Tensions between Domestic and International Law for Supremacy in Uzbekistan

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Abstract

In their respective constitutions, Central Asian countries have boldly embraced international law and its universalist values. Uzbekistan, the most densely populated country of the region, is no exception. Consequently, one could expect that individuals may considerably benefit from the application and enforcement of international norms in domestic courts. Primarily, this paper seeks to clarify this assumption and investigate the contentious issues between international and domestic law in Uzbekistan. The authors argue that while the country has performed remarkably through joining international organizations and through contracting or acceding to bilateral and multilateral treaties, numerous problems remain unresolved. Although Uzbekistan nominally adopts a monist approach to international law by giving it precedence over domestic law, in practice, however, the country is taking quite a similar approach to Western countries with common law jurisdictions when it comes to incorporating international legal norms into their respective legal systems. In many of the instances examined by the authors, the *Oliy Majlis* (Uzbek Parliament) adopted a particular statute to implement the international obligations of Uzbekistan. While this may be viewed a sound move to clarify the relationship between domestic and international law norms in the courts, low levels of awareness concerning international law among judges and the public, coupled with the reluctance of the Supreme Court to guide lower courts on such matters raise barriers towards the successful implementation of international norms in Uzbekistan.

Keywords: Uzbekistan, international law, domestic legal order, Constitutional court, dualism, monism, contentious cases

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I. Introduction

It is almost 30 years that the Republic of Uzbekistan ('Uzbekistan') has been in a position to practice international law as a sovereign state.[1] During this period, the country has built and strengthened its state institutions, and has gradually developed its foreign policy with neighboring and other powerful states and organizations including Russia, China, the European Union ('EU') and the United States of America ('the United States'). Therefore, it is understandable that Uzbek authorities deeply appreciate the vital role of international law in protecting their territorial sovereignty and other interests against formidable powers surrounding the Central Asian region. How persistently Uzbek authorities defend the independence of the country can easily be seen in their conduct towards membership to regional organizations.

Uzbekistan has successfully established its place as a sovereign nation-state in international organizations, including the United Nations ('UN'), has joined numerous international treaties and pacts, and has even hosted some notable regional forums.2 As a result, Uzbekistan is now a member of over 100 international organizations and numerous international treaties.3 Today, international agreements, including both multilateral and bilateral and binding and non-binding, to which Uzbekistan is party exceed more than 4300.4 For the most part, such agreements have been concluded with principal partner countries such as Russia, South Korea, China, Japan, and neighboring countries (*see* Graph 1).

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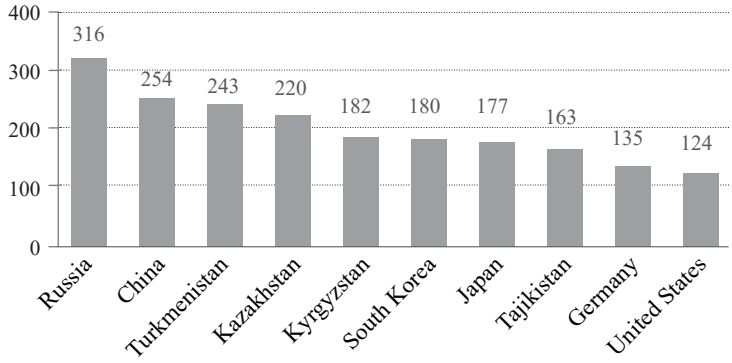
1 Uzbekistan declared its independence on August 31, 1991 following the collapse of the Soviet Union.

2 Uzbekistan is currently actively seeking to enhance its role and place in the international arena. To that end, Uzbekistan has revived talks concerning Afghanistan, and has hosted in Tashkent the high-level International Conference on Afghanistan 'Peace Process, Security Cooperation and Regional Connectivity' on March, 26-27, 2018. The Mirziyoyev government is also seeking to enhance its role in the sphere of human rights. On November 22-23, 2018 the Asian Forum on Human Rights was hosted in Samarkand. As a result of this forum the Samarkand Declaration was adopted. Organizing this forum, the new government sought to express to human rights stakeholder organizations etc., its readiness to promote and protect fundamental human rights in the territory of Uzbekistan.

3 *See* 'Cooperation of the Republic of Uzbekistan with international organizations', Foreign Policy, General Consulate of Uzbekistan in Novosibirsk, *available at* http://www.uzbekistan.nsk.ru/index.php?option=com_content&view=article&id=108:cooperation-of-the-republic-of-uzbekistan-with-international-organizations&catid=28:foreign-policy&Itemid=89 (last visited May 13, 2020).

4 This figure along with figures as appear in graphs 1 and 2 are based on data from the treaty database provided by the Ministry of Foreign Affairs of Uzbekistan.

Graph 1. Top 10 countries with which Uzbekistan has concluded the most international agreements



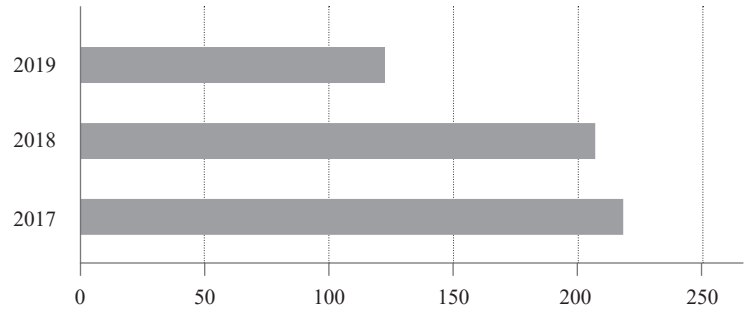
Moreover, the 2016 change in political leadership in the country heralded in a new era in Uzbek foreign policy. And, the new government relaunched World Trade Organization ('WTO') accession talks,[5] started paying greater attention to the domestic implementation of human rights treaties,[6] and placed greater stress on poor neighborhood issues.[7] Not only do such developments demonstrate Uzbekistan's greater engagement in the international arena, but also the gradual opening of its legal system towards harmonization with international law. Almost 550 bilateral agreements and international documents have been concluded since Mirziyoyev became head of State, (*see* Graph 2).

5 Alisher Umirdinov & Valijon Turakulov, *The Last Bastion of Protectionism in Central Asia: Uzbekistan's Auto Industry in Post-WTO Accession*, 11 Trade, L. & Dev. 301, 304-305 (2019).

6 Steve Swerdlow, *Charting Progress in Mirziyoyev's Uzbekistan: Three Years of Frenzied Reform Activity Have Certainly Made a Difference, But Much Work Remains to be Done*, The Diplomat, Sept. 1, 2019, available at https://thediplomat.com/2019/08/charting-progress-in-mirziyoyevs-uzbekistan/ (last visited Jan. 08, 2020).

7 *See* Catherine Putz, *Mirziyoyev Keeping Up the Good Neighbor Act*, The Diplomat, Nov. 2, 2016, *available at* https://thediplomat.com/2016/11/mirziyoyev-keeping-up-the-good-neighbor-act/ (last visited Dec. 22, 2019).

Graph 2. Number of bilateral international agreements concluded by the new government



Nonetheless, Uzbekistan's 1992 Constitution insufficiently clarifies the position of international law in the domestic hierarchy of rules. Although the Constitution openly recognizes the 'priority of the generally accepted norms of international law,' it does not place the Law of Nations in a superior position vis-à-vis the Constitution itself.[8] Furthermore, according to Law 'On the Constitutional Court', only the Constitutional Court may determine the constitutionality of treaties prior to their ratification.[9] Nonetheless the fact that individuals have no legal standing to raise such legal questions (namely, the constitutionality of treaties), coupled with the fact that state authorities (such as the executive and legislature) rarely, if at all, refer such questions to the Constitutional Court, has thus resulted in a Constitutional Court that is rather inactive when it comes to examining such legal questions.[10] In this sense, the position of international law in the constitutional setting and domestic legal system of Uzbekistan is far more ambiguous, and clarification from the Constitutional Court is, in fact, highly un-

8 The Constitution of Uzbekistan adopted on December 8, 1992 at the eleventh session of the Supreme Council of the Republic of Uzbekistan of the twelfth convocation, *available at* http://constitution.uz/en (last visited Nov. 13, 2019).

9 Art.4(2), Law 'On the Constitution Court' of Uzbekistan, LRU-431 (2017), full text *available at* https://www.lex.uz/docs/3221763 (last visited Aug. 24, 2020).

10 For a critical analysis of the activity of the Uzbek Constitutional Court, *see* Mirakmal Niyazmatov, *Qarorlar bor, amaliy o'zgarishlar yo'q. Konstitutsiyaviy sudning 23 yillik faoliyatiga nazar* (Decisions exist, but no practical changes: glancing at the 23 years of activity of the Constitutional Court), Dec. 16, 2018, *available at* https://kun.uz/uz/news/2018/12/16/qarorlar-bor-amaliy-ozgarishlar-yoq-konstitutsiyaviy-sudning-23-yillik-faoliyatiga-nazar (last visited Nov. 23, 2019).

likely. Therefore, the authors consider it pertinent to examine herein how lower courts deal with the normative conflict between international law and fundamental principles of domestic law.

It is unfortunate that, to date, there has been very little international scholarly attention to questions of domestic jurisprudence involving the implementation of international law in the most populous country of Central Asia. Other than a few partial, albeit key, instances,[11] the issues surrounding the implementation of international law norms domestically have been almost left unexamined. Furthermore, Uzbek textbooks on international law at the domestic level barely touch upon the relations of international and domestic law. Only a 2005 textbook by Lukashuk and Saidov openly acknowledged the primacy of international law over domestic law.[12] For the first time, a domestic textbook delved into international law as the applicable law in Uzbek courts, and introduced concrete case studies on the historical and current interplay between domestic and international law.

Overall, the authors of this paper observe that Uzbekistan has long been implementing international treaties through special legislative tools such as primary and secondary legislation e.g., statutes (laws) and decrees (by-laws). However, in the absence of instruction from higher courts, lower courts seem reluctant to directly implement the norms of international treaties. This attitude has significantly hindered international standards from being successfully implemented for many years. The ambiguity of the constitutional system of Uzbekistan vis-à-vis

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11 *See* William Elliott Butler, *The Law of Treaties in Central Asia*, 287-294 in Constitutional Reforms and International Law in Central and Eastern Europe, (Müllerson, Rejn Avovič, Malgosia Fitzmaurice & Mads Tønnesson Andenæs eds., Martinus Nijhoff Publishers) (1998); Gennady M. Danilenko, *Implementation of international law in CIS states: theory and practice*, 10 Eur. J. Int'l. L. 51 (1999); Ilias Bantekas, *The law and legal system of Uzbekistan*, (Juris Publishing, Inc.) (2005); Mansur Bakhriddinov, *Uzubekisutan kyowakoku ni okeru kindai kokusaiho no juyo oyobi gaiko no hatten : shirukurodo suitaiki kara fubyodo joyaku teiketsu made (Acceptance of international law in the Republic of Uzbekistan: from the collapse of great silk road to conclusion of unequal treaties),* 69 Hogaku seijigaku ronkyu : Journal of Law and Political Studies 227 (2006); Mansur Bakhriddinov, *Uzubekisutan kyowakoku ni okeru kokusaiho no kokunai jisshi oyobi keisei no katei : senkyuhyakukyujuninen no kyowakoku kenpo to senkyuhyakukyujugonen no Uzubekisutan kyowakoku joyakuho o chushin ni (Process of formation and implementation of international law in the Republic of Uzbekistan: the case of constitution (1992) and the law on international treaties of the Republic Uzbekistan (1995))*, 78 Hogaku seijigaku ronkyu: Journal of Law and Political Studies, 63 (2008); Marina Girshovich, *Central Asian States*, in *The Oxford Handbook of International Law in Asia and the Pacific*, 701 (Chesterman, Simon, Hisashi Owada &Ben Saul, eds., Oxford University Press) (2019); Husan Tursunov, *Xalqaro huquq normalarini sudlarda qo'llash muammolari (Problems of application of international law norms by courts*), (2009) (Ph.D. Dissertation, Tashkent).

