremacy, which is logically acceptable.

PACTA SUNT SERVANDA AND THE GOOD FAITH APPLICATION OF INTERNATIONAL TREATIES

The principle of *pacta sunt servanda* and the application, in good faith, of binding treaties remain essential to the concern over the relationship between international law and national law. In the first instance, it is worth noting that the Constitution of Albania provides for neither specific nor general provisions that might explicitly constitute the responsibility to the *pacta sunt servanda* principle and application in good faith of international treaties. The only relevant constitutional provision that might apply is Article 5, which prescribes that the Republic of Albania must apply binding international law.⁹⁶ With this in mind, the relevance of

⁹⁴ KUSHTETUTA E REPUBLIKËS SE SHQIPËISË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] Oct. 21, 1998, art.180(2).

⁹⁵ *Id.* art.180.

⁹⁶ *Id.* art. 5.

these principles should be investigated in light of constitutional justice and the case law of the Constitutional Court, while paying attention to the Vienna Convention on the Law of Treaties.⁹⁷

According to the Vienna Convention on the Law of Treaties, the *pacta sunt servanda* principle is binding over all of its signatories.⁹⁸ Article 27 flatly states that states cannot invoke domestic legal actions to invalidate an international obligation as stipulated in a treaty.⁹⁹ An exception to Article 27 of the Vienna Convention does appear in Article 46, which allows states to invoke national rules that invalidate the instrument of ratification of an international treaty, but only if the rule concerned is of crucial importance to the domestic legal order.¹⁰⁰ The other customary exception, the principle of *rebus sic stantibus*, allows states to invalidate international obligations if circumstances change and the meaning of those international obligations have lost their rationale.¹⁰¹ In principle, though *pacta sunt servanda* and application in good faith of treaties are interrelated, the former highlights the state's international responsibility, whereas the latter shows the domestic accountability in the application of a treaty. Simply put, however, the two should be understood as two prongs of the same issue: that is, a state's responsibility to apply international obligations.

To begin with, since the Vienna Convention on the Law of Treaties is part of the domestic legal order of Albania,¹⁰² one could argue that the *pacta sunt servanda* principle is already a domestic legal obligation. Additionally, LMITAA obliges every institution to observe the application of treaties and to report on the vitality of their application.¹⁰³ Though the law does not

⁹⁷ See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–72 (2008).

⁹⁸ *Vienna Convention*, *supra* note 10, art. 26.

⁹⁹ *Id.* art. 27; see Eur. Comm'n for Democracy Through Law, *Law and Foreign Policy*, Doc. No. CDL-STD(1997)024 (Sept. 27, 1997).

¹⁰⁰ *Vienna Convention*, *supra* note 10, art. 46.

¹⁰¹ *Id.*

¹⁰² See *Republika e Shqipërisë [Republic of Albania]*, MINISTRA E PUNËVËTË JASHTME [MINISTRY OF FOREIGN AFFAIRS], <http://www.mfa.gov.al/index.php> (last visited Feb. 17, 2012).

¹⁰³ THE LAW ON MAKING INTERNATIONAL TREATIES AND AGREEMENTS OF ALBANIA [LMITAA] art. 4.

impose any further obligation, one could question whether or not any other constitutional provision applies the *pacta sunt servanda* principle.

The Albanian Constitution, for one, has no further mechanism to uphold *pacta sunt servanda*. Besides, it does not comment, for instance, on whether or not the Constitutional Court may label as unconstitutional acts that invalidate international obligations.¹⁰⁴ In light of Article 121(4) of the Constitution and Article 27 of LMITAA, it seems that any denunciation of international treaties can be undertaken without explicit prohibition, though the Albanian Constitutional Court has argued that domestic measures cannot prevent the country to comply with international law,¹⁰⁵ adding that there is no mechanism to prevent the polity from instituting domestic legal measures that denounce an international treaty of which Albania is a party.¹⁰⁶

The only references to such an occurrence, then, remain in the Vienna Convention, which—given that Albania is a party to it—comprises part of the domestic legal order. Of course, this argument leads to the problem that the legal provisions that allow the denunciation of international treaties provided by LMITAA in Article 27 contradict the Vienna Convention on the Law of Treaties, which means that the only logical conclusion is that the Vienna Convention provisions constitute part of the domestic Albanian law and, thus, prevail over the provisions of LMITAA.

