Law

Transnational Judicial Dialogue on International Law in Central and Eastern Europe

Annex – Country Reports

edited by
Anna Wyrozumska

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UNIWERSYTETU
ŁÓDZKIEGO

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Introduction

The purpose of the EUROCORES research project 10-ECRP-02 "International Law through the National Prism: the Impact of Judicial Dialogue" was to explore the contribution national courts of Central and Eastern European States have made to the theory and practice of international law. The focus was placed on the broadly understood judicial dialogue as a means to facilitate the elaboration and spreading of ideas. The understanding of the impact of judicial decisions and of its extraordinary nature, given the history of the legal systems in the Central and Eastern part of Europe, was dependent on an in-depth empirical research forming the foundations for the subsequent analytical work. To this end the adjudicatory practices of the courts of all levels seated in the countries at stake and the case law were collected.

The collected information demonstrated in a comparative mode that the relationship between domestic and international law in all the States under examination have formally (through the constitutional provisions or other legal acts) been introduced to their legal systems. Yet, the existence of the formal basis for application of the international law in national legal systems does not guarantee that the former finds its reflection in courts' decisions. The judicial practices in this respect vary according to the legal system at stake, but also the type and the level of the courts.

This volume presents the results of the first, empirical, stage of research and the information resulting from the survey conducted on the basis of the written questionnaire addressed to country rapporteurs from the Czech Republic, Hungary, Lithuania, Poland, and Russia. The editors chose not to interfere with the content of the Country Reports (including the formal presentation of the information) in order to preserve the approach reflecting the systemic understanding and analysis of the case law and judicial practices visible in the work of the rapporteurs. This "raw data" was the basis for the analysis throughout the duration of the project and the analysis presented in the volume „Transnational Judicial Dialogue on International Law in Central and Eastern Europe".

Questionnaire

Please note that the questions should be viewed and answered in the light of the main aims of collaborative research project, the answers should refer to decisions of the domestic courts (please, quote relevant excerpts of the original text in a footnote).

The objectives are to explore:

- the role of domestic courts in rule of law protection through international law, focusing especially on "transnational judicial dialogues" about international law;
- trends in judicial dialogues: how often and in what situations courts engage in dialogues with international or foreign courts;
- practical challenges to dialogue, such as access to judgments, translations, commentaries, etc., preventing courts from learning how courts elsewhere treat comparable questions;
- how judicial dialogue impacts international law and whether it should, e.g. when dialogue is driven by personal attitudes of judges, the frequency with which courts are seized of international matters, or procedural and regional differences.

I. Legal basis for application of international law in domestic legal order

Please, characterise shortly the system of your country. The main question is to establish whether national courts are empowered by the domestic legal order to interpret and apply international law with full independence.

1. What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?
2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?
3. For Russia as federal state: do the constitutions of the republics refer to international law, are there constitutional or statutory provisions at the federal level addressing federal authority over matters concerning international law?

II. Treaties

1. How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?
2. Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?
3. What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country? Is there any influence of EU law, including the decisions of European Court of Justice?
4. Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?
5. Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?

6. Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)
7. Do the courts refer to the opinion of the Executive?
8. Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?

III. Customary international law

1. Is customary international law automatically incorporated into domestic law?
2. Do the courts apply customary international law in practice? How do the courts prove existence of customary law? Do the national courts always take account of developments in the practice of States, as well as in case law and jurisprudence while determining the existence and content of customary international law?
3. Do the courts refer to the opinion of the Executive?
4. What are the primary subject areas or contexts in which customary international law has been invoked or applied?
5. What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?

IV. Hierarchy

1. How are treaties and customary international law ranked in the hierarchy of domestic legal system?
2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice? What is the role of the international law doctrine, decisions of international or foreign courts?
3. Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

V. Jurisdiction

1. Do the courts exercise universal jurisdiction over international crimes?
2. Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?
3. Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?

VI. Interpretation of domestic law

1. Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?
2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?
3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

VII. Other international sources

1. Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?
2. Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?
3. To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?
4. Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?

5. Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?

VIII. Other aspects of international rule of law

1. Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?
2. May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?
3. May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?
4. Do the national courts decline to give effect to foreign public acts that violate international law?
5. In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?
6. Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?
7. Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?

IX. Judicial dialogue on international law in Eastern Europe

1. Do the courts refer to decisions of international and/or foreign courts?
2. For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/

understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?
4. What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason for non-referral?
5. Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?
6. Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?
7. Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).

International Law through the National Prism:
the Impact of Judicial Dialogue

Project 10-ECRP-028, European Collaborative Research Projects
in the Social Sciences (ECRP) – ECRP VI (2010)

Country Report – Czech Republic

Dr. Petr Mikeš*

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I. Legal basis for application of international law in domestic legal order

1. What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?

Provisions of Constitution of the Czech Republic as valid from 1st June 2002 dealing with international law:

ARTICLE 1 paragraph 2
(2) The Czech Republic shall observe its obligations resulting from international law.

ARTICLE 10
Promulgated treaties, to the ratification of which the Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

ARTICLE 10a
(1) Certain powers of the Czech Republic authorities may be transferred by treaty to an international organization or institution.
(2) The ratification of a treaty under paragraph 1 requires the consent of the Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

ARTICLE 10b
(1) The government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic's membership in an international organization or institution referred to in Article 10a para. 1.
(2) The chambers of the Parliament shall give their views on prepared decisions of such international organization or institution in the manner laid down in their standing orders.
(3) A statute governing the principles of dealings and relations between both chambers, as well as externally, may entrust the exercise of the chambers' competence pursuant to paragraph 2 to a body common to both chambers.

ARTICLE 49
The assent of both chambers of the Parliament is required for the ratification of treaties:
a) affecting the rights or duties of persons;
b) of alliance, peace, or other political nature;
c) by which the Czech Republic becomes a member of an international organization;
d) of a general economic nature;
e) concerning additional matters, the regulation of which is reserved to law.

ARTICLE 52
[…] (2) The manner in which laws and treaties are to be promulgated is provided for by law.

ARTICLE 87
(1) The Constitutional Court has jurisdiction:
[…]
i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented […].
(2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.

ARTICLE 95
(1) In making their decisions, judges are bound by statutes and international treaties which form a part of the legal order; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such international treaties.
[…]

2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

Main rules regarding application of international law within the Czech national legal system are contained in the Constitution. However there are also many provisions in ordinary statutes that call for priority application of international law. In many cases they are superfluous because they only repeat what is already stemming from the Constitution. This situation is caused sometimes by the fact, that before 1st June 2002 according to the Constitution only international treaties on human rights and fundamental freedoms took precedence over the domestic legal order. Priority application of other international treaties or other sources of international law was therefore contained in law regulating different legal branches. Not all of this legislation was

amended. Sometimes it might be caused only by the fact that the Parliament is not aware that such a provision is superfluous. In some cases however ordinary legislation calls for the application of international law in a broader manner than the Constitution. Therefore in some areas of law international customary law and/or international treaties beside those specified in Article 10 of the Constitution (usually governmental treaties) should be also applied. For example the Criminal Procedure Act calls for criminal immunity of persons that have immunity based on international law without any limitation regarding its sources, i.e. also based on international customary law.
There are also some quite important provisions dealing with dialogue on international law in the Constitutional Court Act (no. 182/1993 Coll.) implementing Article 87 paragraph 1 letter i) of the Constitution, which stipulates that the Constitutional Court has jurisdiction to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented. These provisions were repeatedly amended. At the beginning they almost negated the power in the Constitution (as is stipulated in Art. 87 paragraph 1 letter i) – to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented). The only "measure" that the Constitutional Court could take was to repeal legislation that was according to a binding judgment of ECtHR contrary to ECHR. Such repeal could take place only based on proposal of the government and only if the government could not repeal it in any other way. As the government is dependent on majority in the Chamber of Deputies it can be hardly imaginable that the government if it wished so could not be able to repeal the problematic legislation in the Parliament. On the other hand there were also many other subjects that could propose the Constitutional Court repeal of some legislation because it was contrary to ECHR even though there would be no binding judgment of ECtHR in this regard. So the probability that situation described in the provision could arise was almost zero. After the amendment of 2012 (with the effect by January 1, 2013) these provisions read as follows:

> Eighth Division
> Proceedings concerning Measures Necessary to Implement a Decision of an International Court
>
> § 117
> International Court
> For the purpose of this Statute, the term "international tribunal" shall mean any international body whose decisions are binding for the Czech Republic pursuant to an international treaty which forms a part of the legal order (hereinafter "international treaty").

§ 118
Petition Proposing the Annulment of some Legal Enactment

(1) If an international court finds that an obligation resulting for the Czech Republic from an international treaty has been infringed by the encroachment of a public authority, especially that, due to such an encroachment, a human right or fundamental freedom of a natural or legal person was infringed, and if such infringement was based on a legal enactment in force, the government shall submit to the Court a petition proposing the annulment of such legal enactment, or individual provisions thereof, if there is no other way to assure it will be repealed or amended. In such a case, § 35 para. 1 on the admissibility of petitions instituting a proceeding in matters about which the Court has already decided, shall not apply.

(2) In proceedings pursuant to para. 1, the Court shall proceed in accordance with the First Part of this Chapter.

§ 119
Petition for Rehearing
(1) Should the Constitutional Court have decided in a matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty, a petition for rehearing may be submitted against such decision of the Constitutional Court under the conditions set down in this Statute.

(2) A petition for rehearing before the Court may be submitted by a person who was a party to the proceeding before the Court in a matter mentioned in para. 1 and in whose favour the international court decided.

(3) A petition for rehearing may be submitted within six months of the day the decision the international court handed down becomes final in accordance with the relevant international treaty. In addition to the general requirements for a petition, the petition must also contain a designation of the Court's decision against which the petition is directed and a designation of the international court's decision on which the petition rests, and it must describe in what consists the conflict that was found between the Court's decision and that of the international court.

