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New Constitutions and the Old Problem of the Relationship between International Law and National Law

Vladlen S. Vereshchetin *

I. Introduction

More than thirty years ago *The American Journal of International Law* pointedly observed in its Editorial Comment that:

the continuing practice of making reference to international law in national constitutions has not produced any one form of wording that has found general adoption.¹

In the same Comment a reference was made to an earlier observation to the effect that:

after each World War of the present century there was a wave of effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law.²

One might add to the above observations that the same holds true as far as the situation after the end of the 'cold war' is concerned. Again, on one hand, we are witnessing another wave of introducing references to international law in national constitutions and, on the other hand, the lack of uniformity in wording and, more importantly, in resolving the classical issue of the relationship between national law and international law. However, one can notice a clear tendency towards '*de jure* recognition' of the primacy of international law by new constitutions. This tendency is analysed in the present article from the perspective of post-'cold-war'

* Judge at the International Court of Justice.

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1 Wilson, 'International Law in New National Constitutions', 58 *AJIL* (1964/2) 432.

2 *Ibid.*

constitutional developments in the CIS and East European States, and against the background of contemporary constitutional changes in other countries.

II. Determining Factors

The first question to be dealt with is the following. What are the main factors that induce national law-making bodies, especially after each World War, be it 'hot' or 'cold', to pay more tribute to international law, as manifested in the corresponding constitutional changes? The general answer seems to be obvious. Every devastating war gave rise to hopes, that due compliance with international law, both domestically and internationally, could serve as a guarantee against the repetition of the scourge of war. For former aggressors and States with a totalitarian past, the constitutional commitment to observe the rules of international law serves also as a kind of 'pledge at the highest possible level, of fidelity to international legal values'.³

Hence, it is not incidental that far-reaching provisions on the status of international law within national legal systems were introduced in the German Constitutions after World Wars I and II, in the Italian and Japanese Constitutions after the Second World War, and in the Russian Constitution after the end of the 'cold war'.⁴ Article 28(1) of the 1975 Greek Constitution, Article 96 of the 1978 Spanish Constitution, Article 8 of the 1976 Portuguese Constitution and corresponding articles in some other constitutions may also be viewed as a product of the reaction by the legislature and public of these countries to their former totalitarian or authoritarian regimes, which had often defied international obligations and betrayed common human values.

However, it would be an over-simplification to reason that the pronounced internationalist trend of modern constitutions can be explained merely by what Paul de Visscher called '*la fièvre internationaliste de l'immédiat après-guerre*',⁵ or solely by the general democratization of the States concerned.

The international human-rights factor, which also came into the picture after the First, and especially after the Second World War, plays an important distinct role in the 'penetration' of international law into domestic legal orders and national

3 Ferrari-Bravo, 'International and Municipal Law; The Complementarity of Legal Systems', in R.St.J. Macdonald, D.M. Johnson (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) 733. See also Cassese, 'Modern Constitutions and International Law' 3 *RdC* (1985) 357.

4 The Basic Law of the Federal Republic of Germany of 1949 provides in Article 25 that: 'the general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory.' See also, Articles 23, 24, 26 and 100(2). Article 10(1) of the 1947 Italian Constitution holds: 'Italy's legal system conforms with the generally recognized principles of international law.' See also, Article 11. Article 98(2) of the 1947 Japanese Constitution states that 'the treaties concluded by Japan and the established laws of nations shall be faithfully observed'. See also, Preamble and Article 9. A.P. Blaustein, G.H. Flanz (eds), *Constitutions of the Countries of the World* (1971) I-XX, Supplement.

5 De Visscher, 'Les tendances internationales des constitutions modernes', 1 *RdC* (1952) 573.

constitutions. The relationship between State and individual that traditionally existed in the domain of internal law, no longer can be considered a purely domestic affair. International concern for human rights not only gave birth to a number of very important international legal instruments in this field, but has also led to the recognition in several constitutions of their binding force within national legal systems, and even of their supremacy over national laws.⁶

Among the major factors leading to the 'internationalization' of modern constitutions, one must certainly single out the interdependence processes constantly developing in many spheres of international relations, especially those pertaining to the resolution of global problems and to economic integration. Thus, not surprisingly, European integration had a serious impact on several Western European constitutions. The direct application of Community law in the member States, and in particular the priority of this law over national laws, required the adoption of special constitutional provisions in a number of States.⁷ As a rule, these provisions are formulated rather broadly without mentioning directly Community law.⁸ They may be construed as relating, under certain conditions, to other international organizations as well. Outside the European context references to international organizations, and particularly to the aims and principles of the United Nations, are also often found in modern constitutions.⁹