12 Igor Lukashuk & Akmal Saidov, *Hozirgi zamon xalqaro huquqi nazariyasi asoslari (Theoretical basis of modern international law)*, 25 (O'zbekiston faylasuflari milliy jamiyati nashriyoti) (2007).

international law has also had a negative impact on this. Against this backdrop, a new law that was adopted by parliament in February 2019 openly described international treaties to which Uzbekistan is a party as '*a constituent part of the domestic legal system*.'[13] Consequently, from now on one would have to keep an eye on the future jurisprudence of Uzbek courts on contentious issues that involve international law.

This paper is structured as follows. Section II examines the foreign policy priorities of the Uzbek government in order to clarify how Uzbekistan engages with its close neighbors and the broader international community. Then, through reviewing the relevant parts of the Constitution and domestic laws and by-laws, the hierarchy of international and domestic legal norms is outlined in Section III. Section IV examines the implementation process of international treaties in Uzbekistan. Section V examines the domestic jurisprudence of Uzbek courts on issues engaging international law. Section VI summarizes the findings of the previous sections, and, lastly, the final Section contains the conclusion.

II. Foreign policy priorities of Uzbekistan

How active Uzbekistan is in the international arena may be seen in its foreign policy priorities.[14] Such priorities are articulated in the Constitution as follows:

> The Republic of Uzbekistan shall have full rights in international relations. Its foreign policy shall be based on the principles of sovereign equality of states, non-use of force or threat of its use, inviolability of frontiers, peaceful settlement of disputes, non-interference in the internal affairs of other states and other universally recognized principles and norms of the international law. The Republic may form alliances, join unions and other interstate organizations or withdraw from proceeding from the ultimate interests of the state

13 *See* Law of the Republic of Uzbekistan on International Treaties of the Republic of Uzbekistan, art. 3, LRU-518 (2019), *available at* https://lex.uz/docs/-4193761 (last visited Feb. 11, 2020).

14 *See* the Law on the Main Principles of Foreign Policy Activities of Uzbekistan, 2012, *available at* https://lex.uz/docs/-39149 (visited June 25, 2020). However, this law may have been weakened or otherwise rendered out of date due to evolving foreign policy. The executive has yet to announce the new version. Given the ongoing foreign policy of the Mirziyoyev government, both authors do not anticipate drastic developments with implications to the applicability of international norms.

and the people, their well-being and security.[15]

There is little doubt that strengthening the country's independence and its sovereignty has been the utmost priority for the Uzbek government to date. It was quite clear why Karimov was hesitant to join both the Collective Security Organization or the Eurasian Economic Union ('EAEU') despite considerable pressure from Russia. By resisting to join both organizations, Uzbekistan has managed to maintain its neutrality. However, with some delays, it joined the Shanghai Cooperation Organization ('SCO'), and has become one of its most active members. This could be explained by SCO's nonintrusive policy towards the domestic affairs of its member states. More recently, regarding the EAEU, under considerable pressure by the Russian side, the Mirziyoyev government has reluctantly begun to consider membership issues.[16]

For a long time, it has been a top priority for the country to join the circle of developed democratic nations. Hence, long-lasting conflict in neighboring Afghanistan and terrorist attacks claimed by or attributed to the Turkestan Islamic Movement had led former Uzbek leader, Islam Karimov, to suppress any kind of uprising. Against such backdrop, argued necessary for the purpose of 'state interests', there have been serious violations of basic human rights, including the practice of torture by state bodies against international legal norms.[17] As a result, because of the deplorable record on human rights, lack of transparency, and suppression of freedom of speech,[18] the former Karimov government blatantly failed

15 *See* the Constitution, *supra* note 8, art. 17, *available at* http://constitution.uz/en/clause/index#section2 (last visited Nov. 03, 2019).

16 But it seems that not only the majority of the public, but also the main government bodies and parliament members also exhibit a similar reluctance towards joining the EAEU, *see* Iqtisodiyot, O'zbekiston YeOII bilan keng ko'lamli integratsiyaga tayyormi? Hukumat parlamentga hisobot berdi (Is Uzbekistan ready for large scale integration with EAEU? Government report to Parliament), Kun.uz, Apr. 17, 2020, *available at* https://m.kun.uz/uz/news/2020/04/17/ozbekiston-yeoii-bilan-keng-kolamli-integratsiyaga-tayyormi-hukumat-parlamentga-hisobot-berdi (last visited May 10, 2020). For the time being, Uzbekistan retains its so-called observer status in this Russian-led organization.

17 E.g., the killing of a man by two policemen through torture in June 2020 in the region of Andijan show that despite considerable efforts to reform the governance of the state apparatus, police abuse of power persists. *See* Mukhammadsharif Mamatkulov, *Uzbek Policemen Charged With Torture After Detained Man's Death,* Reuters, June 13, 2020, a*vailable at:* https://www.nytimes.com/reuters/2020/06/13/world/asia/13reuters-uzbekistan-police-torture.html (last visited June 20, 2020).

18 *See* Zhanna Kozhamberdiyeva, *Freedom of expression on the Internet: A case study of Uzbekistan*, 33 Rev. Central & East Eur. L. 95, (2008), where it is argued that the absence of legal guarantees of the effective exercise of freedom of expression on the Internet reflects upon the general weakness of Uzbekistan's domestic system of human rights protection, and that this system gives absolute priority to state interests in legitimizing restrictions upon human rights.

to fulfill very basic norms of international law.[19]

After Shavkat Mirziyoyev became head of State, year-on-year positive changes have been observed. The Mirziyoyev cabinet has demonstrated a strong will to end the systematic use of forced child labor, which was widespread in the cotton industry, political prisoners were released and rehabilitated, and mass media became much more vibrant.[20] Upon the recommendation of the United States, Uzbekistan also closed Jaslyk prison, where individuals involved in political opposition to the former leader, and those active in religious activist circles, were imprisoned and tortured.[21] Constructively engaging with both domestic civil society and the international community, the new government initiated a reform strategy plan for the 2017-2021 period.[22] As mentioned in the strategy, creating security, stability, and a good neighborliness belt around Uzbekistan is also a key priority foreign policy priority for Uzbekistan. It is noteworthy that under the initiative of the new Uzbek leader, Central Asian leaders are once again engaging in talks, however casual, following successive failures and, at times, severe clashes between neighboring states over the last twenty years.[23]

III. International law in the domestic legal order of Uzbekistan

Here let us clarify the position of international legal norms in the domestic legal system. Uzbekistan places the 1992 Constitution at the apex of its constitutional order.[24] In its preamble, the Constitution expressly declares the 'priority of

19 Mariya. Y. Omelicheva, H*uman Rights and Governance in Central Asia***,** in Central Asia in the Era of Sovereignty: The Return of Tamerlane?, 57 **(**Adams, Laura, *et al*. ed., Lexington Books) (2018).

20 *See* Uzbekistan: Events of 2018, Human Rights Watch, *available at* https://www.hrw.org/world-report/2019/country-chapters/uzbekistan (last visited Jan. 12, 2020).

21 *See* Maksim Yeniseyev, *Closure of infamous Uzbek prison lauded by international community*, Caravanserai, Aug. 21, 2019, available at: https://central.asia-news.com/en_GB/articles/cnmi_ca/features/2019/08/21/feature-01 (last visited Nov. 13, 2019).

22 *See*, *Uzbekistan's Development Strategy for 2017-2021 has been adopted following public consultation*, The Tashkent Times, Feb. 8, 2017, *available at* http://tashkenttimes.uz/national/541-uzbekistan-s-development-strategy-for-2017-2021-has-been-adopted-following- (last visited Nov. 13, 2019).

23 In 2012, Uzbekistan and Tajikistan even came to the brink of war over the division of transboundary river waters. *See* Joanna Lillis, *Uzbekistan Leader Warns of Water Wars in Central Asia*, eurasianet, Sept. 7, 2012, *available at* https://eurasianet.org/uzbekistan-leader-warns-of-water-wars-in-central-asia (last visited Dec. 17, 2019).

24 Ironically, however, since its adoption in December 1992, the Constitution has been amended fifteen times to date such a short period of independence. It is unlikely that it would have played much of a meaningful role for the general public during the democratic transition period. (To track the Constitution's amendment

the generally accepted norms of the international law'.[25] However, according to the general view of international law scholars in Uzbekistan, this provision does not give *priority* to international law norms over the Constitution per se.[26] Notably, the Constitution has no provision that defines the status of international law towards domestic law. In particular, Article 15 of Chapter 3 of the Constitution establishes the absolute supremacy of the Constitution and laws in the territory of the Republic. What is more, Article 16 of the same Chapter states that, '*None of* [*the*] *laws or normative legal acts may run counter to the norms and principles of the Constitution*.'[27]

> Furthermore, Article 4 of the Law 'On the Constitutional Court' provides that, the Constitutional Court examines the laws of the Republic of Uzbekistan and the decrees of the Chambers of the Oliy Majlis (parliament) of the Republic of Uzbekistan, decrees and orders of the President of the Republic of Uzbekistan, decrees of the government, decisions of local government bodies, **international treaties (only interstate treaties)** and other obligations of the Republic of Uzbekistan compliance with the Constitution of the Republic of Uzbekistan (emphasis added).

A literal interpretation of this provision suggests that international treaties must comply with the Constitution. In contrast, the norms of the Constitution do not have to comply with international agreements. It would appear, therefore, that international treaties have a lower position in the hierarchy of domestic legal order vis-a-vis the Constitution. (Chart.1)

What about customary international law? Is it possible to interpret the term 'generally accepted norms of international law', as stated in the preamble of the 1992 Constitution, as reflecting customary international law? Unfortunately, not

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history, *see also* https://lex.uz/docs/20596 (last visited Aug. 24, 2020)). From this perspective, one could describe the 1992 Constitution as 'super-flexible' when compared to the Constitution of the United States which has been amended twenty-seven times in its more than 200 years long history.

25 This term closely resembles Article 29 of the 1977 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics.

26 However, some authoritative constitutional law scholars in Uzbekistan argue that evaluating the preamble of the Constitution as non-binding represents the legacy of Soviet constitutional law, whereas, one has to give full legal effect to the 1992 Constitution including its preamble. Farida Bakayeva & Mirzatilla Tillabayev, *Organizatsiya ispolnenie mejdunarodnih obyazatelstv* (Organization of implementation of international obligations), Fan va texnologiya 86 (2018).