(4) The petitioner may submit, together with the petition for rehearing, a petition proposing the annulment of a statute or other legal enactment, or individual provisions thereof, the application of which gave rise to the facts which are the subject of the petition for rehearing, if they are, according to the petitioner's assertion, in conflict with a constitutional act, or with a statute if the petition concerns some other enactment.

(5) Apart from the petitioner, persons who were parties to the proceeding before the Court, the rehearing of which is proposed, shall also be parties to the proceeding on the petition for rehearing; those persons who were secondary parties in that proceeding shall also have that status in the proceeding on the petition for rehearing.

(6) Secs. 83 and 84 shall apply for the reimbursement and payment of attorney's fees in proceedings on a petition for rehearing.

§ 119a
(1) The petition for rehearing shall be inadmissible if the consequences of the infringement of the human right or basic freedom no longer persist and they have been sufficiently redressed by the granting of just satisfaction pursuant to the international court's decision, or if redress was attained in some other manner.

(2) The Court shall not reject the petition for rehearing as inadmissible on the grounds stated in para. 1 if the public interest in the reopening of the proceeding substantially outweighs the petitioner's personal interest.

§ 119b
(1) The Court shall decide on the petition for rehearing without an oral hearing. Should the Court's judgment be in conflict with the international tribunal's decision, the Court shall quash that judgment, otherwise it shall reject the petition on the merits.

(2) If the Court quashes its previous judgment on the basis of the petition for rehearing, it shall once again consider the original petition to institute proceedings in accordance with the relevant provisions of this Statute.

(3) In its new judgment the Court shall proceed on the basis of the international tribunal's proposition of law.

(4) If the Court's new judgment results in the quashing of decisions which preceded its original judgment, § 235i para. 3 of the Civil Procedure Code shall apply analogously to the manner in which the bodies competent to decide in the matter shall proceed.

(5) If the Court decides in a ruling and by that ruling it concludes the proceeding, it shall apply analogously the provisions of paras. 1–4.

3. For Russia as federal state: do the constitutions of the republics refer to international law, are there constitutional or statutory provisions at the federal level addressing federal authority over matters concerning international law?

II. Treaties

1. **How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?**

   I have not found any decision of a Czech court in which would be any problem with qualification of legally binding treaty and only a political commitment.

2. **Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?**

   Yes, Czech courts distinguish between different kinds of treaties. There are following categories of international treaties from the point of view of the hierarchy within domestic legal order:
   a) International treaties by which certain powers of Czech authorities are transferred to an international organization or institution (Article 10a of the Constitution) – beside conditions stipulated for treaties specified under letter c) their ratification has to be approved by qualified majority in the Parliament (3/5 of all deputies and 3/5 of present senators). These treaties take precedence even over the Constitution beside so called hard core of the Constitution.
   b) International treaties on human rights and fundamental freedoms. This category is not mentioned by the present Constitution but comes from a doctrine of the Constitutional Court developed by its judgment file no. Pl. ÚS 36/01 of June 25, 2002. According to this judgment international treaties on human rights and fundamental freedoms are part of Czech constitutional system. Therefore when an ordinary court comes to a conclusion that such a treaty is contrary to domestic law, it cannot give precedence to international treaty, but has to give proposal to the Constitutional Court to repeal the domestic law.[1] This doctrine is

1 The constitutional maxim in Art. 9 para. 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms. This must be a basis for evaluating the changes brought by the amendment to the Constitution, implemented by Constitutional

opposed by many scholars and also by some ordinary courts, especially by the Supreme Administrative Court which directly refused in some cases to apply the said doctrine and gave precedence to treaty on human rights and fundamental freedoms without asking the Constitutional Court for repeal of the law.[2] These treaties have to fulfil the same condi-

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Act No. 395/2001 Coll., in Art. 1 para. 2, Art. 10, Art. 39 para. 4, Art. 49, Art. 87 para. 1 let. a), b) and Art. 95 of the Constitution. The enshrining in the Constitution of a general incorporative norm, and the overcoming thereby of a dualistic concept of the relationship between international and domestic law, cannot be interpreted to mean that ratified and promulgated international agreements on human rights and fundamental freedoms are removed as a reference point for purposes of the evaluation of domestic law by the Constitutional Court with derogative results. Therefore, the scope of the concept of constitutional order cannot be interpreted only with regard to Art. 112 para. 1 of the Constitution, but also in view of Art. 1 para. 2 of the Constitution, and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it.

This is also indirectly supported by Art. 95 para. 2 of the Constitution, as otherwise it would have to be interpreted to the effect that, when a statue is in conflict with a constitutional act, a general court judge is not qualified to resolve it and is required to submit it to the Constitutional Court. In case of conflict between a statute and an agreement on human rights which is of the same nature and quality as constitutional law, under Art. 10 of the Constitution the judge is required to proceed according to the international agreement. Even if such a decision were taken by a court of any level, in a legal system which does not recognise judicial precedent with the quality and binding nature of a source of law it could never have even de facto derogative consequences. The Constitution would thus create an unjustified procedural inequality for two situations identical in their constitutional nature, which, on the basis of the argument reductionis ad absurdum, cannot be ascribed to the framers of the constitution as a purpose of a constitutional amendment.

The cited interpretation of Art. 1 para. 2, Art. 10, Art. 87 para. 1 let. a), b), Art. 95 and Art. 112 para. 1 of the Constitution is also supported by the fact that even after passing Constitutional Act No. 395/2001 Coll. the legislature did not change § 109 para. 1 let. c) of the Civil Procedure Code and Art. 224 para. 5 of the Criminal Procedure Code, which impose on the general courts the obligation to interrupt proceedings and submit a matter for evaluation to the Constitutional Court not only if a statue or its individual provision is in conflict with a constitutional act, but also if they are in conflict with an international agreement which has precedence over statues. For these reasons, Art. 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to submit to the Constitutional Court a case in which it concludes that the statute which is to be used in resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms.

Guided by these considerations, in the present case, the Constitutional Court did not limit evaluation of constitutionality of the provisions of the Bankruptcy and Settlement Act contested by the petitioner only to reviewing their consistency with constitutional acts, but also with ratified and promulgated international agreement on human rights and fundamental freedoms.

2 E.g. judgments file no. 2 Azs 343/2004, of August 4, 2005, file no. 9 Azs 23/2007, of June 14, 4007, and most strictly and directly file no. 6 As 55/2006, of July 11, 2007 in which the Supreme Administrative Court concluded: "The Supreme Administrative Court is aware that the Constitutional Court soon after the adoption of the Constitutional Act No. 395/2002 Coll. in judgment no. 403/2002 Coll. expressed doubts over the expressed conclusion and concluded that there is still a category of international treaties on human rights and fundamental freedoms. The Constitutional Court, referring to the need to preserve 'the achieved level of procedural

tions as treaties specified under letter c) and the only distinction is their subject matter – i.e. human rights and fundamental freedoms. Based on the mentioned doctrine of the Constitutional Court these treaties are part of the Czech constitutional order. Therefore also the ordinary courts should not apply them directly in case they come to a conclusion that treaty is contrary to a statute but they should submit the case to the Constitutional Court which could then repeal the law that is contrary to such international treaty.

c) Promulgated international treaties, ratified, to the ratification of which the Parliament has given its consent and by which the Czech Republic is bound (Article 10 of the Constitution). These international treaties are directly applicable and if the treaty provides something other than that which a statute provides, the treaty shall prevail.
d) Other international treaties (non-ratified, ratified without consent of the Parliament, non-promulgated, etc.). These treaties are directly applicable only if a statute provides for direct application and only if this application would not be contrary to the Constitution (e.g. because certain matters are reserved to be regulated only by statutes).

3. What are the criteria of direct application of treaties?

As was mentioned in the previous paragraph in the most cases the criteria are:
a) promulgation – i.e. publication in the Collection of Laws or Collection of International Treaties,
b) ratification by the president of the Czech Republic,
c) consent of the Parliament for ratification,
d) that the Czech Republic is bound by the treaty from the point of international law,
e) international treaty – i.e. that it is not only a political commitment or a recommendation.
A specific condition is also self-executing character of the treaty. But even if this condition is not met then it does not mean that the treaty would not become part of the Czech legal order. It only cannot be applied directly

protection of fundamental rights and freedoms', feels called upon to examine whether ordinary laws are in conformity with such international treaties. This is because the Constitutional Court feels that it in only it by itself who will deliver real derogatory effects of such agreements by annulment of the contested law. The Supreme Administrative Court, however, cannot fail to see that the conclusion of the Constitutional Court was stated obiter dictum without any connection with the decided case. The conclusion was not justified in detail and in the following scholars discussions were given many arguments to strong criticism of the judgment. In this situation, the Supreme Administrative Court finds it impossible to disregard the clear wording of the constitutional guideline".

instead of a statute because of its character but it might have an indirect impact (especially regarding international law friendly interpretation of the domestic law).[3]

Are the treaties invoked only against organs of the State or may they be invoked also between private parties?

If the treaties are directly applicable then they might be invoked also between private parties.

What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country?

As far as I am aware there was no such influence and the courts always directly applied international treaties only based on provisions of domestic law. It is also because provisions of the Czech Constitution are quite clear regarding rules for application of international law so there is no need for other support.

Is there any influence of EU law, including the decisions of the European Court of Justice?

Only regarding rules of EU law not regarding general international law.

