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Strasbourg, 27 June 2005

Dear Mr Baslar,

Further to your request to prepare a report on the constitutional case-law of countries which have adopted the principle of supremacy of treaties on fundamental human rights and freedoms, I have the honour of transmitting to you a Secretariat Memorandum on this matter, prepared on the basis of comments by Mr Dutheillet de Lamothe (the Venice Commission member for France).

Yours sincerely,

Gianni Buquicchio
Secretary of the Commission

Encl. Secretariat Memorandum

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SECRETARIAT MEMORANDUM

ON EXAMPLES OF CONSTITUTIONAL CASE-LAW OF COUNTRIES IN WHICH INTERNATIONAL HUMAN RIGHTS TREATIES TAKE PRECEDENCE OVER NATIONAL LAW (INSAN HAKLARI ANTLASMALARININ ULUSAL HUKUKTAN ÜSTÜN OLDUGU ÜLKELERDE ANAYASA MAHKEMESI KARARLARINDAN ÖRNEKLER)

I The relevant constitutional provisions

1. At the Commission's 59th Plenary Session (Venice, 18-19 June 2004), Mr Özbudun informed the Commission about the constitutional reform package which had been passed by the Turkish Parliament. An important element was Article 90 of the Constitution, which now provides for the priority of international human rights treaties over conflicting national law, thus placing them on a level between the constitution and ordinary law. Until this amendment, international treaties were incorporated on the level of ordinary law and conflicts had to be resolved by the rules of *lex specialis* and *lex posterior*. Taken together with the other amendments, this constitutes a significant step towards full democratic rule in Turkey.

2. Article 90/5 of the Turkish Constitution as amended on 22 May 2004 provides as follows:

> International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered."

3. Only a few European countries have constitutional provisions specifically concerning the supremacy of human rights treaties. These countries include: Bosnia and Herzegovina, where the European Convention on Human Rights has priority over all other law (Article II.2) and Moldova (Article 4) and Romania (Article 20), where priority shall be given to international regulations on human rights over national laws.

4. However, a large number of European countries have constitutional provisions which expressly give priority to international treaties in general over conflicting national law[1]. These

[1] A number of countries also give priority to the generally recognised principles of international law. For example, the Constitution of Austria provides that the generally recognised rules of international law are regarded as integral parts of federal law (Article 9). The Constitution of Portugal states that the rules and principles of general or customary international law are an integral part of Portuguese law (Article 8). In addition, the constitutions of some countries provide that their national legislation shall comply with generally accepted principles of international law. This is the case in Georgia (Article 6), Hungary (Article 7), Italy (Article 10) and Slovenia (Article 8). The Constitution of the Swiss Confederation provides that the Confederation and the Cantons shall respect international law (Article 5), as must the Federal Supreme Court and other authorities applying the law (Article 190), and states that the mandatory provisions of international law may not be violated in a total or partial revision of the constitution

countries include Albania (Article 122.2)[2], Andorra (Article 3), Armenia (Article 6), Azerbaijan (Article 151, although international treaties do not take precedence over conflicting constitutional provisions and acts accepted by way of referendum), Bulgaria (Article 5), Croatia (Article 134), Czech Republic (Article 10), Estonia (Article 123, although Estonia may not conclude international treaties which are in conflict with its constitution), France (Article 55), Georgia (Article 6, as long as the international treaties do not contradict the constitution), Greece (Article 28), the Netherlands (Article 94), Poland (Article 91), the Russian Federation (Article 15) and the Former Yugoslav Republic of Macedonia (Article 118). The Constitutions of Lithuania (Article 138) and Ukraine (Article 9) provide that international treaties which are ratified by the parliament are part of the national legal system.

5. The constitutions of some of these countries specifically provide that international treaties become part of national legislation. This is the case in Andorra, Armenia, Croatia, Greece, Poland (in respect of international agreements which do not require an act of parliament), the Russian Federation and the Former Yugoslav Republic of Macedonia.

6. France and Greece (with respect to the application of international treaties to non-nationals) provide that reciprocity shall be a requirement for international treaties to take precedence. It is not specified that reciprocity should apply only in respect of bilateral treaties.

7. In a few countries, the constitution provides that if an international treaty has provisions contrary to the constitution, the relevant constitutional provisions must first be amended. This is the position in Armenia (Article 6), France (Article 54), Moldova (Article 8, concerning international treaties other than those dealing with human rights), Spain (Article 95) and Ukraine (Article 9).