III. A Wave of New Constitutions

It has rightly been observed in current literature, that the region of the former Soviet republics and East-European countries has become in the last few years 'a major laboratory of constitutional works'.¹⁰ The sweeping political and economic changes in that part of the world have been accompanied by the adoption of entirely new or radically modified constitutions. As of this writing (August, 1995), new constitutions have been enacted in Hungary (24 August 1990), Bulgaria (12 July

6 Paradoxically, however, in the United States, with its long-standing democratic traditions and the constitutional provision about treaties being part of the 'supreme law of the land' (Art. VI of the American Constitution), the courts 'generally avoid the application of international human rights norms...'. See Bayefsky and Fitzpatrick, 'International Human Rights Law in United States Courts: A Comparative Perspective', 14 *Mich. J. Int'l L.* (1992/1) 89. As Louis Henkin put it: 'A common view seems to be that international human rights are good, but not for us.' Henkin, 'A Post-Cold War Human Rights Agenda', 19 *Yale J. Int'l L.* (1994/1) 254.

7 Rideau, 'Constitution et droit international dans les Etats membres des Communautés européennes', 3 *Revue française de droit constitutionnel* (1990) 425-54.

8 See, for example, Article 20(1) of the Danish Constitution, Article 93 of the Spanish Constitution, Article 28(2, 3) of the Greek Constitution, Article 8(3) of the Portuguese Constitution, as revised in 1982 and 1989. The latter, in particular, provides: 'Rules laid down by the competent organs of international organizations to which Portugal belongs, apply directly in municipal law insofar as the constitutive treaties as applicable provide to that effect.' Blaustein, Flanz, *supra* note 4.

9 See, for instance, Article 27 of the 1989 Algerian Constitution. Generally, on the Algerian Constitution and international law, see Mahiou, 'La constitution Algérienne et le droit international', 2 *RGDIP* (1990) 419-54.

10 Ludwikowski, 'Constitution Making in the Countries of Former Soviet Dominance: Current Development', 23 *Georgia Journal of International and Comparative Law* (1993/2) 158.

1991), Rumania (21 November 1991), Turkmenistan (18 May 1992), Estonia (28 June 1992), Slovakia (3 September 1992), Poland (17 October 1992),¹¹ Lithuania (28 October 1992), Uzbekistan (8 December 1992), the Czech Republic (16 December 1992), Kazakhstan (28 January 1993 and 30 August 1995), Kirghizistan (5 May 1993), Russia (12 December 1993), Belarus (15 March 1994), Moldova (29 July 1994), Tadzhikistan (6 November 1994) and Armenia (5 July 1995).¹² Some other States of the region are still undergoing the constitution-drafting process.

For different reasons, this process proved difficult in several States. In Russia, for example, it was directly influenced by the political struggle between the President and the Legislature and, accordingly, between the political forces standing behind them. The adoption of the constitution was used as a major weapon in this struggle. The same is true of the constitution-making processes in Kazakhstan, Georgia and some other countries. However, even in those States where this process unfolded relatively smoothly, it raised many legal and policy questions. Division of powers, judicial review, direct application of the constitution – these and other issues had to be resolved with due account taken of political, legal, economic and cultural traditions, as well as the geopolitical realities for the countries in question. In most cases, it could not be just a matter of copying the constitutional experience of other States, although the tendency to borrow from this or that experience can be easily traced in some instances. These factors are responsible for similarities and differences that exist in the individual constitutions of the former Soviet republics and East-European States.¹³

One of the common features of all new constitutions in that region is their openness to international law. Manifestations of this openness are manifold but vary from one constitution to another.

IV. Provisions on the Primacy of International Human Rights

It is only natural that human rights and freedoms and their protection occupy a prominent place in all new constitutions. Many of them contain references to the international law of human rights and some affirm its primacy over national laws.