27 *See* the Constitution, *supra* note 8, art. 16, *available at* http://constitution.uz/en/clause/index (last visited Jan. 10, 2020).

only court judgments but also domestic legal textbooks and academic journal articles prefer to be silent on this matter for unknown reasons. In any case, taking the Preamble of the Constitution as treating customary international law to be part of the domestic legal system is not only entirely possible but also most desirable.[28]

What is more, the Law 'On Legal and Regulatory Acts' fails to list international treaties among the legal and regulatory acts that form the hierarchy of legal and regulatory acts according to their constitutional force (Article 5)[29](*see*, Figure 1).

On the other hand, many legal provisions actually prioritize international legal norms over domestic law in their initial provisions (precedence clause).[30] The 1995 Law 'On International Treaties' ('1995 LIT') also reiterates such a norm.[31] Yet, the 1995 LIT failed to articulate the order of precedence of international law in the hierarchy of the domestic legal order. Therefore, domestic scholars dispute the position of international legal norms within the domestic legal order. Therefore, are international treaties part of the domestic legal order of Uzbekistan, and, if so, what is their position within it?

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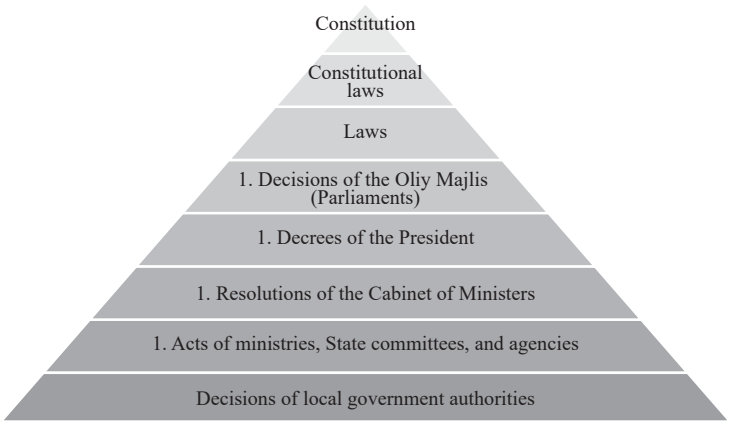
28 *See* for the same issue in neighboring countries, Girshovich, *supra* note 11, at 714-715.

29 The Law 'On Legal and Regulatory Acts of the Republic of Uzbekistan, Art. 5, LRU-160-II (14.12.2000)

30 For instance, *see also* http://lex.uz/ru/docs/-415135 But not all laws do the same, http://lex.uz/ru/docs/-107115 (last visited Feb. 07, 2020).

31 *See* Law of the Republic of Uzbekistan on International Treaties of the Republic of Uzbekistan, art. 2(3), LRU-518 (2019), *available at* https://lex.uz/docs/-4193761 (last visited Dec. 05, 2019).

Figure 1. Hierarchy of sources in the domestic legal order of Uzbekistan according to the Law on Legal and Regulatory Acts



The ambiguity of the Constitution in explaining the position of international law vis-à-vis domestic law can also be seen in relation to criminal law. The Regional Office for Central Asia of the UN Office on Drugs and Crime elaborated on this issue in its recent report as follows:

> Existing legal instruments governing criminal legal relations in the Republic of Uzbekistan, such as the Constitution, the Criminal Code, the Criminal Procedure Code, the Criminal Executive Code, the Laws "On Courts," "On Prosecutor's Office," "On Advocacy," and "On the Bodies of Internal Affairs," do not always directly prescribe the supremacy of international obligations of the state over its national legislation. Such ambiguity creates difficulties, and, sometimes, the reason for non-observance of the international norm by country's state authorities, despite the fact that the norm is obligatory being a part of international treaty of Uzbekistan.[32]

The executive and legislature seem to have finally noticed this ambigu-

32 *See* Regional Office for Central Asia United Nations Office on Drugs and Crime, *Criminal Justice Reforms in Uzbekistan: Brief analysis and recommendations*, Apr. 2018 (3.1. Aligning national legislation with the accepted international obligations), *available at:* https://www.unodc.org/documents/centralasia//2018/UNODC Criminal justice reforms in Uzbekistan Apr 2018 EN.pdf (last visited Aug. 24, 2020).

ity and felt the need to amend legislation with relevant clarifications. The new edition of the 2019 LIT boldly announced that international treaties ratified by Uzbekistan are an *integral* part of the legal system of Uzbekistan, along with generally recognized principles of international law. Specifically, Article 3 expressly states that:

> International treaties of the Republic of Uzbekistan, along with generally recognized principles and norms of international law, are an integral part of the legal system of the Republic of Uzbekistan.

Even though general principles of international law and treaties to which Uzbekistan is a party are recognized to be integral parts of the domestic legal system, the 2019 LIT does not settle the issue of the order of international treaties in relation to the domestic legal order. Thus, if international legal norms are indeed an integral part of the national legal system of Uzbekistan, in which order are they positioned within the domestic legal order vis-à-vis domestic legislation? Moreover, when a normative conflict between a domestic law lacking a precedence/superiority clause and a norm from an applicable (i.e., in force for Uzbekistan) international treaty, which norm and source should take precedence over the other? This is especially true in relation to the so-called 'constitutional laws' of Uzbekistan which totally lack a precedence/superiority clause.

According to the view of Uzbek scholars, the position of international legal norms in the domestic hierarchy of norms can be divided into three groups. The first group supports Akmal Saidov and Lola Saidova's theory that imply the priority of international treaties. They argue that their view is supported by the Preamble of the 1992 Constitution which expressly affords priority to international treaties and agreements. Therefore, according to them domestic courts may directly apply international treaties that have already been ratified by Parliament.[33]

However, supporters of the second group place priority to neither international nor domestic law. For example, Husan Tursunov points out that international legal norms do not always overlap with domestic law, and that each situation should be taken into account on a case-by-case basis.[34] Under that view,

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33 Akmal Saidov, *Inson huquqlari bo'yicha xalqaro huquq (International Human Rights Law)*, Konsaudit-inform 93 (2006). *See also* Lola Saidova, *O'zbekiston Respublikasi qonunchiligiga xalqaro normalarni implementatsiya qilishning ba'zi bir jihatlari* (Some aspects of implementation of international norms into Uzbekistan's legislation) 107, (unpublished materials of scientific-practical seminar) (2006).

34 Tursunov, *Supra* note 11, ch. I (TSIL).

sometimes, courts should, and would be justified to do so, prioritize Uzbekistan's international obligations arising under international law over domestic legislation, in fulfilling Uzbekistan's foreign policy goals, whilst, in other occasions, courts should prioritize domestic legislation if this is would better promote public policy objectives and state sovereignty. But Husan Tursunov implies the norms of the Constitution by using the term 'domestic law'.[35]

The third group criticizes the view of the first group. According to the third group, the Preamble of the Constitution should not be interpreted in a literal matter. If it is to be interpreted as such, it would be understood that the Constitution was adopted based on the generally accepted norms of international law, nonetheless it does not imply that international law norms can be applied directly. They distinguish generally accepted norms of international law from other international documents.[36] Thus, the third group believes that the Preamble of the Constitution does not give priority to international treaties. In addition, it argues that neither is there a specific norm in the Constitution that indicates the precedence of international law nor does the Constitution determine the position of international law in the domestic legal order.[37] The third group believes that the role of international legal norms in the domestic legal order is rather vague and that such norms are not considered to be normatively equal to domestic laws.[38] Although the Constitution was adopted based on universally recognized principles of international law, it cannot be assumed that it affects the specific position of international treaties within the domestic legal order.[39]

To conclude, according to the first group, the Preamble of the Constitution and the existence of all main universal principles of international law in the Constitution make it possible for courts to directly apply international treaties in

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35 *Id.*

36 Gulchehra Matkarimova, *Xalqaro huquq va O'zbekiston huquqiy tizim*i *(International Law and the Legal System of Uzbekistan)*, 35 (Tashkent State Institute of Law) (2002).

37 Nugman Nugmanov, *Primenenie mejdunarodno-pravovih norm po pravam cheloveka v Respublike Uzbekistan (Application of Norms of International Human rights in the Republic of Uzbekistan)* 13 (2005) (unpublished Ph.D. dissertation, University of World Economy and Diplomacy).

38 Irkin Umarahunov, *Primenenie mejdunarodnih dogovorov Respubliki Uzbekistan. Sudebnaya zashita prava cheloveka: problemi teorii i* praktika (Application of International Treaties of the Republic of Uzbekistan. Judicial protection of human rights: theoretical and practical issues), 74 (Tashkent State Institute of Law) (2003).

39 Valijon Hoshimov, *Xalqaro huquq me'yorlarini milliy qonunchilikka implementatsiya qilishning ayrim masalalari (The Some Issues of Implementation of International Norms into National Law)*, 55 O'zbekiston qonunchiligi tahlili (2006).

domestic cases before them. This is mainly because the courts are the primary mechanism of ensuring the priority of international agreements in the domestic legal system. Yet, those who identify with the second and the third group divide the application of international treaties into direct and indirect. In their opinion, international treaties on human rights cannot be applied directly in domestic cases. Such treaties should first be implemented into domestic law before their norms may be applied in domestic cases. They argue that if there is no implementation into domestic law, or there is a contradiction between domestic law and an international treaty ratified by Uzbekistan, it may yet be possible for international treaties on human rights to be applied directly in domestic courts.

Chart 1. Comparative chart of the hierarchy of domestic and international law in municipal legal systems

Japan		**US**		**Uzbekistan**	
Domestic law	***International law***	***Domestic law***	***International law***	***Domestic law***	***International law***
Constitution		Federal Constitution		Constitution	
				Constitutional statute	
	Treaty / International custom				Treaty / International custom
Statute		Federal law	Treaties	Statute	
			International custom		
		State constitutions / Laws			

To sum up, one may witness that there is no unanimous consensus on the position of international treaties vis-a-vis domestic law. The reason is that all major laws such as the Constitution, the Law 'On Legal and Regulatory Acts' and the LIT have failed to clarify the exact position of international treaties within the legal order of Uzbekistan. While the Constitution only recognizes the 'soft' priority of international norms over domestic legislation, what is clear from domestic legislative practice is that in order for international norms to be domestically applied, implementation of legislative acts are necessary.[40]

40 *See* for the similar point, Girshovich, *supra* note 11, at 715-716.

> The national legal system recognizes the supremacy of the Constitution and the precedence of international law over national legislation. An international treaty must be incorporated into national legislation before it can be applied. Following incorporation, the rules of international law become part of national legislation and are binding. However, it has not become standard practice for judicial bodies to make direct reference to specific international treaties; such practice is in fact extremely rare.[41]

The domestic legal order also contains so-called 'constitutional laws' which refer to politically significant statutes such as the Law 'On the Constitutional Court',[42] the Law 'On the Legislative Chamber',[43] and the Law 'On the Senate'.[44] Following our investigation, we believe that not a single constitutional law recognizes the priority of international law in its initial provisions. This shows that not only the Constitution, but also the legislature perceives constitutional law to be higher compared to international treaties.[45]

IV. Ratification and implementation of treaties in the Uzbek legal system

Not all treaties are subject to parliamentary approval.[46] Uzbekistan has already become a party to the UN's international human rights treaties and to a further seventy international treaties related to human rights.[47] However, Uz-

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41 'Common core document forming part of the reports of States parties: Uzbekistan', HRI/CORE/UZB/2017, para 269, (23 October 2017).