4. **Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?**

Courts are not obliged to ask any other authority. Courts usually look into information contained in the Collection of International Treaties (in the past, also published in the Collection of Laws) where are published: information on conclusion of a treaty, reservations made by the Czech Republic, termination of a treaty, etc. Problem is if some information are not published in the Collection of International Treaties either because of fault of the responsible state organ or because such information are not published

3 In this regard are inspiring several judgments of the Supreme Administrative Court in which the court used Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (judgments of July 18, 2006, file no. 1 Ao 1/2006, of March 29, 2007, file no. 2 As 12/2006, of June 14, 2007, file no. 1 As 39/2006, and of August 29, 2007, file no. 1 As 13/2007. The Supreme Administrative Court concluded that the convention is not self-executing, however tried to interpret relevant domestic law as far as possible in the way compatible with the convention.

in the Collection of International Treaties at all (e.g. information on other contracting parties in case of multilateral international treaties and reservations made by them).

When courts have any doubts about accuracy of information contained in the Collection of International Treaties or in case of lack of them they should always check, in my opinion, by themselves information from other sources (e.g. to check information contained in the UNTS).[4] This idea comes from the fact that one of the conditions for direct application of an international treaty is that the Czech Republic is bound by the treaty under international law.[5]

5. Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?

I do not know about any such court decision.

6. Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)

In most cases Czech courts try to interpret international treaties as they would be interpreted by international tribunal. If they interpret it otherwise it is, in my opinion, in most of the cases not because of protection of national interests but because of false interpretation of international

4 The Supreme Administrative Court in judgment of March 27, 2008, file no. 9 Afs 130/2007, did examined in detail all conditions for possible direct application of the Convention on the Marking of Plastic Explosives for the Purpose of Detection regardless of information contained in the Collection of International Treaties, including question if the international treaty is binding on the Czech Republic from the point of international law. This review was carried out because there was a dispute between the parties if all conditions for direct application contained in Art. 10 of the Czech Constitution are met. The court found that even though the Czech Republic is bound by the convention on the level of international law the said convention was not ratified by the president and neither the Parliament gave consent to such ratification. Therefore the court refused to use the convention. However in this case there was no discrepancy between information contained in the Collection of International Treaties and information that the court gathered. This judgment is also contained in ILDC under no. ILDC 799 (CZ 2008).

5 However there exists a judgment of the Constitutional Court which concludes that if an information on termination of a treaty was not published in the Collection of International Treaties then such a treaty is still part of the domestic legal order and has to be applied (judgment of the Constitutional Court file no. I. ÚS 420/09 from June 3, 2009). But it does not seem that it should be a constant doctrine of the Constitutional Court.

law. I am aware only of few opened oppositions to interpretation of an international treaty rendered by international body. In the first case this situation arose regarding decisions of the Human Rights Committee when the committee in cases no. 516/1992 (Šimůnek) and no. 586/1994 (Adam) concluded that the Czech Republic breached Art. 26 of ICCPR. The reason for such conclusion was that Czech restitution legislation stipulated Czech citizenship as one of the conditions for return of property seized during the communist regime. The Committee did not see this condition as a justified reason for different treatment of persons in similar situations and therefore breaching the ban on discrimination contained in Art. 26 of the ICCPR. Czech Constitutional Court however concluded in its judgment of June 4, 1997, file no. Pl. ÚS 33/96, that the condition of the Czech citizenship was reasonable and objective. [In Czech legal terminology there is a distinction between citizenship and nationality. Nationality is understood as primarily subjective relationship with certain nation. It is therefore connected also with question of national minorities. While citizenship is legal relationship with state. So e.g. member of German national minority will be usually Czech citizen. In this case was in question citizenship regardless of nationality.] First reason was that the Czech Charter of Fundamental Rights and Freedom stipulates that a law can limit some property rights only to Czech citizens. (The decision seems wrong from the point of the Czech constitutional law and irrelevant from the point of ICCPR.) The second reason were the aims of the restitution legislation. According to the Constitutional Court it was not only to alleviate certain property injustices committed by the communist regime, but restitutions were also one of forms of privatization. The condition of citizenship therefore reflected the legislature's efforts to return property when the person is present in the state territory and thus there is likelihood of due care of the returned property. This second reason seems to be also doubtful. There is no obligation of Czech citizens to live in the Czech Republic and otherwise foreigners may live in the Czech Republic. But it is true that there is higher probability that Czech citizens will live in the Czech Republic especially when in that time it was usually possible to have only one citizenship. The Constitutional Court also pointed out that there was legislation that allowed in a period from 29 March 1990 to 31 December 1993 for most of the persons deprived of their citizenship by the communist regime to gain Czech citizenship in a very simple way. Therefore national law created enough space for any person that was interested in gaining back the seized property to fulfil all criteria, including Czech citizenship. There were also disputes regarding so called Lustration Acts which prevent certain officials of the communist regime to become public employees in some positions. This legislation was disputed especially by International Labour Organization. Constitutional Court of former

Czechoslovakia in 1992 and Czech Constitutional Court in 2001 however upheld the legislation.[6]

Regarding using international sources to interpret international law, special attention is paid to the jurisprudence of the European Court of Human Rights (ECtHR). The Constitutional Court comes to a conclusion that if the European Convention on Human Rights (ECHR) is not interpreted by a court within the jurisprudence of ECtHR then this court breaches a right of the participant to a fair trial. This applies regardless the fact if the decision was against the Czech Republic or any other state party. Even though the Constitutional Court was dealing with ECHR, the court made a general conclusion that the courts are obliged to interpret international treaties according to the interpretation given by any international tribunal called by contracting parties to interpret them authoritatively.[7] Regarding Vienna Convention on the Law of Treaties the courts use this convention quite rare. I have found cases where the courts used it in order to solve differences between different language versions of a treaty[8] and in another case in order to

6 Judgment of the Constitutional Court of the Czech and Slovak Federal Republic of November 26, 1992, file. no. Pl. ÚS 1/92 and judgment of the Constitutional Court of December 5, 2001, file no. Pl. ÚS 9/01.

7 Judgment of the Constitutional Court file no. I. ÚS 310/05, of November 11, 2006:

"In particular, the complainant mentioned in support of its arguments, a number of judgments of the ECtHR. […]In the Czech Republic are promulgated international treaties that have been ratified by the Parliament and by which the Czech Republic is bound as part of the law (Article 10 of the Constitution). A special position among them have international treaties on human rights and fundamental freedoms which form part of the Czech constitutional order with all the resulting consequences […]. The immediate applicability of international treaties also includes the obligation of Czech courts and other public authorities to take into account the interpretation of these treaties by international tribunals as authorities called upon to pronounce authoritatively on the interpretation of international treaties. This of course also applies to the interpretation of the ECHR by the ECtHR. The relevance of the ECtHR jurisprudence achieved constitutional law quality in the Czech Republic. ECtHR decisions are for the Czech Republic and for public authorities on its territory binding in an individual case, which also comes from Article 46, paragraph 1 of the ECHR […]. For the reasons mentioned above, however, have public authorities a general duty to take into account the interpretation of the ECHR carried out by the ECtHR. […] Public authorities, in the first place then the courts, are therefore obliged to take into account the case law of the ECtHR as well as in the cases where decisions concerned the Czech Republic as well as in the cases that concerned another Member State of the ECHR when these cases were, by its nature, significant also for the interpretation of the ECHR in the Czech context. This duty is of special importance if a party before a Czech court points out to such case law. If such an argument is omitted by a court then the court commits a misconduct which could lead to the infringement of the fundamental right to judicial protection under Article 36 paragraph 1 of the Czech Charter of Fundamental Rights and Freedoms, Article 6 paragraph 1 of the ECHR, eventually of the respective fundamental right guaranteed by the ECHR. In any case also Article 1 paragraph 2 of the Czech Constitution is affected".

8 Judgment of the Constitutional Court file no. Pl. ÚS 1/94, of April 26, 1994 – dissenting opinion of judges P. Holländer a V. Ševčík.

solve differences between obligations from a multilateral treaty and a later bilateral agreement.[9]

The courts sometimes refer to the writings of legal scholars but as far as I am aware only of Czech scholars. On the other hand it is not usual situation. Most often courts decide regardless of opinion of scholars.

Sometimes courts cite decision of foreign courts in support of their interpretation of domestic law, particularly the Constitutional Courts uses sometimes decisions of foreign courts, especially of German Constitutional Court. But the citation is usually very short and often not direct but through literature that analyses foreign jurisprudence. Here are some examples of using foreign jurisprudence in this regard. The Constitutional Court pointed out that also the German Constitutional Court concluded that statutory limitation of criminal prosecution is not part of constitutional ban on retroactivity when was reviewing constitutionality of exclusion of limitation periods that expired during communist regime.[10] One decision of German Constitutional Court and one decision of British House of Lords were used in order to show that in defamation disputes must the criticizing person prove that his statements were true.[11] When the Constitutional Court was interpreting consequences of repeated refusal to do mandatory military service of persons that were already convicted by court of the same crime, it used two decisions of German Constitutional Court regarding limits of refusal of mandatory military service and civilian alternative service.[12] Quite extensive analysis of foreign judgments was used in case of constitutional review of later additional taxation and lowering of support given previously to owners of renewable sources of energy and especially of owners of solar power plants. In this case used the Constitutional Court firstly jurisprudence of German Constitutional Court when finding conditions under which is inacceptable even indirect retroactivity. Then was analyzed jurisprudence of courts in Germany, Poland, and Spain dealing with later limitation of support given previously to producers of energy. Also was analyzed jurisprudence of courts in Italy, Austria Croatia and United States of America regarding general possibility to later reduce state aid or impose/increase taxation. The outcome of this comparison was that generally is acceptable to change the volume of support or to increase taxation because no one can presume that legislation cannot be under any circumstances changed. Finally was mentioned jurisprudence of ECtHR regarding possibility to give to a certaing group of people advantageous position compared with other.[13]

9 Decision of the Regional Court in Prague file no. 17 Co 110/2011, of March 23, 2011.
10 Judgement of the Constitutional Court file no. Pl. ÚS 19/93 of December 21, 1993.
11 Judgement of the Constitutional Court file no. I. ÚS 453/03 of November 11, 2005.
12 Judgement of the Constitutional Court file no. Pl. ÚS 19/98 of February 3, 1999.
13 Judgement of the Constitutional Court file no. Pl. ÚS 17/11 of May 15, 2012.