- 11 'The small constitution' replaced only several chapters of the 1952 Polish Constitution dealing with the distribution of power and local governance. Other chapters of the old constitution remain in effect.
- 12 The Russian texts of many of these constitutions can be found in *Novye konstituzii SNG i baltiyskikh gosudarstv. Izdatel'stvo (New Constitutions of the CIS and Baltic States)* (1994). For the English texts, see Blaustein, Flanz, *supra* note 4.
- 13 Similar processes are underway in another vast region of intensive constitutional developments – the African continent. More than 30 African States adopted, as a rule by national referenda, new or substantially amended constitutions over the last 5 to 6 years. The concept of the law-based State lies at the core of many of these constitutions. It is reflected, *inter alia*, in the relationship between State and individual. The emphasis is placed on human rights and freedoms, with special reference to internationally protected rights and freedoms. On this matter, see Yudin, 'New Trends in the Constitutional Development of the States of Africa' (in Russian), 12 *Gosudarstvo i Pravo* (1992). See also, F. Reyntjens (Rédacteur Général), *Constitutiones Africae* (1988) I-IV.

For instance, the 1991 Bulgarian Constitution starts with a solemn pledge to elevate 'as the uppermost principle the rights, dignity and security of the individual'.¹⁴ A detailed enumeration of human rights and freedoms can be found in all the texts. Thus, 47 out of 137 Articles of the Russian Constitution are devoted to the fundamental principles of the legal status of the individual in the Russian Federation.¹⁵ The catalogue of human rights and freedoms contained in these Articles is not exhaustive.¹⁶ Article 17 of the Constitution declares that:

in the Russian Federation rights and freedoms of person and citizen are recognized and guaranteed pursuant to the generally recognized principles and norms of international law and in accordance with this Constitution.

There is a special clause to the effect that rights and freedoms of the person and citizen are directly applicable (Article 18). In addition to that, in accordance with international treaties of the Russian Federation, a constitutional right is introduced to appeal to inter-State bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted (Article 46(3)).

The primacy of human-rights treaties over national laws are directly established in several new constitutions. The 1992 Slovak Constitution stipulates that:

international instruments on human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements shall take precedence over national law provided that the international treaties and agreements guarantee greater constitutional rights and freedoms.¹⁷

Similar provisions are contained in the 1992 Czech Constitution (Article 10) and in the 1994 Moldova Constitution (Article 4(2)). A detailed formulation to the same effect is contained in the Romanian Constitution.¹⁸ In some other texts the precedence of international human rights law over national laws can be construed from the general provisions on the supremacy of general international law or international treaties.¹⁹

14 1991 Bulgarian Constitution, Preamble.

15 1993 Russian Constitution, Arts. 17-64.

16 Art. 55 states that 'the listing in the Constitution of the Russian Federation of the basic rights and freedoms should not be interpreted as a denial or diminution of other universally recognized rights and freedoms of person and citizen'.

17 Art. 11 of the 1992 Slovak Constitution. On the experience of the Czech and Slovak Federation and its two successor States in constitution-making, see Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?', 88 *AJIL* (1994/3) 427-50.

18 '1. Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with other treaties and pacts to which Rumania is a Party.

2. If there is disagreement between the pacts and treaties on fundamental human rights to which Rumania is a Party and domestic laws, then international regulations will have priority.' (Art. 20 of the 1991 Romanian Constitution).

19 This is true of the Constitutions of Armenia, Belarus, Bulgaria, Estonia, Kazakhstan, Russia, Tadjikistan, Turkmenistan, Uzbekistan.

V. Provisions on the Status of International Law Generally

Special general clauses pertaining to the relationship between international law and national law are characteristic of many new texts. In one form or another, such general clauses are present in most of the new constitutions but the kinds of relationship they establish differ. The Constitutions of Armenia, Bulgaria, Estonia, Kazakhstan, Russia and Tadzhikistan, in the most detailed way, proclaim *the supremacy of international treaties*. Article 5(4) of the Bulgarian Constitution holds that:

any international instruments which have been ratified by the constitutionally established procedure, promulgated and brought into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.

Similar provisions are contained in Article 123 of the Estonian Constitution, Article 6 of the Armenian Constitution, Article 4 of the 1995 Kazakh Constitution and Article 11 of the Tadzhik Constitution.

Article 15(4) of the Russian Constitution envisages that:

if an international agreement of the Russian Federation establishes rules which differ from those stipulated by law, then the rules of international agreement shall apply.