42 *See also* https://lex.uz/docs/3221763 (last visited Mar. 12, 2020).

43 *See also* https://lex.uz/docs/51961 (last visited Mar. 12, 2020).

44 *See also* https://lex.uz/docs/51799 (last visited Mar. 12, 2020).

45 This may be logical if we take that all treaties are ratified by legislative acts, therefore on account of their higher position vis-à-vis legislative acts, constitutional statutes may be given priority where conflict with international law norms arises.

46 Law of the Republic of Uzbekistan on International Treaties of the Republic of Uzbekistan, art. 18, LRU-518 (2019).

47 They include, *inter alia*, the Convention on the Rights of the Child (June, 29, 1994); Convention on the Elimination of All Forms of Discrimination against Women (Jul. 19, 1995); Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Sept. 28, 1995); International Convention on the Elimination of All Forms of Racial Discrimination (Sept. 28, 1995); International Covenant on Economic, Social and Cultural Rights (Sept. 28, 1995); International Covenant on Civil and Political Rights (Sept. 28, 1995); Second Optional Protocol to the International Covenant on Civil and Political Rights

bekistan has yet to join the UN Convention on the Rights of Persons with Disabilities (2006). Notwithstanding its signature in 2009, Uzbekistan has yet to complete the ratification process.[48] Following the elimination of widely-criticized child and forced labor,[49] the Labour Inspection Convention (1947), Labour Inspection (Agriculture) Convention (1969), Tripartite Consultation (International Labour Standards) Convention (1976) are imminently expected to enter into force in Uzbekistan during the latter half of 2020.[50]

Following the compulsory scrutiny of treaties by legal experts from the relevant ministries, the Constitutional Court also plays a key role in the ratification process. As we have already noted earlier, Article 4 of the Law on the Constitutional Court provides the court with additional competence (preventative review). The current provision establishes that,

> The Constitutional Court determines compliance with the Constitution of the Republic of Uzbekistan of the constitutional laws of the Republic of Uzbekistan, laws of the Republic of Uzbekistan on ratification of international treaties of the Republic of Uzbekistan - before they are signed by the President of the Republic of Uzbekistan.

By amending the Law 'On the Constitutional Court', the legislature introduced a prior monitoring mechanism in 2017, particularly by the Constitutional Court, of the constitutionality of a proposed treaty. Therefore, in the event of conflict between the treaty and the Constitution, the latter can be amended before international commitments are ratified by Parliament and signed by the Presi-

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aiming to the abolition of the death penalty (Dec. 23, 2008); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Dec. 23, 2008); Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (Dec. 23, 2008).

48 The UN and EU are actively urging Uzbekistan to complete the ratification process. However, the official reasons behind the ratification delay have yet to be announced. *See* United Nations in Uzbekistan, Public discussion on the process of ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the Republic of Uzbekistan, 4 April 2019, *available at http://www.un.uz/eng/news/display/361* (visited Mar. 17, 2020).

49 Until recently, Uzbekistan has had a serious international reputation problem with its forced child labor issue in cotton fields. Although the Mirziyoyev government is taking considerable action to end this controversial practice, a cotton boycott campaign against the country is still in place. *See* Julia K. Hughes & Nate Herman, *It's Not Time to End the Uzbek Cotton Boycott Yet: Companies should not buy Uzbekistan's cotton until labor protections and responsible sourcing are guaranteed,* Foreign Policy, May 28, 2020, *available at: https://foreignpolicy.com/2020/05/28/uzbek-international-cotton-boycott/* (last visited June 12, 2020).

50 *See* International Labor Organization, *Ratifications for Uzbekistan, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103538* (last visited June 12, 2020).

dent. It seems that legislators intended to prevent conflict between the norms of international treaties and the Constitution. After the 2017 revision of the Law on the Constitutional Court, no case has been published by the Constitutional Court. This may suggest that Parliament has only ratified treaties which are compatible with the basic principles of the Constitution. Since the Constitutional Court has not generated a single case on this issue, we are not aware of any warning from the Constitutional Court to the executive.

The implementation of treaties in Uzbekistan seems to indicate an interesting practice. Exhibiting the hallmarks of a robust dualist system, Uzbekistan's practice of international law suggests that it favors the transformation, over the incorporation, of international norms in specific statutes. For instance, following calls from the Committee on Economic, Social and Cultural Rights ('CESCR') and the Committee on the Elimination of Discrimination against Women ('CEDAW') the Uzbek Parliament adopted the Law 'On the Guarantees of Equal Rights and Equal Opportunities for Men and Women' (2019) in relation to cultural stereotypes regarding the role of women in society.[51] Taking further steps, in the same year, Uzbekistan adopted specific legislation on violence against women.[52] Furthermore, the country incorporated its international obligations through following the Law on 'Guarantees of the rights of the Child' (2008),[53] adopting the Law 'On Countering the Trafficking in Persons', and amending Article 135 of the Criminal Code.[54] More importantly, both chambers of Parliament recently passed the citizenship law in February 2020, which eventually grants citizenship to 50,000 stateless persons.[55] It is another bold move forward towards the implementation of international norms that protect and reduce the numbers of stateless persons.

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51 *See* Law On the Guarantees of Equal Rights and Equal Opportunities for Men and Women, LRU-562 (Sep. 2, 2019), *available at https://lex.uz/docs/4494849* (last visited Jan. 14, 2020).

52 See Law On the Protection of Women against Oppression and Violence, LRU-561 (Sep. 2, 2019), *available at https://lex.uz/docs/4494709* (last visited Jan. 14, 2020)

53 No doubt the Law aimed at the domestic implementation of international standards in this sphere, such as the Convention on the Rights of the Child.

54 In the background of this legislative action lies Uzbekistan's ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2002). This has brought the definition 'trafficking in persons' in conformity with international treaties.

55 *See* Law On the Citizenship of the Republic of Uzbekistan, LRU-610 (to enter into force by September 15, 2020), *available at: https://lex.uz/docs/4824096* (last visited June 27, 2020).

Chart 2. Ratification process of treaties in Uzbekistan

But these improvements do not mean that everything is perfect in the case of incorporation. During the work of the Working Group on the Universal Periodic Review in 2018, seventy-seven delegations addressed statements to Uzbekistan for the improvement of human rights conditions.[56] Subsequently, Uzbekistan accepted 198 recommendations from those it had received. This figure points towards the considerable amount of work necessary for the effective implementation of international norms in Uzbekistan. While many delegations acknowledge the efforts of the Mirziyoyev government over the last two and a half years in this regard, it was still necessary for them to make crucial recommendations. The long list of such recommendations implies that the executive and legislature of Uzbekistan must carry out plenty of work to catch up with international legal standards.[57]

56 *See* United Nations Human Rights Council, *Universal Periodic Review – Uzbekistan*, Third cycle, (2018), *available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/UZindex.aspx* (last visited May 05, 2020).

57 Those recommendations include, *inter alia,* that Uzbekistan: ensure respect for the freedoms of expression, association, and assembly, in accordance with international human rights standards (Finland); ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Greece, Chile, Denmark, Estonia, Ghana, Lithuania, Senegal); address the cultural and linguistic needs of minorities (Kazakhstan); ensure respect for transparency and equity in the granting of land and real-estate facilities to investors (France); continue to provide appropriate training to lawyers, prosecutors and judges in order to carry out judicial reforms (Japan); further strengthen ongoing efforts to increase transparency of its judiciary (Republic of Korea); revise so-called religious 'extremism' laws to decriminalize peaceful religious activities, simplify registration requirements for religious groups, and remove penalties on religious literature communications (the United States); revise provisions in the country's criminal and administrative codes relating to freedom of religion or belief so as to conform with Article 18 of the International Covenant on Civil and Political Rights (Canada); decriminalize defamation and

V. Application and interpretation of international law by Uzbek courts: judicial practice at a glance

In this section, we examine the jurisprudence of domestic courts on matters engaging international law. Up until mid-2018, court judgments were not disclosed to the general public; in fact, not even legal scholars had access to them. Instead, the Supreme Court would only publish its Plenary Judgments in an abridged form. In the face of public discontent,[58] a presidential decree was issued concerning the transparency of court activities which compelled the Supreme Court to disclose court decisions to the public.[59] Therefore, at the time of writing, domestic court judgments were publicly available. Nonetheless, despite progress, occasionally temporary shutdowns of, and difficulties in accessing, the court website present considerable barriers to searching and locating cases involving international legal issues.

A. Judicial competences of courts in Uzbekistan: the power of judicial review

The domestic judiciary consists of the following courts: the Constitutional Court, the Supreme Court, the Military Courts, the Supreme Court of the Karakalpakstan Autonomous Republic, and various provincial courts with separate civil, economic, and administrative law jurisdiction.[60] With only 3,000 active judges for an ever-increasing population of 34 million, the domestic judiciary is no less busy than its counterparts in other jurisdictions.

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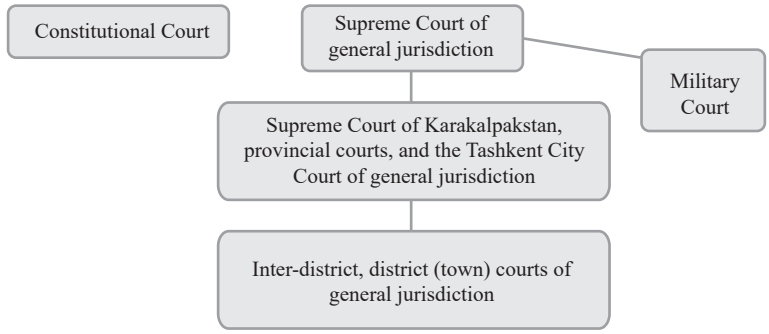
include it in the Civil Code in accordance with international standards (Estonia); continue to work closely with international organizations to eradicate the drivers of forced labor and ensure compliance with ILO recommendations across all sectors (the United Kingdom); take necessary steps to attain gender parity in the higher education system, and address barriers to non-traditional education and career paths for girls and women in the country (Malaysia), etc. *See* Report of the Working Group on the Universal Periodic Review, Human Rights Council Thirty-ninth session, A/HRC/39/7, (Sept. 10–28, 2018) *available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/208/50/PDF/G1820850.pdf?OpenElement* (last visited Feb. 08, 2020).

58 *See* Alisher Umirdinov, *Odil sudlovning shaffofligi: bizda sud qarorlari qachon ommaga e'lon qilinadi? (Transparency of judiciary: when the court decisions will be made public?)*, xabar.uz, June 19, 2018, *available at https://xabar.uz/huquq/odil-sudlovning-shaffofligi* (last visited Dec. 23, 2019).

59 *See* The web-page of the Supreme Court of Uzbekistan, *available at:* https://public.sud.uz/#!/sign/view.

60 *See* Maria Stalbovskaya (update by Mirfozil Khasanov), *UPDATE: Legal Research in Uzbekistan*, GlobaLex, *available at https://www.nyulawglobal.org/globalex/Uzbekistan1.html#_Judicial_Authority_in_the_Republic_* (last visited June 16, 2020).