In my opinion sometimes the quotation is not very applicable to the domestic situation. One of the examples could be judgments of the Constitutional Court regarding wages of judges in the Czech Republic. The Constitutional Court solved this materia many times. In the fourth set of decisions (in 2005) pointed to jurisprudence of Polish Constitutional Court in this regard and slightly of decisions of German Constitutional Court.[14] Same Polish decisions were quoted in two later judgments from 2011 and 2012. New decision of the Polish Constitutional Court was used in the last judgment in 2014.[15] However the Polish constitution contains specific provision – Art. 178 paragraph 2, which reads: "Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties". There is no similar provision in the Czech Constitution. So in this case the Constitutional Court should explain if the reasoning of the Polish courts was based only on this specific provision or also used general principles of independence of judicial power because on this ground was based reasoning of the Czech Constitutional Court.

Referring to decisions of international courts in other situations than the interpretation of a specific international treaty is even more rare. I have found only a decision of the Supreme Administrative Court in which the court needed to interpret the term "internal armed conflict" contained in the Czech Asylum Act. The court used for this interpretation the decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Court of Justice and the opinions of the International Committee of the Red Cross, and decision of the Special Court for Sierra Leone.[16]

7. Do the courts refer to the opinion of the Executive?

No. There is no legal ground for such a procedure and courts do not do it.

8. Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?

I have not found any decision that would apply any other statements beside reservations nor any case in which would courts ever declare a reservation illegal.

14 Judgments of the Constitutional Court file no. Pl. ÚS 34/04, Pl. ÚS 43/04, and Pl. ÚS 9/05 all of July 14, 2005.

15 Judgement of the Constitutional Court file no. Pl. ÚS 28/13 of July 10, 2014.

16 Judgment of the Supreme Administrative Court file no. 5 Azs 28/2008 of March 13, 2009.

III. Customary international law

1. **Is customary international law automatically incorporated into domestic law?**

   No. There are only some acts that give in some specific legal areas precedence also for international customary law over the domestic law (especially regarding diplomatic immunities – in criminal law or tax law). There is also possibility that an international treaty that is directly applicable in the Czech law can give precedence to international customary law. In such cases domestic court should apply international customary law based on the international treaty. The courts should also take into account international customary law through indirect application based on Article 1 paragraph 2 of the Constitution.[17]

2. **Do the courts apply customary international law in practice? How do the courts prove existence of customary law? Do the national courts always take account of developments in the practice of States, as well as in case law and jurisprudence while determining the existence and content of customary international law?**

   Application of international customary law is quite rare. There are basically three causes for application of international customary law by Czech courts. The first cause to apply international customary law is the area of national law which is closely related to international law and without application of international customary law it is often impossible to interpret national legislation. Situation is similar when directly applicable international treaties are at stake, but they need to be applied with regard to the rules of international law, including customary ones. The courts in this context consider in particular issues related to citizenship and the succession of states.[18]

17 The Czech Republic shall observe its obligations resulting from international law.

18 Judgment of the Constitutional Court file no. Pl. ÚS 9/94 of September 13, 1994 – dealing with the state power to grant citizenship under international law, decision of the Constitutional Court file no. IV. ÚS 580/06 of April 3, 2007 – dealing with possible discrimination regarding granting of citizenship, decision of the Constitutional Court file no. II. ÚS 120/2000 of May 31, 2000 – dealing with duty to do a military service of a person holding dual citizenship, judgment of the Constitutional Court file no. II. ÚS 214/98 of January 30, 2001 – dealing with succession of the Czech Republic to the international obligations of former Czechoslovakia and judgment of the Constitutional Court file no. I.ÚS 420/09 of June 3, 2009 – dealing with succession to international treaties between former USSR and Czechoslovakia.

The second cause to apply international customary law is a situation where national legislation calls for such application. The Supreme Court for example applied international customary law when deciding if a member of wider royal family during his private trip enjoys the privileges and immunities (decision of the Supreme Court file no. 11 Tcu 167/2004 of December 16, 2004). The last reason for which courts take into account international customary law in their decisions, is to promote an application of an international treaty that has a codification nature. By this argument they usually want to support importance of the rule contained in the treaty. In particular they do it in the area of refugee law.[19]

Usually the courts do not explain too much why they consider a specific rule as a rule coming from international customary law or they only cite one opinion of a scholar supporting conclusion that a rule is part of international customary law.

3. Do the courts refer to the opinion of the Executive?

No, they do not have legal basis for doing so.

4. What are the primary subject areas or contexts in which customary international law has been invoked or applied?

As mentioned in point 2. above the courts use customary international law regarding citizenship, succession of states, diplomatic immunities and refugee law.

5. What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?

There are only very few cases dealing with diplomatic or consular immunity. One of them was dealing with a member of wider royal family (see above point 1). Another case was dealing with a question if an ambassador of the Sovereign Order of the Knights of Malta is obliged to act as a witness in a criminal case.[20] Both of the cases were solved based on international customary law. In another case a Czech citizen was a holder of diplomatic

19 Judgment of the Supreme Administrative Court file no. 9 Azs 23/2007 of June 14, 2007, and similar judgments of the Supreme Administrative Court file no. 1 Azs 40/2007 of September 19, 2007, and file no. 6 Azs 215/2006 of October 24, 2007, and also judgment of the Supreme Administrative Court file no. 5 Azs 28/2008 of March 13, 2009 – dealing with distinguishing between a civilian and a combatant.

20 Decision of the Constitutional Court file no. I. ÚS 173/04 of May 4, 2004.

passport of Liberia. The Supreme Court concluded that holding of a diplomatic passport itself does not have any impact on determining if such person is not a member of a diplomatic mission.[21]

Regarding state immunity there was a dispute between Poland (Polish embassy in Prague) and its employee on a labour contract governed by Czech law. The Supreme Court strictly distinguished between diplomatic and state immunity. Poland was invoking Vienna Convention on Diplomatic Relations of 1961. The Supreme Court however concluded that the immunity would be applicable only if party to the dispute would be the ambassador or another member of diplomatic staff but in this case the state is the party, as an employer. The Supreme Court then briefly analysed historical development of state immunity when it used a Czech scholar Jiří Malenovský book and Report of the Working Group on Jurisdictional Immunities of States and Their Property within International Law Commission, text UN Doc. A/CN.4/L.576, annex at p. 58. The court concluded that in case that a state does not act as a sovereign (*acta iure imperii*) but is in a position of a civil party, there is no place for state immunity in a civil dispute.[22] The Supreme Court upheld this conclusion also in a later case dealing with an action against Austria represented by cultural department of Austrian Embassy in Prague in which the plaintiff was asking for an excuse for non-admission to the readings held at the Austrian Cultural Institute in Prague.[23]

Czech Republic is only a signatory of the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 and did not ratify it yet. I have not found any case in which would Czech courts use the said convention.

IV. Hierarchy

1. How are treaties and customary international law ranked in the hierarchy of domestic legal system?

There is no system hierarchy but rather application hierarchy. It could be in brief described by following application order of norms:

1. Hard core of the Constitution.
2. International treaties described in Article 10a of the Czech Constitution (supranational law).

21 Decision of the Supreme Court file no. 11 Tcu 95/2003, of July 17, 2003.
22 Decision of the Supreme Court file no. 21 Cdo 2215/2007, of June 25, 2008.
23 Decision of the Supreme Court of March 24, 2011, file no. 30 Cdo 2594/2009, of March 24, 2011.

3. Constitutional order.
4. International treaties dealing with human rights and basic freedoms.
5. International treaties that meet the conditions set out in Article 10 of the Constitution.
6. Other international treaties and international customary law if a specific law gives precedence to them and such precedence is not contrary to the Constitution.
7. Laws.

2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice? What is the role of the international law doctrine, decisions of international or foreign courts?

I have found only one decision dealing directly with question of *jus cogens* regarding rule of non-refoulement in order to protect physical and mental integrity of an individual, i.e. in particular the right to life and prohibition of torture and inhuman treatment.[24] But the court only stated existence of this rule without any reasoning probably because the protection was refused since the complainant failed to prove any risk that would lead to the breach of the norm. On the other hand based on the jurisprudence of the Constitutional Court there is specific status of international treaties dealing with human rights and basic freedoms, some of them of *ius cogens* character, as e.g. the prohibition of torture. The Constitutional Court gave in some cases precedence to the human rights treaties over the other international obligations. It was in cases of possible extradition to countries where was a risk of torture of the extradited person. The Constitutional Court concluded without expanded argumentation regarding international law that the obligation based on the treaty protecting basic human rights must prevail over international obligation that would lead to breach of human rights.[25]

3. Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

The Constitutional Court gives higher status to international treaties on human rights and basic freedoms as was mentioned in Part II. point 2 of this questionnaire.

24 Decision of the Constitutional Court of July 24, 2007, file no. I. ÚS 1316/07.

25 Decisions of the Constitutional Court of April 15, 2003, file no. I. ÚS 752/02, December 20, 2006, file no. I. ÚS 733/05, and of January 3, 2007, file no. III. ÚS 534/06.

V. Jurisdiction

1. **Do the courts exercise universal jurisdiction over international crimes?**

   They have such jurisdiction based on Penal Code[26] but I am not aware of any case in which it would be applied.