8. Ireland "accepts the generally recognised principles of international law as its rule of conduct in its relations with other states" (Article 29) but makes any obligation under international treaties subject to acceptance by the parliament. Finland also requires that any international obligation should be brought into force by an act of parliament or presidential decree and states that "an international obligation shall not endanger the democratic foundations of the Constitution" (Section 94), although it also provides that the Constitutional Law Committee shall issue statements on the relation of legislative proposals and other matters to international human rights treaties (Section 74).

II The relevant case-law of courts with constitutional jurisdiction

9. In accordance with the request from the Turkish authorities, decisions included in this report are primarily from countries whose constitutions give priority to international treaties over national law. Decisions of constitutional courts from countries in which national legislation is required to incorporate international treaties into domestic law have generally been excluded. The memorandum also only deals with the influence of international treaties, not customary law. It is purely descriptive and is limited to case-law concerning the supremacy of international human rights treaties over national legislation, not constitutions. Decisions included deal either

(Articles 193 and 194). The Belgian Constitution provides that federal authorities may temporarily substitute themselves for councils and communities "in order to ensure respect of international and supranational obligations" (Article 169). The Latvian Constitution provides that the State shall "recognize and protect fundamental human rights in accordance with the constitution, laws and intemational agreements binding upon Latvia" (Article 89).

[2] All article references are to the constitutions of the countries cited.

with the status of international treaties in national legal system or with the conformity of national legislation with international treaties ratified by the country in question.

10. The following extracts are from decision summaries (précis) taken from the Venice Commission's CODICES database, with complementary information provided in some cases by individual members from the Venice Commission. It should be made clear that the decisions which appear in the CODICES database represent a selection made by participating courts as being decisions of particular importance. CODICES is not, therefore, an exhaustive source of information. For this reason, additional information has been included where this seemed appropriate to portray a global picture of the position existing in the different countries.

11. The decisions are listed by country. They are quoted according to their CODICES identification number. The number, the date of decision and the jurisdiction which delivered the decision are also indicated. The full précis can be accessed through the CODICES database (www.CODICES:coe.int).

12. A large number of cases were found in which constitutional courts dealt with international treaties on human rights. In particular, there were numerous cases in which constitutional courts applied provisions of the European Convention on Human Rights (see for example a number of cases from the Netherlands). In order to keep the report to a reasonable length, we have excluded decisions in which constitutional courts apply an international treaty on human rights (in most cases the European Convention on Human Rights) and included only those decisions where the constitutional courts dealt with the influence or position of international human rights treaties in the domestic legal system.

13. Other decisions less directly relevant to the present report, for example because they deal with the superiority of international treaties other than human rights treaties or because they are decisions of countries which do not recognise the supremacy of international treaties, but which are nonetheless of interest in this context, can be found in the CODICES database.

Albania:

ALB-2002-3-007; decision No. 186, delivered on 23.09.2002 by the Constitutional Court

14. "With regard to the fact that the Rome Statute, in contrast with domestic law, does not recognise the immunity of certain subjects, the Court found that, nevertheless, this was not in conflict with the Constitution, because the immunity granted under domestic law provided protection only from the national judicial power. It could not prevent an international organ, like the International Criminal Court, from exercising its jurisdiction over persons vested with immunity under domestic law.

15. The Court affirmed that the generally accepted rules of international law are part of domestic law. Thus the lack of immunity against international criminal proceedings for specific crimes is part of the Albanian legal system…

16. On the trial of an individual by the International Criminal Court for acts for which he or she has previously been tried by a domestic court, the Court found that the Rome Statute did not run counter to the principle of "non bis in idem", which is guaranteed by the Constitution. This was because the Constitution provided for the retrial of a case by a higher court in accordance with the law. This role will be played by the International Criminal Court, which thereby supplements

the role of domestic courts when the domestic legal authorities have failed to conduct genuine proceedings. According to the Constitutional Court, such a regulation serves the purpose for which the International Criminal Court was established."

Armenia:

ARM-2002-1-001; decision No. DCC-350, delivered on 22.02.2002 by the Constitutional Court

17. "The Constitution, providing for human rights and freedoms itself, does not restrict the right of individuals to also enjoy other rights and freedoms enshrined in international treaties on human rights.