Chart 3. The structure of the judiciary in Uzbekistan



First, the Constitutional Court is the only court that may exercise judicial review. It hears cases related to the constitutionality of laws, as well as of treaty and other international obligations of Uzbekistan. The Court refrains from examining facts if the latter are within the competence of other courts or agencies. Until now, the Court has only handled a few cases and has failed to tackle highly contentious issues. The reason behind its ineffectiveness lies in structural barriers. In fact, individuals had no legal standing before the Constitutional Court and, therefore, no access to it, and the new government is considering action to alter this situation in favor of its citizens. For example, Parliament amended the Law 'On the Commissioner of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman)' in 2017 by providing the Ombudsman the right of direct access to the Constitutional Court (Article 20). Furthermore, since early 2020, reacting to calls by legal practitioners and scholars,[61] political leaders have started to exhibit a willingness to widen the class of prospective petitioners/persons with legal standing persons who may apply to the Constitutional Court.[62]

Three years ago, the legislative body amended the Constitutional Law 'On the Constitutional Court' to prevent the occurrence of contradictions between international treaties and Constitution. According to Article 4 (paragraph 2), the

61 *See* Rustam Abdug'ofurov, *Konstitutsiya kunida janob Prezidentdan eshitishni istaganlarim (What I want to hear from Mister President on the Day of Constitution)*, SOF.UZ, Nov. 30, 2019) *available at* https://sof.uz/uz/post/konstituciya-kunida-janob-prezidentdan-eshitishni-istaganlarim (last visited Feb. 13, 2020).

62 *See Fuqarolarga Konstitutsiyaviy sudga masala kiritish huquqi beriladi (Citizens will get a right of appeal to the Constitutional Court)*, kunz.u, Feb. 11, 2020, *available at* https://m.kun.uz/uz/news/2020/02/11/fuqarolarga-konstitutsiyaviy-sudga-masala-kiritish-huquqi-beriladi (last visited Mar. 18, 2020).

Constitutional Court conducts a preventative review concerning the constitutional compliance of the proposed ratification of an international treaty before it is signed by the President. While this new mechanism may prevent conflicts between the Constitution and international agreements, it does not guarantee absolute compliance. Due to the evolutionary development of international law, it is not uncommon for international organizations to provide contracting parties and other stakeholders with commentaries on the international treaties within the scope of such organizations after many years that such instruments/agreements have entered into force. When an international organization issues commentary on some provisions of a particular international treaty already ratified by Uzbekistan, it is possible that some interpretative discrepancies, or even conflicts, may arise between the views of the Constitutional Court (as expressed in its earlier review) and the views expressed by the international organization in its subsequent commentary. So long as such differences give rise to problems in the application of an international treaty to domestic cases, only the Supreme Court may refer matters to the Constitutional Court concerning the compliance of international treaty provisions with the Constitution. As mentioned earlier, presently, individuals do not have legal standing before the Constitutional Court.

Second, notwithstanding the fact that the Constitutional Court has exclusive judicial review powers to consider the constitutionality of treaties, the Law 'On Courts' also gives wide judicial powers to ordinary courts. For instance, this piece of legislation states that domestic courts are called upon to exercise the judicial protection of the rights and freedoms of citizens as proclaimed by, among other things, 'international acts on human rights, rights and interests of enterprises, institutions and organizations protected by law' (Article 2). However, this law fails to mention international acts on human rights or other international legal norms, especially in Article 66, which establishes the responsibilities of judges. According to Article 66,

> Judges, within the limits of their authority, shall strictly adhere to the Constitution and other laws of the Republic of Uzbekistan, to protect the rights and freedoms of citizens, their privacy, dignity and property, the rights and interests of enterprises, institutions and organizations which are protected by law. They [i.e., judges] must be fair.

In our opinion, since international treaties have become an integral part of the domestic legal system, Article 66 does not pose severe obstacles to local

courts. Theoretically, judges are afforded discretion in interpreting and applying international treaties binding on Uzbekistan.

Third, the Supreme Court of Uzbekistan is the highest court with civil, criminal, and administrative law jurisdiction. Its rulings are binding across Uzbekistan on all-natural and legal persons. The Supreme Court has the right to supervise the administration of justice by the Supreme Court of the Karakalpakstan Autonomous Republic, as well as by provincial, city, town, and district courts. A critical feature of the Supreme Court is that it issues interpretations and guidance for the application of laws that are binding on lower courts and advisory/persuasive for law-enforcement agencies.[63] Notably, the Plenum of the Supreme Court considers materials for the harmonization of court practice, and issues explanations concerning the application of legislation.[64] Although Plenum decisions are not recognized as a source of law within the domestic hierarchy of norms as outlined in the Law 'On Legal and Regulatory Acts', and the Law 'On Courts', in practice, domestic judges do approach such decisions as judicial precedent. Plenum decisions play an essential role in the interpretation and application of laws by the judiciary.

Such interpretations and guidance play a significant role where domestic courts make only a very formalistic interpretation of statutes, and where they intentionally abstain from using their broad interpretative powers. The court decisions issued by domestic courts are notoriously terse and dry; this fact demonstrates the tendency of lower courts to seek top-down guidance from the Supreme Court on the interpretation of ambiguous points of primary or secondary legislation. To date, the Plenum of the Supreme Court has issued interpretative resolutions in excess of 30 times.[65]

The Plenum of the Supreme Court, in its guidance to lower courts, has covered international legal norms on a number of occasions. For instance, the Plenum has advised lower courts to take relevant international treaties into account on the application of amnesty acts;[66] has stressed the need for *habeas corpus* re-

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63 *Id*. at 61.

64 *See* Article 17. Powers of the Plenum of the Supreme Court of the Republic of Uzbekistan, Law on Courts.

65 *See O'zbekiston Respublikasi Oliy sudi Plenumning amalda bo'lgan qarorlari ro'yxati (List of current decisions of the Plenum of the Supreme Court of the Republic of Uzbekistan)*, *available at:* https://nrm.uz/contentf?doc=166895_o'zbekiston_respublikasi_oliy_sudi_plenumning_amalda_bo'lgan_qarorlari_ro'yhati (last visited Jan. 11, 2020).

66 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on Some Issues of the Ap-

forms of domestic law aimed at ensuring the lawfulness of detention in line with international standards;[67] and has emphasized that Uzbekistan has ratified several international instruments to combat human trafficking and has adopted the Law 'On Combating Trafficking in Human Beings' and introduced corresponding amendments to national legislation implementing the norms of international law.[68] The Supreme Court has also asked lower courts to adhere to international legal standards on maternity protection and the legal protection of the child.[69]

The Supreme Court has also urged lower courts to pay attention to the following provisions in international treaties in their respective decisions: under Article 11 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, each person charged with a crime will not be charged until his/her guilt is proven in court;[70] courts in criminal cases involving drugs and psychotropic substances must follow international treaties in this area, including the Convention on Psychotropic Substances (Vienna, 1971), the United Nations Convention on Drugs (Vienna, 1961), the United Nations Convention against Drugs and Psychotropic Substances (Vienna, 1988))[71]. It is the right of every individual to demand an independent and impartial trial, which is enshrined in Article 10 of the Universal Declaration of Human Rights and other international legal instruments to which Uzbekistan is a party.[72] The Supreme Court has also reminded lower courts of some cases in which one spouse had moved abroad for permanent residence, and he/she fails to appear in court, the court may take measures to notify the parties in accordance with international treaties relevant to Uzbekistan.[73] These referrals suggest that the Supreme Court

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plication of Amnesty Acts by Courts, N:16, (Dec. 22, 2006).

67 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on the Application of by the Courts of Prevention Measures in the Type of Security Conclusion at the Pre-Treatment Stage, (Nov. 14, 2007).

68 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on Some Issues of Court Practice on Human Trafficking, N:12 (Nov. 24, 2009).

69 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on the Practice of Application by the Courts of the Legislation of Disputes Concerning the Child Education, N:23 (Sep. 11, 1998).

70 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on Court Judgments, N:07 (May 23, 2014).

71 Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan on Court Practice in Criminal Cases Concerning Illegal Use of Drugs and Psychotropic Substances, N:12 (Apr. 28, 2017).

72 Resolution of the Supreme Economic Court of the Republic of Uzbekistan on Judicial Power, N:1/60, (Dec. 20, 1996).

73 Decision of the Plenum of the Supreme Court of the Republic of Uzbekistan on the Practice of Application of the Law on Divorce Proceedings by Courts, N:06, (July 20, 2011).

is well-aware of the international legal obligations of Uzbekistan.

In sum, the Constitutional Court remains inactive, and ordinary courts have just started publishing their cases in recent years. Therefore, domestic legal scholarship has yet to become accustomed to extensive case analysis, as is the case in common law countries such as the United States and the United Kingdom, continental European countries such as France and Germany, or other countries such as Japan. Legal textbooks extensively focus on the introduction of norms in statutes or codes, rather than elaborating on legal issues by reference to specific court practice (e.g., court judgments), which results in legal textbooks being fairly tedious and descriptive.[74] Despite such shortcomings, still, we can find some contentious domestic court cases involving international law. The following sections will highlight those cases.

B. Contentious cases in domestic courts involving international legal issues

Even though there is no consensus on the application of international treaties among domestic scholars, they all actively criticize domestic courts on the non-application of international treaties. For instance, Tursunov criticizes the court decision in *Fleks international manufacturing trading v. Bektemir district tax inspection* (2005). In this case, the Economic Court of Tashkent City had failed to apply the double tax treaty between Canada and Uzbekistan,[75] even though that agreement ought to have been applied directly.[76] Furthermore, *Jamshid farm company vs Custom committee* was also criticized. In this case, the Economic Court of Tashkent City made an inconsistent decision by not applying the Agreement between Kazakhstan and Uzbekistan on free trade of June 2, 1997. However, later these two decisions were overturned by the Supreme Economic Court. That Court stated that the relevant international agreements ought to have been applied in those cases. Particularly, regarding the latter case, the Supreme Economic Court in cassation stated that non-application of the relevant international trade agreements could further be a breach of the Vienna Convention on the Law

74 For the state of legal education in Uzbekistan, *see* Aziz Ismatov, *Legal Education in Uzbekistan*: Historical Overview and Challenges of Transition, (Discussion Paper, No.18, Center for Asian Legal Exchange (CALE)) (2019), *available at* http://cale.law.nagoya-u.ac.jp/_userdata/CALE%20Discussion%20Paper-No18.pdf (last visited Feb. 25, 2020).

75 The agreement on 'For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital' between Canada and Uzbekistan, (17. 06. 1999 Ottawa).

76 *Id*. at 34.

of the Treaties. These cases prove that higher domestic courts have been aware of the country's international obligations. However, may we assume the same attitude in other fields of international law as well? This question is addressed in the following subsections.

1. Protection of religious freedom

In Uzbekistan, the absolute majority of the population in the country is believed to identify with Sunni Islam, and social life is, to a large extent, affected by the Hanafi school of Islamic jurisprudence. Notwithstanding this fact, the political elite still distances itself from devout Muslims, and, on fundamental issues, the State apparatus still firmly adheres to Soviet-era practices concerning secularism and the secular state. The wearing of the headscarf in public places, particularly in public schools and universities, remains a contentious issue. The *hijab*, another term used in relation to the headscarf, is obligatory for every Muslim female in Islam who has reached puberty. The hijab covers the entire body of a woman except for the face and hands. Although some women may decide to cover their faces and hands as well, this is not widespread in Uzbekistan. Yet, all public schools and other higher education institutions prohibit the use of a traditional hijab, consisting of a scarf covering the hair and neck.