In this supremacy clause, the Russian Constitution does not draw any distinction between the agreements ratified by the Parliament and the agreements not-requiring ratification, between self-executing and non-self-executing agreements. Nor does it say anything about the requirement of official publication of agreements. These matters are dealt with in a special law on international treaties passed by the Russian Parliament in 1995.²⁰

Some other constitutions are silent on the supremacy or otherwise of treaties, but establish *the priority of general principles or 'generally accepted norms' of international law*, that is of customary international law. Such is the case with the Constitutions of Uzbekistan, Turkmenistan and Belarus: 'recognizing priority of the generally accepted norms of international law' (Preamble and Article 17 of the Uzbek Constitution); 'Turkmenistan shall acknowledge priority of generally accepted norms of international law' (Article 6); 'the Republic of Belarus shall acknowledge the priority of generally recognized principles of international law and shall ensure that its legislation conforms to them' (Article 8).

One has to ascertain, however, the extent to which the above provisions of the Constitutions of Uzbekistan and Turkmenistan apply to the relationship between

20 The Federal Law On International Treaties of the Russian Federation was adopted by Duma on 16 June 1995 and came into effect on 21 July 1995. Article 5 of the Law envisages, *inter alia*, that: 'The provisions of the officially published international treaties of the Russian Federation which do not require the adoption of internal acts for their application are directly applicable. Corresponding legal acts shall be adopted for the application of other provisions of the international treaties of the Russian Federation.'

international law and national law internally, within the legal systems of these States. This is necessary since, in the context of these constitutions, these provisions may be interpreted as relating only or primarily to international relations, and aimed at establishing priority of the dictates of general international law over political considerations of foreign policy. Such an interpretation is supported by the fact that neither of the two constitutions speaks directly about priority of international norms over national legislation. The respective provisions are couched in very abstract language and placed in the articles dealing with foreign policy. Furthermore, in the Uzbek Constitution, contrary to the above quoted provision, there exists an article which establishes 'absolute supremacy' of the laws of the Republic of Uzbekistan (Article 15).

Still another group of the constitutions incorporates international law or its constituent parts into internal legal systems, sometimes with an additional statement on their direct application, but without mentioning the issue of 'supremacy', 'precedence' or 'priority'. For example, Article 12(3) of the Kirghiz Constitution stipulates that:

inter-state treaties ratified by the Republic of Kirghizistan and other norms of international law form a constituent and directly applicable part of the legislation of the Republic of Kirghizistan.²¹

Article 138 of the Lithuanian Constitution says that 'international agreements which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania'. Article 11(2) of the Romanian Constitution also attributes the treaties ratified by the Parliament to the internal law. In a somewhat different form this principle is stated in the Hungarian Constitution:

The legal system of the Republic of Hungary shall adapt the generally accepted rules of international law, and shall ensure harmony between the assumed international law obligations and domestic law. (Article 7(1))

VI. The Role of Constitutional Courts

The incorporation of international law or its constituent parts into domestic law on the basis of parity, without a clear indication as to the primacy of one over the other, poses a difficult issue of choice between conflicting rules of international law and domestic law.

Of great significance, in such cases, is judicial practice, especially the pronouncements of constitutional courts. Although rare, such jurisprudence already exists in a number of countries and, as a rule, it resolves the above issue in favour of

21 Presumably, by 'other norms of international law' the legislator meant customary rules of international law.

international law. The Hungarian Constitutional Court, while considering in 1993 the problem of the application of the statute-of-limitation rules, held that:

The Constitution and the domestic regulation are to be interpreted in such a way, that generally accepted rules of international law shall be effective.²²

Poland is another East-European State where constitutional life is being influenced to a large extent by the jurisprudence of the supreme judicial organs (the Constitutional Tribunal and the Supreme Court). Although the Polish constitutional law of 1992 (also known as 'Small Constitution' or the 'Provisional Constitution') does not deal specifically with the role of international law in the municipal legal system, the recent decisions of the Constitutional Tribunal and the Supreme Court (not always consistent) seem to confirm the validity of international law *ex proprio vigore* within Polish municipal law, and in some cases the precedence of international treaties over national laws.²³

Significantly, in the last years of the Soviet Union, whose Constitution did not contain a provision on general incorporation (let alone on supremacy) of international law, the change in the status of international law within the Soviet legal system was largely effected by the pronouncements of the Committee on Constitutional Supervision. Under the Law on Constitutional Supervision of 1989, the Committee was given power to review national laws by reference to the USSR's international obligations, in particular in the field of human rights.²⁴ The Committee handed down a number of decisions based on the precedence of international law of human rights over the contradicting national laws. The above Committee was the precursor of the Constitutional Court of Russia, created in 1991, that, in turn, decided several cases on the basis of direct application of international law and its priority over national laws.²⁵ These developments greatly contributed to the relatively easy acceptance, during the drafting process, of the radically new principle in the Russian Constitution of 1993, according to which:

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall constitute part of its legal system. If an international agreement of the Russian Federation establishes rules which differ from those stipulated by law, then the rules of the international agreement shall apply.²⁶

22 Quoted in Double Issue 2 No. 4, 3 No. 1 *East-European Constitutional Review* (1993-94) 10. A commentator in the same journal interpreted this ruling of the Court as 'ultimately declaring, it seems, that international law prevails over the Constitution'. (ibid.) However, the former Vice-President of the Hungarian Constitutional Court, Judge Géza Herczegh, in a conversation with the present author, disagreed with such an interpretation of the above ruling.

23 For more detail see Czaplinsky, 'International Law and Polish Municipal Law: Recent Jurisprudence of the Polish Supreme Judicial Organs', 53 *ZaöRV* (1993/4) 871-81.

24 Law of the USSR on Constitutional Supervision in the USSR, *Vedomosty Svezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR* (1989) Issue No. 29, Item No. 572.

25 For more details on the decisions by the USSR Committee on Constitutional Supervision and the Russian Constitutional Court, see Danilenko, 'The New Russian Constitution and International Law', 88 *AJIL* (1994/3) 460-4.

26 The former Constitutions of the Soviet Union and of Russia never contained general principles on the relationship between international law and internal law. The Constitutions of the Soviet Union and of Russia (Arts. 29 and 28, accordingly) included only a provision on foreign policy to the

One can see that the above article of the Russian Constitution draws a distinction between treaty rules and customary rules. While both of them are incorporated into the national legal system, solely treaty rules are mentioned as being capable of overriding the conflicting rules of national laws. The higher hierarchical status accorded to the treaty norms may be explained by the traditionally circumspect approach of the Soviet and Russian legal doctrine to customary norms of international law, as well as by practical difficulties in ascertaining the existence of certain customary norms, especially for courts of lower instance.

At the same time the Russian Constitution stipulates that in the Russian Federation human rights are recognized and guaranteed 'pursuant to the generally recognized principle and norms of international law' (Article 17). It remains to be seen if the new Russian Constitutional Court, when confronted with a concrete case, will interpret Article 17 of the Constitution as granting priority to universal human-rights standards, irrespective of their treaty or customary origin.

VII. Constitutions in the Making

Turning to the draft constitutions proposed or under consideration in the States that have not yet adopted new constitutions, one can see that the trend of placing international law or its constituent parts above national laws (but not above the constitution itself) is clearly maintained.

In Poland, the Constitutional Commission established by the National Assembly adopted in 1995 a chapter for a new Polish Constitution. This chapter entitled 'Sources of Law' introduces into the future Constitution provisions to the effect that ratified and published international agreements form an integral part of municipal legal order and are directly applicable, 'unless their application is conditional upon the enactment of a law'. The draft also provides that duly ratified agreements prevail over laws, and that other international agreements prevail over normative acts subordinate to laws.²⁷

In the statement of principle of the new Ukrainian Constitution, adopted by the Ukrainian Parliament in 1991, it is said that the Ukraine is guided by the principles of international law and 'recognizes the priority of generally accepted international

effect that relations of the USSR (Russia) with other States should be based on the principle of fulfilment in good faith of obligations arising from the generally recognized principles and norms of international law, and from treaties concluded by the USSR (Russia). On the other hand, a number of Soviet national laws in specific fields had a clause on the primacy of international treaties in case of conflicts with the provisions of the law. The first important step for the introduction of the general principle on the primacy of international law into the text of the Russian Constitution was made in April 1992 when a new chapter pertaining to human rights was added to the Constitution then in force. It contained, *inter alia*, the following provision: 'The generally recognized international norms concerning human rights have priority over the laws of the Russian Federation and directly create rights and obligations for the citizens of the Russian Federation.' (Art. 32 of the Constitution of 1978, as amended in April 1992.)