18. The Constitutional Court considered the issue of conformity of obligations stated in the European Convention on Human Rights and its several protocols with the Constitution. The Court's examination ascertained that some of the rights and fundamental freedoms stated in the Convention and said protocols correspond to those guaranteed by the Constitution, while some of the rights and freedoms are stated in the Constitution but in a different manner and formulation. On the other hand, some rights established in the Convention and its Protocols are absent from the Constitution.

19. The essence of the difference between constitutionally guaranteed rights and freedoms and those enshrined in the European Convention on Human Rights, is that the Conventional and Protocol norms protect human rights and freedoms more extensively.

20. Although at the first sight it may seem that there is a contradiction of a normative nature between the different legal instruments, such an impression is false if one considers the whole legislative system and the obligations of international treaties: a unique intercommunicated legal system.

21. In this regard, Article 6 of the Constitution states that, "International treaties that contradict the Constitution may be ratified after making a corresponding amendment to the Constitution". Furthermore, it should also be adopted as an obligatory initial provision regulating the constitutional relations, as is required by Article 4 of the Constitution, which declares: "The State guarantees protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law". This constitutional provision means that the Republic of Armenia is obliged to conscientiously carry out its obligations arising from principles and norms of international law, including international treaty obligations (*Pacta sunt servanda*).

22. The International Pact of 16 December 1966 on Civil and Political Rights and the facultative protocol thereto, as well as the International Pact of 16 December 1966 on Economic, Social and Cultural Rights as international, all-encompassing documents providing for human rights and fundamental freedoms, as well as their possible limitation or derogation, are legally binding in the Republic of Armenia.

23. Thus, in accordance with Articles 4 and 43 of the Constitution, the provisions of the above-mentioned international instruments do form part of the legal system of norms and principles regulating constitutional-legal relations.

24. This condition may create the illusion of apparent contradiction between Articles 4 and 6.6 of the Constitution.

25. However, there is no contradiction as Article 43 of the Constitution provides that "the rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms". In other words, a citizen of the Republic of Armenia - or a person being under its jurisdiction - not only has the rights and freedoms guaranteed by the Constitution, but also such rights and freedoms which are the logical continuation of the rights and freedoms stated by the Constitution or an additional guarantee of the implementation of the latter.

26. The ground for this interpretation is that a possible collision of the provisions of the Constitution and any international treaty supposes that the Constitution either directly excludes the right, which is clearly determined by an international treaty, or imposes such a behavior, which is categorically prohibited by a treaty. There is no such collision in the view of above-mentioned rights.

27. The Constitutional Court also considered that regardless of the norms of Public International Law, states are bound by mutual obligations, yet the approach towards the protection of human rights, formed in the system of Public International Law, gives grounds to conclude that the human rights and fundamental freedoms, based on the system of multilateral conventions, are rather the objective standards of the behavior of states, than their mutual rights and obligations. The obligations of states, stemming from international instruments, are rather directed to individuals under the jurisdiction of these states than to other participating states. In this regard, the Convention of 4 November 1950 is used to protect persons and non-governmental organisations from the organs of state power, which is an important sign of the rule of law, stated by Article 1 of the Constitution. Moreover, the Convention and its Protocols are based on such rights and standards, which conform to the spirit and letter of human rights and fundamental freedoms guaranteed by the Constitution and the international treaties to which the Republic of Armenia is party.

28. The whole legal regime of the Convention, including the principles on the possible limitation of the guaranteed rights, are constructed on that initial provision that the obligations adopted by the State are directed to the protection of all individuals, in accordance with the norms and principles of international law. Consequently, taking into account Article 4 of the Constitution, obliging the State to guarantee all internationally recognised rights and freedoms; Article 43 of the Constitution, stating that the rights and freedoms enumerated by the Constitution are not exhaustive, meaning that a citizen or other person do have other universally recognised rights and freedoms, and accepting the fact that the constitutional norms on human rights and freedoms do not have a prohibiting, but an authorising nature; it can be said that the issued conventional and Protocol norms conform to the norms and principles on human rights and fundamental freedoms, set forth in the Constitution."