In Uzbekistan, the veil is considered too excessive even for practicing Muslims. Therefore, the main discussions revolve around the scarf. Such contentious disagreement between people who want to practice their faith and the secular state apparatus has existed since independence following the collapse of the Soviet Union. Domestic courts have dealt with human rights cases involving women and the scarf since the late 1990s. In *Raihon Hudoyberganova v. Uzbekistan*, the United Nations Human Rights Committee ('UNHRC') ruled that a school's treatment of a student violated Article 18 of the International Covenant on Civil and Political Rights ('ICCPR') which prohibits 'coercion that would impair the individual's freedom to have or adopt a religion' (para 6.2).[77]

Raihon Hudoyberganova started wearing a hijab to the Tashkent State Institute of Eastern Languages in Uzbekistan during her second year of studies.

77 *See* Raihon Hudoyberganova v. Uzbekistan, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004), *available at:* http://hrlibrary.umn.edu/undocs/html/931-2000.html (visited Nov. 12, 2019). A very convenient summary of this case may also be found in Global Freedom Expression Initiative of Columbia University, *available at:* https://globalfreedomofexpression.columbia.edu/cases/hudoyberganova-v-uzbekistan/ (last visited Nov. 12, 2019).

That year, the Institute adopted a regulation that restricted students from wearing religious apparel to school. Hudoyberganova refused to abide by the regulation and was, consequently, banned from the students' residence and, eventually, from the Institute. Subsequently, Hudoyberganova filed a lawsuit before a district court in Tashkent, requesting that her student rights be restored. In response, the Institute demanded Hudoyberganova's arrest for violating a national law passed on May 15, 1998, that restricted Uzbek citizens from wearing religious apparel in public places. The district court dismissed Hudoyberganova's lawsuit. She appealed, but the lower court decision was upheld by the Supreme Court.[78] She also appealed to the Ombudsman, who replied with a copy of a letter from the Institute's dean, where he alleged that Hudoyberganova had violated the Institute's regulations and belonged to an extremist Wahhabi sect.[79] The UNHRC reasoned that although the freedom to manifest one's religion is not an absolute right, but rather one that may be subject to limitations, Uzbekistan had not justified as to why this particular restriction had been necessary.[80] The following dictum of the UNHRC at the merits phase warrants full citation:

> The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or

78 *Id*. para. 2.9.

79 *Id*. para. 2.10.

80 *Id*. para. 6.2.

> morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.[81]

Reminding the state of its obligation to provide an effective and enforceable remedy in case a violation has been committed, the UNHRC wished to receive from Uzbekistan, within 90 days, information about the measures taken to give effect to the UNHRC's views. Yet, Uzbekistan has not taken any steps to correct its way of settling the issue or incorporate the UNHRC's view on the scarf issue. Rather, after almost twenty years, the hijab-related cases re-surfaced in recent cases, namely, *Luiza Muminjonova v. Islamic Academy of Uzbekistan* and *Nazimakhon Abdukakharova v. Islamic Secondary School of Islamic Academy of Uzbekistan*.[82]

Two female students, Luiza Muminjanova and Nazimakhon Abdukakharova filed lawsuits against the restrictions on the hijab, which was imposed in 2018 by the International Islamic Academy and its secondary school. A government decision of August 15, 2018, signed by Prime Minister Abdulla Aripov, imposed

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81 *Id*. para. 6.2.

82 *See Uzbekistan: Supporters of Islamic clothing take battle to court*, Eurasianet, Mar. 14, 2019, available at: https://eurasianet.org/uzbekistan-supporters-of-islamic-clothing-take-battle-to-court (last visited Dec. 16, 2019).

a secular dress code in all educational institutions. This meant a *de facto* ban on the hijab. Muminjanova stated that soon after she was accepted to the Academy in September 2018, she found out that she could not attend classes in the hijab. The Academy cited the government's new secular dress code.[83] The Academy placed several signs outside its building in late 2018, illustrating what clothing was and was not acceptable for male and female students based on the relevant government decision. The posters indicated that female students must wear knee-length skirts, and that the head must be uncovered. The examples of photos of women in long dresses covering their legs and headscarves covering their neck and head were crossed out with red lines, indicating that such attire was not allowed. Furthermore, both Tashkent City's Shaykhantaur District Court (first instance) and Tashkent City Appeal Administrative Court between February and March 2019 supported the ban. The two women appealed to the Supreme Court on 28 March 2019.[84] However, later on, Muminjonova, gave up her battle and went to Turkey, a religious friendly country, to pursue her bachelor's degree in religious tourism.[85] The other case had a similar outcome. After losing in the first instance, Abdukakharova challenged the judgment of the first instance court in appeal as well as before the Supreme Court. Alongside the appeals court, the Supreme Court dismissed the claimant's arguments noting that the academy had the right to determine its school uniform policy.[86]

Indeed, Article 18 of the Constitution of Uzbekistan guarantees all citizens equal rights and freedoms, and equality before the law without discrimination on the basis of sex, race, nationality, language, religion, social origin, convictions, or individual and social status. In addition to that, the basic law conditions the exercise of the rights of citizens must not encroach upon the lawful interests, rights, and freedoms of other persons, the state, and society (Art. 20). Nonetheless, state organs still try to place limitations on religious people to discourage and restrain religious practice. Although we are not aware whether the above two claimants

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83 *See* Mushfig Bayram, *Uzbekistan: Supreme Court challenge to student hijab ban*, Forum 18, Apr. 29, 2019, *available at:* http://www.forum18.org/archive.php?article_id=2472 (last visited Dec. 16, 2019).

84 *See supra* note 82.

85 *See Ўзбекистон: Ислом академиясида рўмоли билан ўқий олмаган Луиза Мўминжонова Туркияга ўқишга кирди (Uzbekistan: Luiza Muminjonova entered university in Turkey after she could not study at Islamic Academy of Uzbekistan with her hijab)*, BBC News, Sept. 22, 2019, *available at:* https://www.bbc.com/uzbek/uzbekistan-49789353 (last visited Nov. 30, 2019).

86 *See* U.S. Embassy in Uzbekistan, *2019 Report on International Religious Freedom: Uzbekistan, Office of International Religious Freedom*, *available at* https://uz.usembassy.gov/2019-report-on-international-religious-freedom-uzbekistan/ (last visited Jan. 6, 2020).

relied on international law norms in their respective cases, the hijab issue has yet to be settled in Uzbekistan. During visits of UN special envoys, government representatives speak and act in a matter as to suggest that the government is paying proper attention to religious freedom, however, once the visits are over, this is then brushed aside.[87] But it is true that putting in place strict prohibitions on the manifestation of religious beliefs in public places, the prohibition of the hijab being one example, government bodies continue to ignore the fundamental rights of female students to religious expression, thus, also indirectly restricting their right to education.

2. Recognition and enforcement of foreign arbitral cases by domestic courts

Another thorny issue of international law in the domestic courts is the recognition and enforcement of foreign arbitral cases. The country is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'). In addition to the ICSID Convention, Uzbekistan is also party to more than fifty bilateral and multilateral investment treaties and has already faced numerous investor-state arbitrations overseas. Fortunately, Article 54(1) of the ICSID Convention states that,

> each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[88]

This provides considerable relief for foreign investors because it almost entirely relieves such parties from seeking local courts to recognize and enforce ICSID panel awards. Furthermore, Uzbekistan is no exception when it comes to foreign investors seeking the enforcement of ICSID or other investment treaty awards in the domestic courts of a host state.

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87 Until today, historical visits of the UN High Commissioner for Human Rights, Zeid Ra'ad Zeid Al Hussein in May 2017 and the UN Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, and their critical comments, have yet to result in position outcomes in Uzbekistan. *See* the Preliminary findings of Country Visit to Republic of Uzbekistan by the Special Rapporteur on freedom of religion or belief, Tashkent, (12 October 2017), *available at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22224&LangID=E (last visited Feb. 01, 2020).

88 *See* The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (entered into force on Oct. 14, 1966) *available at* https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf (last visited Dec 08, 2019).

The list of Investor-State Dispute Settlement cases that Uzbekistan has faced to date

Case title	*Applicable Investment Treaty*	*Status/Forum*
1. *Federal Elektrik Yatirim v. Uzbekistan* (2013)	Turkey-Uzbekistan BIT (1992)	Pending, ICSID Case No. ARB/13/9
2. *Güneş Tekstil v. Uzbekistan* (2013)	Turkey-Uzbekistan BIT (1992)	Decided in favor of investor ICSID Case No. ARB/13/19
3. *Kim v. Uzbekistan* (2013)	Kazakhstan-Uzbekistan BIT (1997)	Pending ICSID Case No. ARB/13/6
4. *Spentex v. Uzbekistan* (2013)	Netherlands-Uzbekistan BIT (1996)	Decided in favor of State ICSID Case No. ARB/13/26
5. *Oxus Gold v. Uzbekistan* (2011)	United Kingdom-Uzbekistan BIT (1993)	Decided in favor of investor UN-CITRAL
6. *Metal-Tech v. Uzbekistan* (2010)	Israel-Uzbekistan BIT (1994)	Decided in favor of State ICSID Case No. ARB/10/3
7. *Romak v. Uzbekistan* (2006)	Switzerland-Uzbekistan BIT (1993)	Decided in favor of State PCA Case No. AA280
8. *Bursel Tekstil v Uzbekistan*(2017)	Turkey-Uzbekistan BIT (1992)	Pending ICSID Case No. ARB/17/24

The problem, however, lies with the recognition and enforcement of *foreign commercial awards* delivered by foreign commercial arbitral institutions or *ad hoc* arbitrations overseas. Uzbekistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on June 10, 1958 ('the New York Convention'). It also is a party to multiple bilateral and multilateral agreements on the enforcement of foreign court decisions, none of which are with major Western countries.

On this issue, the Economic Procedure Code of Uzbekistan ('EPC') includes a separate chapter regulating the recognition and enforcement of foreign court judgments and arbitral awards. Pursuant to this chapter, foreign judgments and awards will be recognized and enforced by economic courts in Uzbekistan only where doing so is provided for:

(i) by relevant international treaties;

(ii) by the laws of the Republic of Uzbekistan.

That chapter also regulates the procedure for processing applications for the recognition and enforcement of foreign judgments and arbitral awards, as well as grounds for rejecting such applications. Furthermore, the Supreme Eco-

nomic Court issued a plenary decision on the recognition and enforcement of foreign court decisions or arbitral awards by economic courts in May 2013.[89] According to extensive research, Uzbek economic courts have yet to develop a unified methodology regarding the grounds for recognition and enforcement of foreign arbitral awards.[90] And recent developments again indicate that this remains the case.[91] Hence, the most worrisome part is that currently, inconsistency in case law exists at the highest level of the domestic court system: namely, the Supreme Court of Uzbekistan.