2. **Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?**

   I am not aware of any case in which it would be applied.

3. **Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?**

   I am not aware of any problems in this regard. If there is a dispute regarding jurisdiction of Czech courts, it is solved usually through EU regulations regarding jurisdiction (Brussels I and II). These disputes are not of any specific importance. If the courts conclude that they do not have jurisdiction, they dismiss the proceedings.

VI. Interpretation of domestic law

1. **Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?**

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26 Law no. 40/2009 Coll., Penal Code, § 7 paragraph 1:
"Principle of Protection and Principle of Universality
(1) The law of the Czech Republic assesses the culpability of torture and other cruel and inhumane treatment (Section 149) […], terrorist attack (Section 311), terror (Section 312), sabotage (Section 314) […], genocide (Section 400), attacks against humanity (Section 401), apartheid and discrimination against groups of people (Section 402), preparation for aggressive war (Section 406), use of prohibited means of combat and clandestine warfare (Section 411), war atrocities (Section 412), persecution of the population (Section 413), looting in the area of military operations (Section 414), abuse of internationally and State recognised symbols (Section 415), abuse of flag and armistice (Section 416) and harm of a parliamentarian (Section 417) even when such a criminal offence was committed abroad by a foreign national or a person with no nationality to whom permanent residence in the territory of the Czech Republic was not granted".

Yes. Mainly based on Article 1 paragraph 2 of the Constitution. There is not any specific doctrine on indirect application of the international law.

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

Due to the fact that the international treaties on human rights and basic freedoms were, and due to the above mentioned doctrine of the Constitutional Court still are, part of the constitutional order there is no need for interpreting the domestic constitutional law dealing with human rights and freedoms in the light of international law because they are on the same level. In consequence they are applied together. The Constitutional Court also applies a doctrine that before quashing any legislation there has to be an attempt to interpret the domestic law in a way that will be consistent with international obligations even though such interpretation would not be in other cases used.

So rather ordinary courts are those, that interpret domestic law in the light of international law. There are very good examples of practice of the Supreme Administrative Court on application of the Aarhus Convention. In one of the cases the petitioners sought judicial review of the amendment of the city plan of Prague. The subject of the changes was the implementation of a new runway airport in the area along with the construction of the ring road and high-speed tracing. Petitioners argued that the change of the city plan should be seen as a measure of general application within the meaning of the Administrative Procedure Code to which review is the Supreme Administrative Court entitled. On the contrary the city of Prague was of the opinion that the amendment is not in itself a measure of general application, but it is approved by generally binding regulations (regional law) which could be invalidated only by the Constitutional Court. The Supreme Administrative Court decision came also from Articles 6, 7 and 9 of the Aarhus Convention. It identified the structures, which are related to change in the city plan as those in which public participation is mandatory, and therefore where the state is obliged to ensure public participation in the initial stage decision-making, when all options are opened and effective public participation can take place. In the preparation of plans and programs relating to the environment, the Czech Republic has an obligation to take measures for public participation. Finally, there is an obligation to ensure to members of the public concerned, subject to specified conditions, to achieve a judicial review in terms of material and procedural legality of any decision, act or failure to act under the provisions of Article 6, or according to other provisions of the Aarhus Convention. According to the court, while national legislation allows different interpretations, having regard to Article 1, paragraph 2 of the Czech Constitution, the court

is obliged to accept such an interpretation, which leads to the fulfilment of the requirements of the Aarhus Convention. Subsequently the Supreme Administrative Court, referred to the obligations of Community law and constitutional order and concluded that the adoption or amendment of planning documentation is a measure of general application to which review this court is entitled.[27] There were also some other judgments of the Supreme Administrative Court that were interpreting domestic law in the light of the Aarhus Convention.

3. **Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?**

   I am not aware of any such decision. I have found only simple reference to the Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes, when interpreting Czech Act on Bills of Exchange and Promissory Notes in the decision of the Supreme Court. Czechoslovakia has signed the said Convention but has never ratified it.[28]

VII. Other international sources

1. **Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?**

   I am not aware of any such decision.

2. **Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?**

   The only binding resolutions, besides EU law, would be resolutions of the UN Security Council. I have not found any decisions in which a resolution of the UN Security Council would be used as a base for the decision. It is only cited in some refugee cases when describing situation in the country of origin.

27 Judgment of the Supreme Administrative Court file no. 1 Ao 1/2006 of July 18, 2006.
28 Judgment of the Supreme Court file no. 29 Odo 574/2006, of August 22, 2007.

3. **To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?**

   The courts sometimes use soft law as an aid in interpretation of international law instruments. There is for example a judgment of the Constitutional Court in which the court used General Comment no. 4 of the Committee on Economic, Social and Cultural Rights – The right to adequate housing for interpretation of Article 11 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights. The court concluded on the said general comment that the state has a right to regulate amount of rent even though this right is not directly stipulated in Article 11 paragraph 1.[29]

4. **Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?**

   There is specific situation regarding ECtHR since domestic courts understand that this court is empowered by the contracting parties to a binding interpretation of ECHR. Also basically only the judgments of the ECtHR can in fact have direct effect on already going procedures and on reopening of a procedure previously completed on domestic level. As was mentioned in point 1.2. of this questionnaire the Constitutional Court may under certain circumstances reopen the court procedure if an international court which decisions are binding on the Czech Republic declares that the Czech Republic breached its obligations arising from an international treaty in an individual case. This kind of procedure is quite unique, there were only nine applications for reopening of the procedure since 2004 when this possibility (up to 2012 only in criminal cases) was enacted. Two of the applications were rejected because they were filed by persons that were not parties to the procedure before the ECtHR and two applications were rejected for formal deficiencies. One application was rejected because the consequences of the infringement of the human right or basic freedom no longer persisted and they have been sufficiently redressed by the granting of just satisfaction pursuant to the international court's decision. It was in a situation when the ECtHR found custody of the petitioner contrary to the ECHR and awarded him with pecuniary satisfaction and the custody no more lasted (the petitioner was already in jail).[30] There were only four applications

29 Judgment of the Constitutional Court file no. Pl. ÚS 3/2000 of June 21, 2000.
30 Decision of the Constitutional Court file no. Pl. ÚS 28/11 of April 24, 2012.

that met all the legal requirements and the Constitutional Court reopened the procedures.[31]

In its decision of February 26, 2004 the Constitutional Court had to solve quite an unusual problem. For the Constitutional Court this was for the first time after the Euro-amendment of the Constitution and also probably first time ever when it had to deal with a prior decision of the ECtHR regarding the same matter as pending before the Constitutional Court.

Complainants filed previously on 3 March 1998 an individual application to the European Commission of Human Rights against some decisions of Czech courts. They alleged that they had been the victims of the violations of several provisions of the ECHR. The ECtHR found their application partially admissible regarding breach of Articles 3, 8, 13 and 14 of the ECHR. Regarding the Article 6 of the ECHR the Court found admissibility only regarding the length of the domestic procedure but not regarding the fair trial because of not exhausting of all domestic remedies (namely the constitutional complaint). The Czech Republic and the complainants reached a friendly settlement. The ECtHR approved the friendly settlement and struck out the application from the list.

Meanwhile there were still some domestic procedures pending regarding the same issues, especially before the Constitutional Court. The complainants partially withdrew their constitutional complaint based on the fact of concluding the friendly settlement but insisted on deciding the rest of the complaint in respect of the breach of Article 6 of the ECHR regarding the length of the procedure after submission of the complaint to the European Commission of Human Rights and as well as regarding the fair trial.

The Constitutional Court ceased the procedure applying by analogy procedural provisions on withdrawal of the complaint by the plaintiffs. The Constitutional Court reasoned in the following way. The Constitution after the Euro-amendment incorporated to the Czech legal order a large group of international treaties and courts are bound by them. On the other hand none of the provisions of the Constitution incorporates decisions of an international court based on an international treaty which is according to Article 10 of the Constitution part of the Czech legal order. Therefore these decisions do not have the same effects as decisions of Czech courts. The Constitutional Court did not have any doubts that the content of a binding judgment of the ECtHR in a case against the Czech Republic constitutes an obligation of the Czech Republic arising from international law. The duty to observe such obligation is also stipulated in Article 1 Section 2 of the Constitution that binds also the Constitutional Court. The ECtHR is not entitled to solve the dispute before the applicants exhausted all domestic

31 Decisions of the Constitutional Court file no. Pl. ÚS 13/06 of May 6, 2008, file no. Pl. ÚS 1/07 of May 6, 2008, file no. Pl. ÚS 1/09 of July 28, 2009 and file no. Pl. ÚS 19/12 of December 18, 2012.

remedies. If the ECtHR decided to accept the friendly settlement before the Constitutional Court decided on the matter then this has to be interpreted in the way that the ECtHR did not feel necessary to wait for the decision of the Constitutional Court. It would be contrary to the spirit of the ECHR, principle of subsidiarity, logic and the judgment of the ECtHR itself if after striking an application out of the list of cases should the procedure continue at a domestic level. The wording of a judgment of the ECtHR is for the Constitutional Court an international obligation. The scope of the international obligation cannot be from its nature unilaterally changed by a subject that is subordinated to the jurisdiction of the Czech Republic by means of domestic law (within the procedure about the constitutional complaint).

On one hand the resolution of the Constitutional Court is on a general level quite friendly to the decisions of international courts. Even though the Constitutional Court came up to a conclusion that such a decision is not formally binding on it the Constitutional Court accepted its obligation to observe it. On the other hand in my opinion the Constitutional Court omitted importance of the decision on admissibility.