Austria:

AUT-1987-C-001; decisions B 267/86; B 2434/95; G 363-365/97; G463,464/97 et al.; 120s63/97; 40b266/00x; 60b69/01t; B 1625/98, delivered on 14.10.1987 by the Constitutional Court

29. “In Austria fundamental rights guaranteed by the European Convention on Human Rights (hereafter the Convention) are regarded as individual rights and rank as constitutional law. The courts are at liberty, within the limits of their jurisdiction, to base their decisions on provisions of the Convention. This is a frequent practice. For example, in the field of criminal law, the fundamental right to freedom of opinion takes on considerable importance when offences against a person's reputation are being dealt with (cf. the Supreme Court's decisions of 18.12.1998, 120s63/97; 24.10.2000, 4Ob266/00x; and 26.04.2001, 6Ob69/01t). The courts are also required to take account of the fundamental rights guaranteed by the Convention when interpreting the provisions of ordinary law. However, consideration of the Convention when interpreting ordinary written law is admissible only to the extent that this leaves some room for freedom of interpretation.

30. Where an ordinary law that a court must apply in a given case is at variance with fundamental rights under the Convention, and must consequently be deemed "unconstitutional", the court concerned is nonetheless under an obligation to apply it. The matter must then be referred to the Constitutional Court, which can cancel the provisions in question if it holds that they are unconstitutional by reason of their failure to comply with the Convention.

31. Anyone entitled to appeal to the Constitutional Court may do so on the ground that a legal decision (an administrative decision, a law or a regulation) has interfered with his or her rights under the Convention.

32. Nonetheless, the Constitutional Court does not consider itself strictly bound by the case-law of the European Court of Human Rights. It has, for instance, already expressly underlined that it is in principle autonomous in giving its own interpretations and pointed out that "domestic law governing organisation of the state, which is of constitutional rank" may gainsay the consequences of certain interpretations. The Constitutional Court has also stated that the European Court of Human Rights must be regarded as "the principal body required to interpret the Convention and must accordingly be accorded 'special importance'" (VfSlg 11.500/1987). In this respect, to avoid contravening international law, the Constitutional Court makes a regular effort to take account of developments in the Strasbourg court's case-law (VfSlg - Official Digest - 14.939/1997, Bulletin 1997/3 [AUT-1997-3-007]; VfSlg 15.129/1998, Bulletin 1998/1 [AUT-1998-1-004]; VfSlg 15.462/1999; decision of 24.02.1999, B 1625/98, Bulletin 1999/1 [AUT-1999-1-002]).”

Czech Republic:

I US 752/02, decision No. 14, delivered on 15 April 2003 by the Constitutional Court

33. “The priority of the obligations from agreements on the protection of human rights, in the event of conflict between obligations under international agreements, arises primarily from the content of these agreements, in connection with Article 1 paragraph 1 of the Constitution, under which the Czech Republic is a state governed by the rule of law. The respect and protection of fundamental rights are defining elements of the substantively understood state governed by the rule of law; therefore, in a case where a contractual obligation protecting a fundamental right and a contractual obligation which tends to endanger that same right exist side by side, the first obligation must prevail. The Constitutional Court holds the opinion expressed in the judgment, the legal conclusion of which the Minister of Justice disagrees with, that no amendment of the Constitution can be interpreted to the effect that it would result in restricting an already attained level of procedural protection of fundamental rights and freedoms (Pl. US 36/01, published

under no. 403/2002 Coll.). The scope of the concept of constitutional order therefore cannot be interpreted only with regard to Article 112 paragraph 1 of the Constitution, but in view of Article 1 paragraph 1 and 2 of the Constitution, it is necessary to include in it ratified and promulgated international agreements on human rights and fundamental freedoms.

34. Although after amendment of the Constitution (Constitutional Act no. 395/2001 Coll.) agreements on the protection of human rights no longer form an independent category of legal norms with priority in application under the previous wording of Article 10, nonetheless they are a special group of norms, and at the same time represent a reference point of view, both for the abstract review of norms under Article 87 paragraph 1 of the Constitution, and for proceedings on constitutional complaints."

France:

FRA-1975-C-001; decision No 75-54/DC, delivered on 14.01.1975 by the Constitutional Council

35. "In order to determine the admissibility of an argument alleging a violation of Article 2 ECHR, the Constitutional Council was required for the first time to rule on the compatibility of a law with a treaty.

36. The "Loi Veil", which regulated the voluntary termination of pregnancy, was alleged to be contrary to the European Convention on Human Rights, which provides that "Everyone's right to life" is to be protected. The Constitutional Council refused to entertain the application and held that Article 55 of the Constitution does not provide or imply that respect for the principle of superiority of treaties over laws must be ensured in the context of a review of the constitutionality of laws provided for in Article 61 of the Constitution."