Let us have a look at actual cases: In his recent Kluwer Arbitration Blog post, domestic legal practitioner, Yakub Sharipov, highlighted two cases on identical issues but resulting in the contrasting decisions of the Supreme Court and the Tashkent City Economic Court.[92] Since only one of those cases was published, we will use the original script from the author's blog post.[93]

> **Application of Article III of the New York Convention**
>
> In the unreported *A v B* case, claimant 'A', a UK-based company, filed an application for the recognition and enforcement of an LCIA award against respondent 'B', a Russia-registered entity, at the place where the respondent's assets were located, *i.e*. in Uzbekistan. The Court of First Instance, Appeal Court and ultimately the Supreme Court all refused even to accept the claim[1)] based on jurisdictional grounds, under Article 249 of Economic Procedural Code ('EPC'), and returned it to the claimant without conducting the hearing, let alone recognizing and enforcing the award. The courts held that, notwithstanding Uzbekistan's accession to the [New York Convention], the mere fact that the respondent is a foreign-registered entity precluded the claimant from applying to Uzbek national courts for recognition and enforcement as, according to the courts, they lack jurisdiction. To support this dubious position, the courts referred to

89 The plenary decision 'On the Application of Laws to Some Issues of Recognition and Enforcement of Foreign Court Decisions or Arbitral Awards by Economic Courts No. 248 (dated May 24, 2013).

90 Foziljon Otakhonov & Alisher Umirdinov, *Commercial Arbitration in Uzbekistan*, 439-483, Ch.11, (in Kaj Hobér & Yaraslau Kryvoi eds., Arbitration in the CIS Region, Kluwer Law International) (2017).

91 *Id.* at 472-473.

92 *See* Yakub Sharipov, *Enforcement of Arbitral Awards in Uzbekistan: Challenges and Uncertainties*, Kluwer Arbitration Blog, Nov. 11, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/11/11/enforcement-of-arbitral-awards-in-uzbekistan-challenges-and-uncertainties/ (last visited Apr. 22, 2020).

93 *Id.*

Article III of the [New York Convention], quoting that '*each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles'.*

More specifically, the courts found that, under Article 249 of the EPC, the application for the recognition and enforcement of foreign court decisions or arbitralawards shall be filed either (i) in the courts at the place of a debtor's actual location, (ii) in the courts at the place of a debtor's residence, or, alternatively, (iii) in the courts at the place of the debtor's registered office if the debtor's location or residence place is unknown. Since the respondent, as a foreign-registered entity, did not have an actual location, place of residence or registered office in Uzbekistan, the courts refused to accept the claim and hear it because of their alleged lack of jurisdiction. The claimant's submission that all of the respondent's tangible assets were located in Uzbekistan did not convince the courts otherwise.

[…]

Same Jurisdiction, Different Approach

In a similar case, **Case No. 4-11-1912/222**, a Danish party, "Alliance Capital K/S," applied to the Tashkent regional Economic Court for recognition and enforcement of an ICC award against a Spanish party, "Corsan Corviam Construccion S.A." The regional court transferred the case to the Tashkent city Economic Court as the court having jurisdiction to decide the case. That court accepted jurisdiction and heard the case. Surprisingly, unlike in *A v B*, the court cited Article III of the [New York Convention] in full. The court also cited Article VII of the [New York Convention], emphasizing that an interested party cannot be deprived of the rights to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. In doing so, the court acknowledged the role of the [New York Convention] in the legal system of the country and refused to apply domestic law to the extent it was inconsistent with the [New York Convention].

> Interestingly, despite quite similar factual circumstance with *A v B*, the court in **Case No. 4-11-1912/222** did not confirm whether it had jurisdiction under Article 249 of the EPC and did not discuss the respondent's actual location or place of residence at all. Unlike in *A v B*, the court also did not mention the fact that the respondent's registered office was in Spain as a potential ground for refusing to accept jurisdiction as had been done in the *A v B* case. Quite to the contrary, neither the respondent's nationality nor the claimant's failure to identify the respondent's assets in Uzbekistan was found to be of any importance to the court in deciding that it had jurisdiction over the claim. Even though the court ultimately refused recognition and enforcement on different grounds, the claimant at least was able to present its position on recognition and enforcement in the courtroom.

As Sharipov rightly mentions, the cherry-picking of Uzbek high courts may tarnish the 'arbitration friendly' face of Uzbekistan. As can be seen in *A v. B*, the Uzbek courts appear to have interpreted the New York Convention out of context and focused on one clause of the relevant provision while disregarding Article III as a whole, hence not giving effect to the aims and principles of the New York Convention and its spirit. Sharipov also sharply criticizes domestic courts for failing to take the supremacy of international law over domestic law into account. He utterly refutes the courts' inconsistent attitude towards international law:

> Although they referred to the EPC, the courts failed to refer to its relevant provisions pertaining to the supremacy of international law over domestic law in its entirety. Specifically, none of the courts referred to the very first article of the Code, which unequivocally states that the provisions of international treaties prevail over national law in case of discrepancy between them. Effectively, this means that the [New York Convention] supersedes the provisions of the EPC to the extent any provisions of the EPC are inconsistent with it. The courts, however, seem to be of a different opinion as no analysis of the interplay between international and domestic law was provided.[94]

94 *Id.*

Notwithstanding the strong arguments mentioned above, one must note some positive changes in the recent approach of domestic courts towards the recognition and enforcement of foreign arbitral awards. As an example, in the *Organik Solutions v. Kamelot-A* case, the Supreme Court dismissed a domestic private entity's arguments vis-a-vis a Russian entity.[95] The Supreme Court explicitly referred to Uzbekistan's obligations flowing from the New York Convention, and, for the most part, upheld the defendant's arguments. More importantly, we can also observe the same phenomenon in cases between foreign entities and Uzbek state-owned enterprises ('SOEs'). In previous decades, Uzbekistan was notorious for its overprotection of its SOEs in court proceedings against foreign companies. However, judicial practice suggests that the Supreme Court shows increased willingness to apply international law even to the 'sacred domain' of the state, namely, SOEs. In *KEGOS v. Uzbekenergo*, GEKOS, a Russian-owned legal entity, asked the Supreme Court to recognize and enforce the arbitral award delivered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.[96] Referring several times to an important regional treaty in the Commonwealth of Independent States-wide Kiev Convention on the Procedure for Settling Disputes Connected with Economic Activity of 1992, the Supreme Court sided with GEKOS. In a nutshell, Sharipov's arguments may only partially explain the practice of the domestic judiciary.

3. Rights of children

Over the last 30 years, Uzbekistan has been taken action to improve child rights by legislating to implement provisions of international treaties and international customary law. Uzbekistan is a contracting party to two principal conventions on child rights, namely, the Convention on the Rights of the Child ('CRC') and the Convention on the Civil Aspects of International Child Abduction, to which it acceded in 1992 and 1999, respectively. Today, state policy in the field of ensuring the interests of children is implemented by the basic requirements of these two international treaties. For example, equality before the law (Article 65), the right to education and to free secondary education (Article 41) are protected by the Constitution. Additionally, Article 64 states that,

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95 *Organik Solutions v Kamelot-A* Case No. 4-14-1906/9, (July 10, 2019).

96 *KEGOS v Uzbekenergo,* Case No. No 4-10-1818/237, (June 18, 2019).

> Parents shall be obliged to support and care for their children until the latter are of age. The state and society shall support, care for and educate orphaned children, as well as children deprived of parental guardianship, and encourage charity in their favor.

After the ratification of the above two child rights treaties and some general international treaties in the field of human rights, their provisions began to be gradually implemented into national legislation.[97]

Furthermore, the judiciary is not indifferent to international treaties in the field of the rights of children. For example, the Decree of the Plenum of the Supreme Court of the Republic of Uzbekistan 'On Judicial Practice in Cases of Juvenile Crimes' (No. 21 of September 15, 2000) focused on the implementation of international treaties in the field of the protection of child rights. In spite of the fact that Uzbekistan has taken action in order to implement international treaties in the field of child rights, problems remain that need to be solved. For instance, the Committee on the Rights of the Child ('the Committee') also emphasized in its observations[98] that,

> While noting that the Preamble to the State party's Constitution makes reference to the status of international agreements, the Committee regrets that the main body of the State party's Constitution and the Law on "Normative Legal Acts" do not explicitly refer to the Convention as a source of law. Furthermore, the Committee is concerned that the Convention is not directly applicable by courts or cited in court judgements.

In its concluding observations, the Committee recommended that Uzbekistan strengthen children's rights accordingly, and that Uzbekistan should ensure the full incorporation of the principles and provisions of the CRC and its Optional Protocols into domestic legislation. Uzbekistan should also provide clear guide-

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97 Uzbekistan adopted, *inter alia*, the Family Code, Law 'On Combating Trafficking in Human Beings' (2008), Law 'On Education' (1997), Law 'On Guardianship and Trusteeship' (2014), Decree of the President of the Republic of Uzbekistan 'On additional measures of material and moral support to young families (2007). There are also some specific domestic regulations such as the Law on Guarantees of the Rights of the Child (2008) and the Law on the Prevention of Neglect and Juvenile Delinquency (2010), and the Resolution of the President of the Republic of Uzbekistan 'On additional measures to further strengthen the guarantees of the rights of the child' (2019).

98 Concluding observations on the combined third and fourth periodic reports of Uzbekistan, adopted by the Committee at its sixty-third session (27 May-14 June 2013), para. 8. p. 4. *See also* https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-UZB-CO-3-4.pdf (last visited Jan. 07, 2020).

lines for the consistent and direct application of the provisions of the CRC and its Optional Protocols.[99] Moreover, the Committee found national legislation to be inadequate at taking the best interests of the child into account, and recommended paying attention to its general comments No. 12 (2009) and No. 14 (2013).[100]

To give a concrete example, failure to directly apply the CRC may be observed in *K child custody case (No. 4-14/13) 2013* where the judge decided the case without paying the necessary attention to CRC. In the case of K, custody first instance and appellate court failed to apply the CRC, even though Uzbekistan is a party to it. If we look at the detailed background of this case, K's parents met in Kazakhstan, and she was born subsequent to her parent's Islamic marriage. When she was one year old, they moved to Uzbekistan. However, her mother could not live in Uzbekistan, and about three months later, her mother returned to Kazakhstan without K. For six years, K's mother had been unable to visit her daughter in Uzbekistan due to financial hardship, but she claimed that she would call her daughter during that time. By this time, K had reached the age of seven, and was attending school in Uzbekistan. According to the second paragraph of the main part of the decision of the cassation court, K had grown up surrounded by Uzbek culture, had stated that she does not want to live with her mother, only spoke Uzbek, and did not speak Kazakh or Russian. For her part, K's mother did not speak Uzbek to communicate with her daughter. In this case, the court applied Articles 71 (equality of parents to their children) and 75 (Exercise of parental rights) of the Family Code of Uzbekistan. Article 75 is particularly relevant to this case, as it establishes that,

> The place of residence of children when parents live separately, is established by joint statement of the parents. In the absence of a joint statement, a dispute between parents is resolved by the court based **on the best interests of the children** and taking into account the views of the children. At the same time, the court takes into account the child's affection for each of the parents, brothers and sisters, the child's age, the moral and other personal qualities of the parents, the relationship existing between each of the parents and the child, the possibility of creating the child's conditions for upbringing and development (occupation, working hours of the parents , financial and marital status of parents and others.

99 *Id.* at para. 9.

100 *Id.* at paras. 22, 23, and 27.