27 Document QR1-Konst. 1.106 of 23 August 1995.

legal norms'.²⁸ Following up this trend, the Supreme Rada of the Ukraine (Ukrainian Parliament) enacted in 1993 the Law on International Treaties of the Ukraine.²⁹ Article 17 of this Law stipulates:

1. The international treaties of the Ukraine concluded and properly ratified shall be an integral part of the national legislation of Ukraine and be applied in the procedure, provided for the norms of the national legislation.
2. If the international treaty of the Ukraine, concluded in the form of a law, establishes other rules than those provided in the legislation of the Ukraine, then those applied shall be the rules of the international treaty of the Ukraine.

The draft of the Georgian Constitution provides that legally-binding and promulgated international treaties shall be 'a part of the national legal system of Georgia. They shall have precedence over laws and other normative acts'.³⁰

VIII. Provisions Relating to Foreign Policy

A good many new constitutions include clauses pertaining to foreign policy and international relations. One way or another, all these clauses contain general commitments to abide by the rules of international law in conducting international affairs.³¹ Some of them enumerate the most important principles of international law from the perspective of a given State.

From the international law perspective, such constitutional commitments do not add much to already existing obligations of all States to observe customary and treaty rules of that law.³² Rather, they should be perceived as a manifestation of willingness to be a loyal and law-abiding member of the international community, as a kind of 'confidence-building measure'. At the same time, we cannot deny that constitutional constraints on foreign policy-making and specific constitutional commitments on the non-use of force, except in strict compliance with the United Nations Charter, may serve a very useful purpose in providing a legal basis for

28 The statement of principle of the new Constitution of the Ukraine, *New Constitutions of the CIS and Baltic States*, *supra* note 12.

29 The Law of Ukraine 'On International Treaties of Ukraine' of 22 December 1993.

30 Art. 7 of the 1994 Draft Constitution of Georgia, *New Constitutions of the CIS and Baltic States*, *supra* note 12. The new constitution of Georgia was adopted on 24 August 1995. Article 6(2) of this constitution reads: 'The legislation of Georgia corresponds with universally recognized norms and principles of international law. International treaties or agreements concluded with and by Georgia, if they are not in contradiction to the Constitution of Georgia, have prior legal force over internal normative acts'. The English text of the Constitution was kindly provided by the Embassy of Georgia in Belgium.

31 See, for instance, Arts. 10 and 11 of the Romanian Constitution, Art. 135 of the Lithuanian Constitution, Art. 17 of the Uzbek Constitution, Art. 9 of the Kirghiz Constitution, Art. 6 of the Turkmen Constitution, Art. 11 of the Tadjik Constitution, Preamble and Art. 8(1) of the Moldova Constitution, Art. 18 of the Belarus Constitution, Art. 8 of the Kazakh Constitution.

32 As was pointed out by Verdross back in 1919 during the deliberations of the Constitution of the Weimar Republic, the validity of international law for inter-State relations cannot depend upon any recognition on the part of State constitutions. On the role of Verdross in these deliberations see a very interesting article by Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 6 *EJIL* (1995/1) in particular at 41-3.

parliamentary and constitutional court control over the Executive and, generally, in strengthening world peace and security.

As to the participation in international institutions and supra-national structures most of the new constitutions take a cautious stand. It has been correctly observed in literature that:

[a]lthough the Eastern European States generally have remarkable primacy clauses in respect of human rights and international law in general, they do not provide for any express transfer of sovereign powers.³³

Contrary to their desire to join European institutions and unions, which will inevitably lead to some limitations of sovereign powers, these States at the present stage prefer not to directly provide for this possibility in their constitutions. The situation is easily understandable in the case of States which have but recently re-attained their political independence.

Among the former Soviet republics, a prohibition on the delegation of sovereign powers is stated categorically in the 1993 Azerbaijani Law on the Amendments to the Constitution of 1978. Article 73, as amended, reads:

The Azerbaijani Republic shall not alienate in any form sovereign rights exercised in its territory to other States or unions of States.³⁴

The constitutions of the other States are either silent on this matter or take a more liberal approach. For example, Article 136 of the Lithuanian Constitution provides:

The Republic of Lithuania shall participate in international organizations provided that they do not contradict the interests and independence of the State.³⁵

A watchful attitude towards international institutions is reflected (though in somewhat peculiar form) in the Constitution of Belarus:

The normative legal acts of interstate entities with the participation of the Republic of Belarus, which are determined by the Constitutional Court as contravening the Constitution, laws or international legal acts, shall be invalid in whole or in part in the territory of the Republic of Belarus from a moment to be determined by the Constitutional Court.³⁶ (Article 128)

As to the Russian Constitution of 1993, the corresponding provision is worded similarly to those of some constitutions of West-European States. It expressly

33 See Häberle, 'Constitutional Developments in Eastern Europe from the Point of View of Jurisprudence and Constitutional Theory', in *Law and State* (A biannual collection of recent German contributions to these fields) (1992) 81.