37. In subsequent decisions, the Constitutional Council made it clear that, if the review of the rule stated in Article 55 of the Constitution could not be effected within the framework of constitutional review, it had to be carried out by other courts. Reviewing the conformity of statutes with treaties, and especially with the European Convention of Human Rights, is now a matter for ordinary and administrative courts under the control of the Court of Cassation and the *Conseil d'Etat*.

Germany:

38. In Germany, international treaties that have been ratified by the Federal legislature (*Bundestag*) have the force of ordinary federal legislation (Article 59(2) of the German Constitution). This provision also applies to human rights treaties. However, the Federal Constitutional Court has held in 1987 that the European Convention on Human Rights must be "taken into account" by German courts when interpreting the fundamental rights of the German Constitution (BVerfGE 74, 358, at p.370). This has recently been confirmed and further refined in a judgment of the Second Senate of 14 October 2004 (2 BvR 1481/04; English translation retrievable on http://www.bverfg.de/cgi-bin/link.pl?entscheidungen). This most recent decision has been delivered with the following headnotes:

39. "Being bound by statute and law" (Article 20.3 of the Basic Law (Grundgesetz =96 GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of

Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

40. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

Hungary:

HUN-1993-3-015; decision No. 53/93, delivered on 13.10.1993 by the Constitutional Court

41. "The President asked the Court to review the law for its conformity with both the Constitution and two international agreements - Article 7.1 ECHR and Article 15 of the International Covenant on Civil and Political Rights. As for the second claim, the Court had to interpret its jurisdiction to consider questions of international law when ruling on the constitutionality of a not yet promulgated law. The Court claimed the right to judge the law's conformity with international law, because the Court is required under Article 7.1 of the Constitution to ensure harmony between domestic law and obligations assumed under international law when evaluating a law's constitutionality."

Lithuania:

LTU-1995-3-008; decision No. 8/95, delivered on 17.10.1995 by the Constitutional Court

42. "In accordance with the principle of sovereignty every State has the right to choose concrete ways and forms of implementing norms of international law in its internal legal system. There are various ways and forms of implementation of norms of international law, and it is recognised that the validity of international law in general and of international treaties in particular within the legal system of the State shall always depend on national law. According to the Constitution only international treaties which are ratified by the Seimas shall be the constituent part of the legal system of the Republic of Lithuania having the force of law.

43. The case was initiated by the Government of the Republic of Lithuania. It requested the Constitutional Court to investigate if Article 7.4 and Article 12 of the Law «On International Treaties of the Republic of Lithuania» are in compliance with the Constitution. … The second problem concerned the juridical force of international treaties entered into by the Republic of Lithuania and the ways of implementing them.

44. The Constitutional Court ruled that the provision of Article 12 of the disputed law, namely that international treaties «shall have the force of law», was in compliance with the Constitution to the extent that it applied to international treaties ratified by the Seimas; but the same provision contradicted the Constitution to the extent that it applied to international treaties which had not been ratified by the Seimas."

Poland:

POL-1994-3-020; decision No W 10/94, delivered on 30.11.1994 by the Constitutional Tribunal

45. A statute authorising the President to ratify an international treaty is a normative act being subject to the Tribunal's control.

46. According to Article 33 of the Small Constitution (the Constitutional Act of 17 October 1992), the ratification and denunciation of international treaties is reserved for the President. The ratification and denunciation of international treaties relating to the State borders and defensive alliances, as well as of treaties imposing upon the State financial obligations or requiring legislative changes should previously be authorised by Parliament in a statute.

47. Neither the Constitution nor the Constitutional Tribunal Act explicitly authorise the Tribunal to review the constitutionality of an international treaty. According to the Constitutional Tribunal Act, however, the Tribunal is empowered to decide upon the constitutionality of any «legislative act» (statute or act having the force of a statute). Accordingly, a statute authorising the President to ratify an international treaty is subject to the Tribunal's control.

48. The Tribunal is also competent to declare a statute authorising the President to ratify an international treaty unconstitutional when the treaty contains self-executing provisions inconsistent with the Constitution.