Nonetheless, the above provisions does not mention culture, habitual residence of the child in relation to what may be the child's best interest. Therefore, the court failed to take the culture and habitual residence of the child into account and decided that K should be given to her mother as she is seven years old, and at that age, the child needs its mother's care. In this case, both, the first instance and cassation courts did not mention or cite in their decisions any provisions of the two child rights conventions mentioned earlier. Instead, the courts relied on traditional societal attitudes towards K and, to a limited extent, took into consideration K's wishes.

Despite considerable efforts on the part of the legislature and numerous recommendations from international organizations, what may be the reasons behind the failure to directly apply the CRC? The answer is obvious: issues surrounding the competence of local cadres in the judiciary have yet to be resolved, and the aforementioned general comments of the Committee (namely, No. 12 (2009) and No. 14 (2013)) have yet to be fully reflected in domestic legislation and the Decisions of the Plenum of the Supreme Court. For example, White & Case LLP also paid attention to the competence of local cadres in its 2014 report.[101] This report, which is based on a survey of the experiences of 47 lawyers working in Tashkent over the past ten years, revealed that, in practice, judges seem to only refer to domestic law and do not welcome references to international human rights treaties. None of the interviewed lawyers could identify any case in the past ten years referring to the CRC or any other international treaty. Additionally, the report also negatively evaluated the direct application of the CRC in domestic courts.[102]

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101 White & Case LLP, *Access to justice for children: Uzbekistan*, 2 (report produced in Sept. 2014), *available at* https://archive.crin.org/sites/default/files/uzbekistan_access_to_justice.pdf (last visited Apr. 12, 2020).

102 *Id*. at 2. In the report for Question D (namely, Can the CRC be directly enforced in the courts?) the following answer was provided: 'It is unlikely that the CRC can be cited in the courts' (*see* UN Committee on the Rights of the Child, Concluding Observations on the third and fourth periodic reports of Uzbekistan, para. 8.). Although Uzbekistan's legal system recognizes the supremacy of international law over domestic law, 'in order to be applied, an international instrument must be incorporated in domestic law. Following incorporation, the rules of international law become part of domestic law with binding force. But it has not become standard practice for judicial bodies to cite specific international instrument directly; such practice is in fact extremely rare' (Core documents forming part of the reports of State parties: Uzbekistan , HRI/CORE/UZB/2010, Jan. 18, 2012, p.27, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2FCORE%2FU ZB%2F2010&Lang=en) (last visited May 13, 2020).

VI. Discussion

In light of the analysis in the foregoing sections, the following thoughts may be outlined:

Firstly, the Decisions of the Plenum are important in court practice. To date, only one Plenum Decision comments on the application of international treaties and agreements.[103] However, this decision provides only two explanations regarding the application of international treaties. Moreover, the Plenum Decision does not give any explanation as to when international treaties contradict domestic law or when they may be applied instead of domestic law.

In the first explanation, the Supreme Court stated that courts should pay attention to the application of multilateral treaties, not only bilateral agreements, concluded by the government in civil and criminal matters. In the second explanation, the Supreme Court pointed out that before applying international treaties, the courts must consider two conditions: a. is Uzbekistan a member of a particular international treaty; and, b. did that treaty enter into force in the territory of Uzbekistan? As is the case with other domestic normative/legal acts, this Decision does not clarify the position of international treaties in the domestic legal order.

Secondly, courts are simply indifferent to international treaties. Obviously, the uncertainty of the position of international treaties in the Constitution and further to the Law 'On Legal and Regulatory Acts,' makes judges unable to overcome the impasse concerning the application or non-application of international treaties within the domestic legal order'. However, the situation is far more complex to be blamed entirely on the ambiguity of normative acts. Even in some relatively straightforward cases where domestic legislation clearly contradicted to the provisions of international treaties, courts avoided from making clear determinations. This also shows that the courts are simply indifferent to international treaties and tend to avoid from running in unchartered waters of the ongoing tension between domestic and international law without the guidance of the highest courts in the domestic order.

Thirdly, we cannot only blame gaps in domestic law on the non-application of international treaties. Here it is also necessary to take into account the judicial levels of expertise. If attention is paid to work done in the courts, one may

103 Decision of the Plenum of the Supreme Court of Uzbekistan 'On Certain Issues of International Cooperation in the Field of Cases on Civil and Criminal Cases', No. 6, (May 25, 2012).

witness that not only the Supreme Court but also the regional and district courts follow and support international agreements. However, some judges do not apply even the most well-known regional international treaties to domestic cases. For example, in the *Citizen of Russia v. Citizen of Russia divorce case* (2001), a Russian citizen who was a resident of Uzbekistan submitted a claim on the issue of divorce and child custody to the Civil Court of Tashkent City against her spouse, also a Russian citizen, resident of the Russian Federation. The cassation panel exercised its jurisdiction and decided in favor of the wife by applying the Civil Procedure Code and the Family Code of Uzbekistan. By doing so, the court failed in its reasoning to pay proper attention to the Minsk Convention, even though the court must apply the norms of the Minsk Convention as a primary source of law. According to the Minsk Convention, in such situations, the Uzbek courts must apply Russian law and avoid establishing their own jurisdiction in cases where one of the parties has already submitted his/her claim to the courts of another Minsk Convention state party. Consequently, the spouse submitted additional arguments to the court in respect of the application of the Minsk Convention on family matters in the territory of Commonwealth of Independent States ('CIS') countries via the Embassy of Russia in Tashkent, Uzbekistan. Subsequently, the Economic Court of the CIS gave its advisory opinion (N 01-1/3-2001)[104] concerning this case. From the advisory opinion, it became clear that, according to the Minsk Convention, the courts in Uzbekistan had no jurisdiction to hear that claim, and the application of domestic law was also contrary to the norms of the Minsk Convention.

Some failures on the application of international treaties do not mean that the level of all judges of Uzbekistan is relatively low. Barriers to the understanding of judges exist, and, as a result, judges fail to apply international treaties to domestic cases. For example, although approximately 80 percent of the judiciary (mainly in the district and regional courts) may hear claims only in the Uzbek language, international treaties signed or ratified by Uzbekistan are not available in an the Uzbek language.[105] Most international treaties and agreements are in English and Russian, except bilateral agreements to which Uzbekistan is party. On the whole, while some translations of international treaties exist, they are unofficial translations. In practice, however, it is clear that many cases related

104 Decision of CIS Economic Court, N 01-1/3-2001 *available at* http://sudsng.org/download_files/rh/2002/Rh_01-1_3-2001_15012002.pdf (last visited Jan. 16, 2020).

105 There is also no website dedicated exclusively to international treaties to which Uzbekistan is party. That being said, the Ministry of Foreign Affairs does publish a journal on international treaties.

to international treaties are handled by district and regional courts. This not only bars lower courts from appropriately understanding and applying international treaties, but, more importantly, it hampers the public's understanding of, and exposure to information concerning its rights and obligations under international treaties relevant to Uzbekistan.

VII. Conclusion

To date, the Uzbek government first and foremost has emphasized security, sovereignty, and peace within its territory as well as in the broader Central Asian region. That is why human rights and environmental problems have historically played a secondary role. Naturally, the surrounding geopolitical and other considerations have undoubtedly shaped Uzbekistan's foreign policy priorities. But this is gradually changing where we can see a relaxation of the pressure by the state security apparatus on civil society,[106] easing of state control over religious practices, and less censoring on the freedom of speech. But all these developments are at their infancy, and considerable work remains to be done on the establishment of robust institutions to protect the environment and human rights at times of political crisis. To achieve that goal, the good faith implementation of international law into domestic law is indispensable.

While combining elements of monist and dualist approaches to international law, the last two decades have been tricky when it comes to Uzbekistan's approach to international law. The good news is that new political leadership is now trying to boldly embrace international legal standards and is demonstrating, at least, formal tolerance for the implementation of international legal norms and good practice as recommended by international organizations in Uzbekistan. For instance, convened by the Government of Uzbekistan in November 2018 in the ancient city of Samarkand, the Asian Forum for Human Rights reaffirmed the commitment of Uzbekistan to the Universal Declaration of Human Rights and its importance in the attainment of the 2030 Agenda for Sustainable Development in Central Asia.[107] Protecting freedom of speech, easing pressure on religious ac-

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106 *O'zbekistonda 17 yil ichida ilk marta inson huquqlarini himoya qilish tashkiloti ro'yxatdan o'tkazildi (For the first time in 17 years, a human rights organization has been registered in Uzbekistan),* kunz.uz, Mar. 13, 2020, *available at* https://kun.uz/uz/news/2020/03/13/ozbekistonda-17-yil-ichida-ilk-marta-inson-huquqlarini-himoya-qilish-tashkiloti-royxatdan-otkazildi (last visited Apr. 20, 2020).

107 *See Samarkand Declaration of the Asian Forum on Human Rights "Outcomes of the 70th Anniversary*

tivities, enhancing the operationalization of political parties during parliamentary elections, and actively engaging with donor organizations are some of the notable achievements of the Mirziyoyev government.

Apart from some very active areas where international and domestic law ostensibly intersect (e.g., recognition and enforcement of foreign arbitral awards), what may explain the reluctance of courts of general jurisdiction to actively implement international treaties? Apart from the lack of clarity on the constitutional status of treaties, several explanations are possible. No doubt, low levels of public legal awareness of international law and the longstanding lack of transparency concerning the work of the judiciary have also contributed to this outcome. Furthermore, in addition to the lack of competence of local cadres of the judiciary,[108] one of the reasons behind the lack of incorporation of international law into domestic law could yet be the absence of instruction from the Supreme Court to lower courts. It might be one of the main factors that hinders the active application of international treaties into domestic law. For instance, the higher courts of neighboring countries have already issued such guidance that has substantially eased the work of lower courts and has eventually led them to directly cite and apply international treaties.[109] It seems to the authors of this paper that the absence of top-down guidance on behalf of the Supreme Court not only bars lower courts from actively searching, embracing, and applying international legal norms but also hinders members of the public from learning about, asserting, and enjoying their rights under international treaties. One could hope that the recently approved national human rights strategy of the country (June 2020) will accelerate the judiciary's engagement with international law,[110] hence increasing the harmonization of the domestic legal system with the international rule of law.

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of the Universal Declaration of Human Rights: Challenges and Reality," (Nov, 22-23 2018) *available at* https://asianforum.uz/en/menu/samarkand-declaration (last visited Feb. 11, 2020).

108 No doubt, the judiciary needs to be actively educated to learn how to deal with international legal issues in cases it handles.

109 Normative Resolution of the Supreme Court of the Republic of Kazakhstan No 1 of 10 July 2008 (amended 30 December 2011) 'On the Application of Norms of International Treaties of the Republic of Kazakhstan'; Resolution of the Plenum of the Supreme Court of the Republic of Tajikistan No 9 of 18 November 2013 'On the Application of International Legal Acts Recognized by Tajikistan'; Resolution of the Plenum of the Supreme Court of the Kyrgyz Republic No 16 of 12 June 2008 'On a Court's Judgement' cited in Girshovich, *supra* note 11, at 725-726.

110 On May 22, 2020, the President Mirziyoyev signed a decree on the National Strategy for Human Rights which aims at the domestic implementation of the recommendations of international organizations, including the UN. *See also* https://kun.uz/uz/news/2020/06/22/ozbekistonning-inson-huquqlari-boyicha-milliy-strategiyasi-tasdiqlandi (last visited June 25, 2020).

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