Additionally, the Constitution prevails over the Vienna Convention on the domestic front and does not provide the means for any denunciation, but only refers to LMITAA, which must regulate it. Ultimately, then, the principle of *pacta sunt servanda* and the application in good faith of international treaties can be considered domestic principles only in light of the penetration of the Vienna Convention on the Law of Treaties into the Albanian domestic legal order, since the Constitution provides no particular insight into this issue. The

¹⁰⁴ KUSHTETUTA E REPUBLIKËSË KOSOVËS [CONSTITUTION OF THE REPUBLIC OF KOSOVO] June 15, 2008, art. 114(3)–(4).

¹⁰⁵ Gjykatës Kushtetuese [Constitutional Court] Sept. 23, 2002, 32 FLETORJA ZYRTARE [OFFICIAL GAZETTE] 1299.

¹⁰⁶ *Id.*

lack of repressive jurisdiction to control the constitutionality of treaties, however, does signify an implicit acceptance of Article 27 of the Vienna Convention on the Law of Treaties by the Constitution of Albania.

CONCLUSION

This article addresses the issue of the relationship between treaties and the Albanian domestic legal order. While the article approaches the issue mainly from a constitutional law perspective, it also addresses international law. Using existing scholarship and specific case studies, the article's findings reveal themselves to be both tangible and convincing. They help expose the complicated situations created by the intricacies of Albanian law and, by broadly interpreting current legal frameworks, seek to produce logically and legally correct conclusions.

Overall, this article addressed five main questions:

As to the first question—of the power to negotiate and formulate a treaty—it is clear that authority rests in the hands of the Albanian Council of Ministers and the President of the Republic, who has the power to sign treaties. Through a legally-logical argument, the article concludes that the negotiation, formulation, and signing of treaties—which constitute the treaty-making powers in narrow terms—cannot be conducted without the permission of the President of Republic, though the Council of Ministers can engage in negotiating, formulating, and signing activities. The Albanian Constitutional Court welcomes the same conclusion based on the case of *Socialist Party v. Council of Ministers*. On the other hand, the ratification of treaties rests with the Albanian Parliament, though its power is limited to certain specified legal fields. If a given treaty falls outside the fields mentioned in the Constitution, the treaty can be considered ratified after being signed by the President of Republic.

As to the second question—of the relationship between treaties and the domestic legal order—this article concludes that Albanian constitutional law provides for a monist model of the relationship between international treaties and national law. International treaties, upon ratification, become *ex proprio vigore*, part of the domestic legal order and directly

applicable. As a result, treaties ratified by law take precedence over inconsistent laws.

As to the third question—of the constitutional review of treaties and the review of the consistency between laws and international treaties—it appears that the Albanian Constitutional Court is vested with the power to check *a priori* the constitutionality of treaties and *a posteriori* the consistency of laws with prevailing international treaties. This job can be unreservedly exercised by the Parliament as well.

As to the fourth question—of whether constitutional law and the law of treaties provide for any mechanism that would uphold the principle of *pacta sunt servanda* domestically—this article concludes that the Constitution and relevant laws barely address this issue. Hence, only the penetration of the ratified Vienna Convention on the Law of Treaties can be considered as a source for explaining this phenomenon.

Finally, the article ends with the assertion that the relationship between treaties and domestic law in the case of Albania is to a certain extent modern, even if its regulation is not entirely clear. The findings of the article, as a result, can help facilitate Albanian constitutional justice to address the issue of the rapport between international treaties and the domestic legal order in a theoretically informed and inclusive manner.