49. The Tribunal may not declare such a statute unconstitutional having regard only to the fact that it entitles the President to ratify a treaty that is inconsistent with previous international obligations of the State. Neither may such a statute be declared contrary to the Constitution solely on the ground that it entitles the President to ratify a treaty imposing upon the State a duty to implement legislation, or might affect the coherence of the Polish legal system."

Romania:

ROM-2001-2-005; decision No 226/2001, delivered on 03.07.2001 by the Constitutional Court

50. "The impugned legislation was alleged to contravene the spirit and letter of the international human rights treaties ratified by Romania and forming part of its domestic law, since it discriminated against Romanian citizens on the ground of their dual or multiple nationality.

51. In this connection, reference was made to Articles 2, 21.1 and 21.2 of the Universal Declaration of Human Rights, Articles 2.2 and 6.1 of the International Covenant on Economic, Social and Cultural Rights, and Articles 2.1 and 25 of the International Covenant on Civil and Political Rights, together with Articles 5.9 and 7.5 of the Document of the Copenhagen Meeting.

52. In considering the objection, the Court found that although the provisions of Section 6.a of Act no. 188/1999 were acknowledged to be fully in keeping with the terms of Article 16.3 of the Constitution, the objecting party had requested a review under Article 20 of the Constitution concerning the primacy of international human rights provisions in the event of conflict with domestic law.

53. In the light of Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, the Court found that the right to work established by Article 38.1 of the Constitution could not be restrictively interpreted as the right of entry to either a regular civil service post or a similar post. Exercise of the right to work may be subject to conditions

(education, age, etc) which are not to be construed as restricting the right to work. In the case of the civil service, there are other specific requirements besides these conditions.

54. The impugned legislation was fully in accordance with Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, with Articles 2, 23 and 29 of the Universal Declaration of Human Rights, and with Article 19.3 of the International Covenant on Civil and Political Rights. According to these provisions, the exercise of freedoms may by its very nature be subject to certain restrictions which must nevertheless be prescribed by law and necessary inter alia for maintaining national security or law and order.

55. Likewise concerning requirements as to the interpretation of Article 21 of the Universal Declaration of Human Rights as a whole, the Court made the observation that the provisions in question contemplate access to elected public offices, as long as these are deemed to embody paramount values of protection, expression of the people's will through genuine elections, the will of the people constituting the basis of the authority of the state, and elections held under procedures securing freedom of voting. Article 25 of the International Covenant on Civil and Political Rights has a similar purport.

56. It follows from the aforementioned international instruments that prohibition of all discrimination is not seen as unlimited but, in the context of a legal prescription, may be assessed in terms of its reasonableness.

57. In the case in point, the Court correctly found the objection alleging unconstitutionality inadmissible in asking it to interpret a provision of the Constitution in such a way as to declare it incompatible with the international treaty framework relating to human rights. If it allowed the objection, the Court would take the revision of the Constitution upon itself, the effect of the decision being to nullify the application of the text.

58. In this way, the Court would extend the limits of its own jurisdiction."

ROM-1994-3-004; decision No 81/1994, delivered on 15.07.1994 by the Constitutional Court

59. "It is contrary to the constitutional and international provisions safeguarding the right to a private life to consider sexual intercourse between two consenting adults of the same sex an offence, if the act was not performed in public and did not cause a public scandal.

60. The Court held that Section 200.1 of the Criminal Code is unconstitutional if applied to sexual intercourse between two consenting adults of the same sex, if the act was not performed in public and did not cause a public scandal. Before so ruling the Court took into consideration Article 26 of the Constitution, relating to the protection and enjoyment of private and family life, and to the fact that this Article concurred with Article 8 ECHR and the Council of Europe Parliamentary Assembly's amendment no. 8 to the report on the application by Romania for membership of the Council of Europe.

61. Having regard to the principle of the primacy of international law provided for in Article 20 of the Constitution and the interpretation given to Article 8 ECHR by the European Court of Human rights, the Court found that all homosexual relations with minors or even between adults, where one of the two parties had not consented, or causing a public scandal, are not covered by this article of the European Convention on Human Rights, to which Romania acceded under law no. 30 of 31 May 1994."

ROM-1993-R-001; decision No 23/93, delivered on 27.04.1993 by the Constitutional Court

62. "Likewise, with regard to citizens' rights and liberties, domestic law is consistent with international law, insofar as Article 20 of the Constitution states that its provisions relating to citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, and the covenants and other treaties to which Romania is a party, and that in the event of any inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, precedence shall be given to the international rules."