34 The translation from Russian is by the author. The text of the Law (in Russian) can be found in 19 *Vedomosti Verkhovnogo Soveta Azerbajjanskoi Respubliki* (1993) 896.

35 The possibility to participate in international organizations or unions is also expressly provided by the Constitutions of Tadjikistan (Art. 11) and Uzbekistan (Art. 17).

36 The character of the 'normative legal acts of interstate entities' as well as of 'international legal acts' in question remains obscure and, hence, the whole provision is open to free interpretation by the Constitutional Court.

permits the transfer of some powers of the Russian Federation to 'interstate associations'.

However, such a transfer is conditioned by two safeguard clauses:

1. it must be exercised through an international treaty (presumably, ratified by the Russian Parliament);
2. it may not entail restrictions on human rights and freedoms or conflict with the basic principles of the constitutional order of the Russian Federation.³⁷

The latest Polish Draft Constitution framed by the Constitutional Commission of the National Assembly in 1995 also provides for the possibility of transferring certain sovereign powers to international organizations or agencies. However, such a transfer of sovereign powers may be the subject of a special referendum and in any case requires a special law passed by a qualified majority in both chambers of the National Assembly.³⁸

IX. Conclusions

1. Most of the new constitutions of the CIS and East European States, adopted in the wake of radical changes which occurred in that part of the world, place special emphasis on the role of international law not only in the foreign affairs of these States, but in their internal legal systems as well. However, the content and wording of the corresponding provisions are far from being uniform.

In many instances, rules of international law (customary, conventional or both) are recognized as a constituent part of national legal systems and given a higher hierarchical status in the case of a conflict with a national law.

2. Several new constitutions expressly provide for the primacy of international human rights and for their direct application by the courts and other States' organs. In some other cases such a rule flows from the general provisions on the supremacy of international law or its constituent parts.

3. Where the supremacy clause of a constitution refers to only one part of international law (customary or conventional), the determining reasons for the choice made by the legislators are not always readily identifiable; they may relate to the historical and cultural considerations as well as to the prevailing legal doctrine in a particular State. The same is true of the constitutional provisions on the issue of direct (without implementing legislation) or otherwise application of the rules of international law within the national legal system of a given State.

37 The whole text of the Article reads as follows: 'The Russian Federation may participate in interstate associations and transfer some of its powers to them in accordance with international treaties provided that this does not entail restrictions on rights and freedoms of individual and citizen and does not contravene the fundamentals of the constitutional order of the Russian Federation.' (Art. 79.)

38 Document QR1-Konst. 1.106 of 23 August 1995.

4. The general trend of the new constitutional development, to incorporate international law into domestic law and to affirm the precedence of the former in conflicting situations, is corroborated by the judicial practice of the constitutional courts of the States concerned, especially in relation to human-rights issues. It is too early, however, to draw any conclusions on the extent to which the ordinary courts of first instance or administrative authorities are prepared and willing to directly rest their decisions on the rules of international law.

5. The ever-growing interdependence of States and peoples, accompanied by the constant 'intrusion' of international law into many national spheres, including those previously reserved for exclusive domestic regulation (from human rights to economy and defence), and the expansion of the prerogatives of inter-State institutions *objectively lead to the de facto affirmation of the primacy of international law* and induce States to recognize *de jure* this primacy. The *gradual process of 'the de jure recognition'* is clearly manifested in the respective stipulations of the new constitutions. The primacy clauses contained in the constitutional texts have been engendered not by the century-old conceptual argument between monists and dualists, but by the objective factors of contemporary life, albeit the above argument could have had some impact on the formulation of the respective clause in a concrete constitution.

Certainly, one can argue that the primacy of international law established by constitutions is relative since, ultimately, it is subject to the provisions of the highest domestic law (the constitution). Moreover, some constitutions expressly establish limits on such primacy, for instance by stipulating that an international treaty may not contravene the constitution. What is important, however, is that the compelling objective factors leading to the current primacy of international law cannot be neglected or disregarded by States at will.