The ECtHR defined which matters but also legal questions will be subject to its review. The ECtHR inter alia rejected review regarding breach of Article 6 as regards the fair trial due to its prematurity and admitted only review of extraordinary length of the procedure. In case the parties would not come up to the friendly settlement the ECtHR would be deciding by the judgment on merits only about the matters and legal questions that were defined by the previous decision, i.e. only about extraordinary length of the procedure not about fairness of the procedure. Therefore if parties reach a friendly settlement then this friendly settlement covers only matters that would be otherwise subject to the review of the ECtHR.

In the commented case the Constitutional Court found that the ECtHR had had to conclude that there is no need for waiting for the decision of the Constitutional Court because otherwise the ECtHR could not deliver its judgment. But ECtHR could deliver its judgment only as regards matters and legal questions that were found admissible. Therefore the question of fair trial was not solved yet and there was no reason for ceasing the procedure in this regard. It seems that the Constitutional Court adhered too much to domestic understanding of a petition to court when the decisive is usually only the relief not the reasoning.

Also it is quite problematic to argue that the reason for not continuing the procedure was a duty of the Constitutional Court to observe international obligations of the Czech Republic. According to Article 53 of the ECHR the high contracting parties are in no way prevented to provide a higher protection of human rights on their territories than is guaranteed by the ECHR. Therefore since international law allows for remedies in the domestic law other than just paying the agreed amount, there would be no breach of any

international obligations of the Czech Republic. It would only to certain extent prevent the complainants from a new application to the ECtHR.

5. **Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?**

   There are some cases where courts were asked to do so but they have always refused.

VIII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?**

   Basically they have the same freedom as when applying other legal rules. The only exception is regarding situation that domestic legislation would be contrary to conventions on human rights and freedoms. As was mentioned many times in this questionnaire, in this case the Constitutional Court adopted a doctrine that the ordinary court should refer such question to the Constitutional Court. However the ordinary courts do not always respect this doctrine.

2. **May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?**

   As the courts may ask any state organs or private subjects to provide information necessary for their decision, they could also ask any ministry to provide any court with information regarding international relations or facts of international law. This question should however be only regarding facts (*quaestio facti*), e.g. if and when was a certain treaty ratified by the Czech Republic. There is no ground to ask for interpretation of international law (*quaestio juris*) when it is the court who has the power to interpret law.

3. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

   There is now exception for judicial power on questions regarding international law. However most of the issues of executive power dealing with international law will not have any direct impact on domestic subjects so domestic subjects will not have right to sue the state in this regard.

4. **Do the national courts decline to give effect to foreign public acts that violate international law?**

   I have not found any decision that would deal with such a question.

5. **In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?**

   Because all of the mentioned treaties fulfil criteria of Article 10 of the Czech Constitution, they are directly applicable and take precedence over the law. The only distinction is that some of them are used more often than the others. The UN Charter and the Vienna Convention on the Law of Treaties are used quite rare. ICCPR is used more often and the most used is ECHR.

6. **Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?**

   As was already mentioned, the jurisprudence of the ECtHR has large influence on interpretation of the ECHR. As far as Czech Bill of Rights is very much inspired by the ECHR and the Convention is on level of a constitutional act, there is no factual need for interpretation of domestic law through prism of international law, but international law is directly applicable.

7. **Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?**

   I am not aware of any such influence especially because courts do not usually need any challenging application of international law.

IX. Judicial dialogue on international law in Eastern Europe

1. Do the courts refer to decisions of international and/or foreign courts?

The courts, especially the Constitutional Court, refer very often to decisions of the European Court of Human Rights when interpreting the European Convention on Human Rights and regarding EU law to the Court of Justice of the EU. They rarely refer to decisions of the International Court of Justice, there are almost no decisions that refer to decisions of the International Criminal Court.

Regarding foreign courts judgments it is even more rare. The only foreign court that is used quite often is the German Constitutional Court. Sometimes are used decisions of other German, Austrian and Polish courts.

Although referring to foreign court's decision is quite rare, even more rare it is in questions of interpretation of international law.

2. For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?

When the courts use decisions of other courts they do it sometimes to find the content and common standard of interpretation/understanding of international law. However in most of the cases they do it to strengthen their own/domestic argumentation as was mentioned in Article II. point 6 of this questionnaire.

They usually do not have need to use dialogue in highly politicised cases but when the Constitutional Court derogates an act of the Parliament it is in some way sometimes more and sometimes less political issue because the court goes against the will of the Parliament. An example could be constitutional review of Act on Law on Churches and Religious Societies, which was enacted through will of majority in the Chamber of Deputies over contra proposal of Senate and veto of the president. The law newly regulated rights and duties of churches and religious societies and it was criticised from their part that it enlarges too much possible state influence on them and limits them in other than strictly religious activities (such as charitable activities). In this judgment the Constitutional Court used also one judgment of the Slovak Constitutional Court and two judgments of the German

Constitutional Court regarding relationship between churches and religious societies and state. One of the German judgments was then dealing with charitable activities of the Catholic Church.[32]

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?

The courts usually refer to international and foreign judgments by citing them. Sometimes they only inform that the external courts decided in certain way without quoting the text or giving any further information on the judgment sometimes they quote a part of the judgment or at least do a brief summary of the main thoughts relevant to decision coming from the judgment. I have not found any case in which would court deal with legal relevance of the decision in the legal order of the cited court. An example of very short quotation is judgment of the Constitutional Court about Act on Churches and Religious Societies mentioned in the previous section. One German and the Slovak decision were only mentioned in the way that they thought similarly as Czech Constitutional Court regarding certain question. The second German decision was summed up into two sentences. Another example could be judgment of the Supreme Court file no. 23 Cdo 888/2011 of January 31, 2013 in which the court used judgment of the Austrian Supreme Court and German Supreme Court regarding interpretation of Art. 13 of CMR Convention. Both of the judgments are summed up into three sentences and were not used original judgments but only their excerpt published in Czech commentary on the CMR Convention.

As extraordinary cases of large analysis of foreign court judgments could be two sent template cases, i.e. judgment of the Constitutional Court file no. Pl. ÚS 11/04 of April 26, 2005, on Judicial Review of Security Clearances, and judgment of the Supreme Administrative Court file no. 9 Azs 107/2014 – 43 of May 29, 2014, on Asylum Seekers in the Transit Area of an Airport. In both of the cases were foreign court judgments cited and analysed. Another very good example (probably the best I have found) is judgment of the Supreme Administrative Court file no. 6 Azs 40/2010 – 70 of March 29, 2011. In this judgment were used decisions of ICJ, ICTY, ICTR, CJEU and national court of Great Britain, Canada, New Zeeland, and United States of America. The court interpreted mainly Art. 1F letter c) of Geneva Convention Relating to the Status of Refugees regarding exclusion of a refugee seeker from protection if he has been guilty of acts contrary to the purposes and principles of the United Nations. In the mentioned case the asylum seeker informed in 1980's Cuban authorities of suspicious

32 Judgement of of the Constitutional Court file no. Pl. ÚS 6/02 of November 27, 2002.

activities other Cubans living in Czechoslovakia. The mentioned decisions were cited and the court was trying to synthesize them into certain general outcomes regarding interpretation of relevant provisions. Criticizing of "external" judgments is absolutely rare. I have mentioned them in Article II. point 6. of this questionnaire.

4. **What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason of non-referral?**

   As lower level courts are concerned the frequency is very rare even regarding judgments of the ECtHR. It is very often because even the parties do not put the ECHR at stake and they stay on level of domestic law that is in most of the cases consistent with the ECHR. An important factor is also that lower courts have to solve big amount of cases and they do not have too much time to render their judgments. Working with international law is time consuming. Regarding higher courts, especially the Constitutional Court, they quote decisions of the ECtHR more often. The reason is in my opinion especially because these courts are aware that the ECtHR can review their judgments and therefore they are much more motivated to follow its jurisprudence. Regarding other courts they do not have this kind of motivation and therefore they use them usually only in order to support their own view.

5. **Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?**

   There are not any procedural obstacles but only the practical ones. First one is lack of translations. On the other hand if a judgment is available in English many of the judges of higher courts are able to translate it. Also many of them speak German since this language was spoken by more people during communist regime than English. It might also in some way explain so wide using of jurisprudence of the German Constitutional Court. French is not so often but it will be probably third after English and German. Probably many older judges would be able to work also with texts in Russian language.

6. **Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?**

As I have mentioned previously the German Constitutional Court is used quite often in jurisprudence of the Constitutional Court.[33] It is for sure also because it is deemed prestigious but also because Germany is a neighbouring state and had to deal in past with relicts of totalitarian regime. US Supreme Court is also used quite often.[34] Also decisions of Austrian[35] and Polish[36] courts are sometimes used, for sure because of the fact that these states are our neighbours.

On the other hand judgments of Slovak courts are not used so often even though it is the nation with most cultural and other links with the Czech Republic.[37]

7. Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).

33 E.g. judgment of of the Constitutional Court file no. Pl. ÚS 6/02 of November 27, 2002, judgments mentioned in Article II. point 6 of this questionnaire.

34 E.g. judgment of of the Constitutional Court file no. I. ÚS 367/03 of March 15, 2005 regarding freedom of speech versus protection of personality, judgment of of the Constitutional Court file no. Pl. ÚS 17/11 of May 15, 2012 – retroactivity of taxation of solar power plants, or judgment of of the Constitutional Court file no. Pl. ÚS 39/01 of October 30, 2002 regarding constitutional conformity of sugar quotas.

35 E.g. judgment of the Supreme Court file no. 8 Ob 657/87 of June 28, 1988.

36 E.g. judgment of the Constitutional Court file no. Pl. ÚS 11/04 of April 26, 2005, on Judicial Review of Security Clearances, and judgments regarding wages of judges mentioned in Article II. point 6 of this questionnaire.