Switzerland:

SUI-1999-C-001; decision No 5 P.30/1999, delivered on 23.03.1999 by the Federal Court

63. "When an appellant relies on the European Convention on Human Rights, the infringement of Convention rights is treated, in procedural law, as equivalent to infringement of constitutional rights."

SUI-1999-2-006; decisions No 1A.178/1998, 1A.208/1998, delivered on 26.07.1999 by the Federal Court

64. "In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 ECHR, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

65. The issue was whether the confiscation order fell under Article 6.1 ECHR. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the Convention. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 ECHR was applicable. The appellant's further reliance on Articles 10 and 13 ECHR did not have a decisive bearing.

66. In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honor their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision."

SUI-1991-S-003; decision No 2A.120/1991, delivered on 15.11.1991 by the Federal Court

67. "According to the Federal Constitution, the Federal Court is required to apply the laws and agreements passed by the Federal Parliament. The European Convention on Human Rights is part and parcel of Swiss law, the Federal Parliament having approved the accession of Switzerland to the Convention. The Federal Court, like any other authority, is thus bound by the

Convention. It ranks higher than a mere federal law. International public law (Vienna Convention on the Law of Treaties, 23 May 1969, to which Switzerland is a party) expressly provides that international treaty law is to prevail over domestic law. The Federal Constitution does not preclude the Federal Court from inquiring as to whether a federal law is compatible with the Convention; it merely precludes repealing or amending it; on the other hand, it may refrain from applying it in a specific case where to do so would be contrary to international law and would thus render Switzerland liable to a conviction for contravening that law. In examining whether a provision of federal law is in accordance with the European Convention on Human Rights, the Federal Court must first of all ascertain whether it is possible to interpret such a provision as being in accordance with the Convention."

SUI-1989-C-001; decision No 1P.76/1989, delivered on 22.03.1989 by the Federal Court

68. "With regard to the principles instituted by the European Convention on Human Rights [Article 5.4 ECHR on the right to consult the record of proceedings, prepare their own defence and therefore respond effectively to the prosecutor's application for an extension of their remand in custody] should be noted, firstly, that when these principles do not offer remand prisoners greater protection than that already afforded by domestic law they are still taken into consideration in interpreting and applying the fundamental rights embodied in the Constitution, in so far as these principles give these rights practical form, and, secondly, that the Federal Court must take account of the relevant case-law of the Convention bodies."

Ukraine:

UKR-2001-C-002; decision No 3-v/2001, delivered on 11.07.2001 by the Constitutional Court

69. "According to other international and legal documents which have had binding effect on Ukraine, even before its Constitution took effect, it is an international legal obligation of Ukraine to ensure that all its citizens are held fully responsible if they commit any of the overwhelming majority of crimes stipulated by the Rome Statute.

70. The foreign policy activities of Ukraine are based upon universally recognised principles and norms of international law (Article 18 of the Constitution). One such principle is the diligent performance of international obligations which came into existence in the form of international and legal norms which were first elaborated in the early stages of the development of the concept of the nation state, and which are today embodied in a number of international treaties.

71. The Statute effectively reproduces the overwhelming majority of the provisions, which define criminal activities, contained in the conventions to which Ukraine acceded. This is in complete conformity to the international and legal obligations of Ukraine."

UKR-2001-2-006; decision No 3-v/2001, delivered on 11.07.2001 by the Constitutional Court

72. "The prohibition on extradition in Ukraine is circumvented in relation to the International Criminal Court by application of the relevant provisions of the Statute developed or approved by the member states. These provisions are based on international conventions on human rights, and Ukraine has already given its consent to be bound by such conventions.

73. Therefore, the constitutional prohibition on extradition may not be considered as being separate from the international legal obligations of Ukraine.

74. International treaties become a part of Ukrainian domestic legislation, after consent to be bound by the treaties which was given by the parliament (Verkhovna Rada). In this way, the issue of national sovereignty is reconciled with the fact that the jurisdiction of the international courts of justice covers Ukrainian territory (provided that the provisions of the statutes of the international courts do not contradict the Constitution). Therefore, binding Ukraine to the provisions of the Statute will not contradict the requirements laid down in Article 75 and Article 92.14 of the Constitution."

Strasbourg, 27 June 2005