37 E.g. judgment of of the Constitutional Court file no. Pl. ÚS 6/02 of November 27, 2002 in which was a decision of Slovak Constitutional Court only mentioned without any analysis of it.

International Law through the National Prism:
the Impact of Judicial Dialogue

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Country Report – Hungary

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I. Legal basis for application of international law in domestic legal order

1. What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?

In Hungary a new constitution, officially the Fundamental Law of Hungary[1] (hereinafter: FL) was adopted on 25 April 2011 that came into force on 1 January 2012. The new constitution does not affect the scope of Hungary's international commitments. However, there are permanent modifications regarding the constitutional foundations, thus a short overview might be reasonable. Mention must be made about the Transitional Provisions of the FL (hereinafter: TP-FL) that were adopted by the Parliament on 30 December 2011, published on 31 December 2011, and it came into force on 1 January 2012.[2] The TP-FL served the coming into force of the new constitution. However, regarding its content the TP-FL was rather an amendment, as about half of its rules were not transitory at all, and some of them undermined the principles and provisions of the FL It was an extremely alarming issue concerning the basic principles of the FL that the TP-FL has constructed an unusual constitutional liability for the "communist past", furthermore it has overruled some important statements of the Constitutional Court e.g. on the right to the lawful and impartial judge[3] and undermined the provisions of the FL on judicial independence, separation of churches and state, division of powers, independence of the Central Bank, etc.[4] According to the Commissioner for Fundamental Rights of Hungary, the TP-FL "severely harms the principle of the rule of law, which may cause problems of interpretation and may endanger the unity and operation of the legal system. The Ombudsman is concerned because the Transitional Provisions contain many rules having

1 For the official English translation of the Fundamental Law (without amendments), see http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf or http://www.mkab.hu/download.php?d=65.

2 An unofficial translation of the TP-FL by Bánkuti, Miklós – Halmai, Gábor – Scheppele, Kim Lane is available at http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf.

3 Constitutional Court Decision № 166/2011. (XII. 20.) AB.

4 On the TP-FL and other cardinal acts read more in *Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and Key Cardinal Laws* (ed. Halmai, Gábor and Scheppele, Kim Lane), available at http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf.

obviously non-transitional character".[5] Thus the Ombudsman requested the Constitutional Court to examine whether the Transitional Provisions comply with the requirements of the rule of law laid down in the FL. After the Ombudsman's initiative, the Parliament adopted the first amendment to the FL clarifying that the Transitional Provisions are part of the FL. By this amendment the governing majority intended to avoid the constitutional review of the TP-FL, confirming its constitutional rank.[6] Despite this, the Constitutional Court ruled on the Ombudsman's petition declaring that all those provisions of the TP-FL are invalid, which did not have transitory character.[7] As a response, the governing majority adopted the 4th amendment[8] of

5 On the petition of the Ombudsman lodged in March, 2012 to the Constitutional Court concerning the TP-FL see http://www.obh.hu/allam/eng/aktual/20120314_3.htm.

6 In April, 2012 the Government of Hungary lodged a bill to the parliament as the 1st amendment of the Fundamental Law of Hungary so as to clarify that the Transitional Provisions are the part of the FL. The first amendment was adopted in June 2012. It added a new 5th point to the Closing Provisions of the FL: "5. The transitional provisions related to this Fundamental Law adopted according to point 3 (31 December 2011) are part of the Fundamental Law". Other relevant points of the Closing provisions: "2. Parliament shall adopt this Fundamental Law according to point a) of subsection (3) of Section 19 and subsection (3) of Section 24 of Act XX of 1949. 3. The transitional provisions related to this Fundamental Act shall be adopted separately by Parliament according to the procedure referred to in point 2 above". (The FL was not in force yet when the Parliament adopted the Transitional Provisions – that is the reason of the reference to the former Constitution.)
The 1st amendment repealed – upon the criticalities of the EU – Article 30 of the TP-FL that infringed the independence of the Central Bank.

7 The Constitutional Court annulled approximately half of the articles of the TP-FL in its decision of 28 December 2012 [Decision № 45/2012. (XII. 29.) AB]. Press release: "The Constitutional Court has declared that the Hungarian Parliament exceeded its legislative authority, when enacted such regulations into the 'Transitional Provisions of the Fundamental Law" that did not have transitional character. The Hungarian Parliament shall comply with the procedural requirements also when acting as constitution-maker, because the regulations that violate these requirements are invalid. Therefore the Constitutional Court annulled the concerned regulations due to formal deficiencies. The Constitutional Court, regarding its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions" (available at http://www.mkab.hu/sajto/news/certain-parts-of-the-transitional-provisions-of-the-fundametal-law-held-contrary-to-the-fundamental-law). It is worth to mention the governing party's response, in which the faction leader immediately declared that the annulled provisions will be inserted into the FL.

8 On 8 February 2013, members of the governing coalition, having two thirds of the seats in the Hungarian Parliament, submitted a proposal to amend the FL. The Parliament adopted the amendment on 11 March 2013. It came into force on 1 April 2013. In March 2013, during the parliamentary debate of the 4th amendment, the Council of Europe, the UN High Commissioner, the President of the European Commission, Hungarian human rights associations and scholars voiced concerns over the changes. See e.g. http://www.bbc.co.uk/news/world-europe-21740743, http://livewire.amnesty.org/2013/03/12/hungarys-constitutional-undermining-of-internationally-protected-human-rights/; http://www.un.org/apps/news/story.asp?NewsID=44389&Cr=judiciary&Cr1#.UUOI7jdMcY6; http://www.politics.hu/20130311/ex-president-solyom-urges-succe

the FL in March 2013, which incorporates into the constitution the majority of the quashed articles.

The FL expresses *commitment to the international community and law* (Article Q) and contains also a *European clause* mandating the cooperation in the EU (Article E). The function and the purpose of these articles are similar to the corresponding rules of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989–90, in force until 31 December 2011; hereinafter former Constitution).[9] A taxonomic change is that the relevant constitutional objectives and authorisations are grouped into one article, not scattered through separate sections like in the former Constitution.[10]

> Fundamental Law Article Q
>
> (1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with every nation and country of the world.

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ssor-to-veto-constitutional-changes-slams-fidesz-use-of-basic-law-for-daily-political-goals/; http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/.
For joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union on 4th amendment, see http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf.
Unofficial translation of the 4th amendment is available here: http://helsinki.hu/wp-content/uploads/Appendix_2_Fourth_Amendment_to_the_Fundamental_Law_Unofficial_translation.pdf.

9 On the relation of international law and Hungarian law (before FL), see Chronowski, Nóra – Drinóczi, Tímea – Ernszt, Ildikó: *Hungary, in International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (ed. Dinah Shelton), Oxford University Press, Oxford 2011, 259–287, available at http://books.google.hu/books?id=HTsW3bjHsiIC&printsec=frontcover&dq=International+Law+and+Domestic+Legal+Systems&hl=hu&sa=X&ei=MOcaT-422Beek4AShieWzDw&redir_esc=y#v=onepage&q=International%20Law%20and%20Domestic%20Legal%20Systems&f=false.

10 Former Constitution Article 6(1): "The Republic of Hungary renounces war as a means of solving disputes between nations and shall refrain from the use of force and the threat thereof against the independence or territorial integrity of other states. (2) The Republic of Hungary shall endeavour to co-operate with all peoples and countries of the world. (4) The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe. §7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law. §2/A (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament".

(2) Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law.
(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation.

Fundamental Law Article E
(1) In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity.
(2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties.
(3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2).
(4) The authorisation to recognise the binding nature of an international agreement referred to in Paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.

Article Q(1) FL differs from the former Constitution in as much as it does not contain the renouncement of war and the prohibition of the use of force based on Article 2(4) of United Nations Charter.[11] Instead, it positively formulates the aims of peace, security and sustainable development during the international cooperation. Thus it incorporates the minimised version of one of the Union objectives in Article 3(5) of the TEU;[12] however, the latter covers more aspects of participation in international community. Unfortunately, the FL reduces the scope of cooperation to nations and countries and does not refer to other actors of the international community (e.g. international and transnational organisations, NGOs.

Article Q(2)-(3) of the FL regulates the relation between international and domestic law. It maintains the principle of harmony, and in respect of the "generally recognised rules of international law"[13] it retains the monist

11 Sulyok, Gábor: 6. § [Nemzetközi kapcsolatok] [International relations], in: Jakab, András (szerk.), *Az Alkotmány kommentárja* [Commentary of the Constitution], Századvég, Budapest, 2009, mn. 16, 23.

12 Article 3(5) of the TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

13 These are customary international law and international *ius cogens.*

concept with adoption theory.[14] This results that the generally recognised rules have at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as part of the constitution,[15] or moreover, certain *ius cogens* norms have priority over the Constitution.[16] In case of other sources of international law (i.e. other sources than "generally recognised rules" – such as treaties, mandatory decisions of international organs and certain judgements of international courts, etc.) the FL supports the dualist model with transformation. It still does not express the priority of international law over domestic law.[17] The "harmony" shall be ensured just with those international norms, which oblige Hungary, thus the instruments of international soft law (e.g. recommendations, declarations, final acts) are excluded from the scope of the harmony rule.[18] According to the detailed explanation of the FL, the EU law also falls out of the scope of Article Q.

To ensure "harmony", the Constitutional Court under Article 24(2) point f) of the FL continues to review the conflict between domestic legislation and international treaties in the future, but the FL does neither regulate who may initiate this procedure, nor refer to the possibility of *ex officio* revision. This is defined in the cardinal act[19] on the Constitutional Court.[20] It is not clear either, how "harmony" shall be ensured, if a domestic legal

14 However, many scholars share the view that it means a general transformation rather then adoption, thus they maintain the dualist concept instead of monist. This approach means that the "generally recognised rules" are at lower rank then the constitution in the Hungarian hierarchy of legal sources. See e.g. Sulyok, Gábor, 'A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása' [Regulation of the relation of international law and domestic law in the Fundamental Law], *Jog Állam Politika* 2012/1, 17–60.

15 Jakab, András: *A magyar jogrendszer szerkezete* [Structure of the Hungarian legal system], Dialóg Campus Kiadó, Budapest–Pécs, 2007, 160.

16 The Constitutional Court stated in Decision № 45/2012. (XII. 29.) AB on unconstitutionality of TP-FL [item IV.7]: "The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms *enshrined in international treaties* and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law".

17 The Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law. CC Decision № 53/1993. (X. 13.) AB határozat, Az Alkotmánybíróság határozatai [Decisions of the Constitutional Court] ABH [1993] 323, 333.

18 Molnár, Tamás: *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* [Incorporation of international law into the Hungarian legal system], PhD dissertation, ELTE ÁJK, manuscript, Budapest 2012, 68.

19 Cardinal act means organic law. The adoption requires two-third majority of the MPs present.

20 According to the Act CLI of 2011 on the Constitutional Court the revision either takes place *ex officio*, or upon the initiation of one-fourth of the MPs, the Government, the president of the Supreme Court, the Attorney General, the Commissioner for Fundamental Rights, or

act violates one of the "generally recognised rules of international law", thus – as hitherto – it can be answered by constitutional interpretation. The annulment of the domestic legislation breaching an international treaty is optional under Article 24(3) point c) of FL, which weakens the effectiveness of the constitutional requirement of harmony. It would have been preferable to oblige the Constitutional Court in the FL to annul those domestic legislative acts that are at the same rank as, or lower rank than the act transposing the international treaty.[21] The domestic legislation conflicting with TEU or TFEU should have been an exception to this rule. The breach of TEU or TFEU shall be established by the CJEU, thus it is an extern limitation for the Constitutional Court's competence.[22]

Article E(1) as the basis of the *European and Union cooperation* essentially follows word by word the Article 6(4) of former Constitution.[23] Thus the frame of interpretation remains unchanged;[24] this objective expresses the commitment to each kind of European (international or supranational) cooperation. The most intensive form of cooperation is within the framework of the European Union.[25] Article E paragraphs (2) and (4), with some simplification, adopts the rules of Article 2/A of the former Constitution; however, the formulation differs at one point. The difference is that the two distinct clauses of Article 2/A(1) ["exercise certain constitutional powers jointly with other Member States […]; these powers may be exercised independently and by way of the institutions of the European Union"] have been merged in Article E(4) ["jointly with other member states through the institutions of the European Union"]. However, in legal understanding, in the course of Union legislative processes the Member States do not exercise

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the judge of any court of law if in a given case s/he shall apply a domestic legislative act conflicting with an international treaty.

21 Cf. with the former Act XXXII of 1989 on the Constitutional Court. Under Articles 44–47 the annulment was obligatory in such cases. See to this problem the point IV.1 of the Questionnaire as well.

22 See more about Article Q of the FL in Molnár, Tamás: 'Az új Alaptörvény rendelkezései a nemzetközi jog és a belső jog viszonyáról' [Provisions of the new Basic Law on the relation of international law and domestic law], in: Drinóczi, Tímea – Jakab, András (szerk.), *Alkotmányozás Magyarországon 2010–2011* [Constitution-making in Hungary 2010–2011], PPKE JÁK – PTE ÁJK, Budapest–Pécs, 2013, 83–91; Sulyok (2012), 17–60.

23 See also Bragyova, András: *No New(s), Good News? The Fundamental Law and the European law, in Constitution for a disunited nation* (ed. Tóth, Gábor Attila), CEU Press, Budapest–New York, 2012, 335–338.

24 See also Blutman, László – Chronowski, Nóra: 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', *International Constitutional Law*, 2011/3, Vol. 5, 329–348, http://www.internationalconstitutionallaw.net/download/e31eb083ca4c5aa70873e5740bd3b46f/Blutman_-_Chronowski.pdf.

25 Blutman, László – Chronowski, Nóra: 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában I' [Constitutional Court and Community law: trapped in a constitutional paradox], *Európai Jog*, 2007/2, 8–9.

the competences "jointly", but those are exercised by the institutions.[26] Equating the form of 'joint' exercise of powers with that of exercise "through the institutions" is a misleading formulation in the text of FL. In the course of the federal development of the Union not only the institutional way of exercising powers is necessary (e.g. in case of treaty-amendment), and strictly speaking the joint exercise of powers is not the same as the exercise through the institutions.[27] All these would have been surmounted, if in the text of FL the "conferral" of certain constitutional powers appeared in accordance with Article 5 of the TEU.

Article E contains only one new rule compared to Article 2/A of the former Constitution, in its paragraph (3) it states that "[t]he law of the European Union may stipulate a generally binding rule of conduct". From the domestic legal viewpoint, the ground for constitutional validity of Union law become clearer than it used to be; however this paragraph still does not solve the problem of application primacy, i.e. that the domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the compliance of domestic and Union law still stems from EU Treaties (i.e., asking for preliminary ruling) and not from the constitution itself. Thus the position of international law in the domestic legal system is still better defined under Article Q of the FL by the harmony-requirement than the constitutional rank of Union law.

In the fundamental rights chapter called "Freedom and responsibility" are further references to international and Union law. Article XXVIII on fair trial stipulates:

> Fundamental Law Article XXVIII
>
> (4) No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union.
>
> (5) Paragraph (4) shall not exclude the prosecution or conviction of any person for an act which was, at the time when it was committed, an offence according to the generally recognised rules of international law.
>
> (6) Except for extraordinary cases of legal remedy determined by law, no person shall be prosecuted or convicted for any offence for which he or she has already been acquitted or convicted by an effective court ruling, whether in Hungary or in any other jurisdiction as defined by international agreements or any legal act of the European Union.

26 Blutman, László: *Az Európai Unió joga a gyakorlatban* [EU law in practice], HVG-ORAC, Budapest, 2010, 94.

27 The Constitutional Court has also respected the relevance of the difference of exercising powers jointly and by the way of institutions. See the Decision № 143/2010. (VII. 14.) AB on the Act promulgating the Lisbon Treaty; press release is available at http://www.mkab.hu/letoltesek/en_0143_2010.pdf.

The *principle of nullum crimen sine lege* is and was the focal element of the constitutional legality of criminal law in Hungary. According to the Constitutional Court, it is not just a state obligation but the right of the individual to be found guilty and sentenced only according to law. The reference to the EU law has appeared first on constitutional level at the time of ratification of Lisbon Treaty. To enable the judicial cooperation in criminal affairs already the former Constitution was amended. A new element is in the FL that the text – as an exception to the rule – explicitly refers to "act, which was, at the time when it was committed, an offence according to the generally recognised rules of international law". However, it is not completely new, since the Constitutional Court in 1993 stated that war crimes and crimes against humanity are to be punished even in the absence of Hungarian criminalisation at the time of the commitment.[28] The explicit formulation of the principle of *ne bis in idem* is also a new element in the FL compared with the former Constitution, however, earlier the Constitutional Court guaranteed it under the principle of rule of law. Definitely a novelty is that the foreign judgments can be recognised not only on the basis of EU law but also on the ground of international treaties.[29]

With respect to Articles Q and E of the FL, international agreements continue to oblige Hungary to respect, protect and uphold the rule of law, democracy and fundamental rights. These obligations thus stem from the constitution itself. The above-mentioned articles set such requirements that broach no exceptions. The European constitutions also contain similar provisions with the same functions, reaffirming the existence of multilevel and parallel constitutionalism in the European legal area. Thus these kinds of constitutional provisions preliminary commit and restrain the national governments for and by the international and common European values.[30] Several provisions of the FL, however, can also be interpreted as permitting exceptions to the aforementioned European requirements – pertaining to democracy, the rule of law and the protection of fundamental rights – and as such they could come into conflict with international commitments.

For example, the Transitional Provisions of the FL (TP-FL) allowed further possible constraints on the right to effective judicial protection. If from the judgment of Constitutional Court or the CJEU or other court arises a debt obligation of the state, under certain circumstances a general contribution covering the common needs – i.e. extra tax – shall be adopted. It can be understood as an intention to sanction – at least indirectly – the lawsuits

28 Constitutional Court Decision № 53/1993. (X. 13.) AB, ABH [1993] 323.

29 Jakab, András: *Az új Alaptörvény keletkezése és gyakorlati következményei* [Formation of the new Basic Law and its practical implications], HVG-ORAC, Budapest, 2011, 229.

30 Ginsburg, Tom – Chernykh, Svitlana – Elkins, Zachary: 'Commitment and Diffusion: Why Constitutions Incorporate International Law', *University of Illinois Law Review* 2008, 101–137. http://works.bepress.com/zachary_elkins/1.

and complaints in cases of great economic significance.[31] The Constitutional Court annulled this regulation; however, the 4th amendment[32] to the FL incorporates it into the text of the constitution.

It gave some hope regarding the "constitutional continuity" that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall the previous argumentation if the formulation of text of the FL is the same as the wording of the former Constitution was.[33] However, the 4th amendment of the FL has repealed the decisions of the Constitutional Court delivered prior to the entering into force of the FL.[34] It is rather controversial, considering that originally the FL declared procedural continuity with the former Constitution. This brand new regulation reinforces the concern, that the governing majority refuses the constitutional traditions of the last two decades.[35] It undermines not just the case law of the Constitutional Court, but also the practice of the courts of law that more and more frequently referred to Constitutional Court rulings, among them the Constitutional Court decisions related to international law. By the constitutional amendment the former Constitutional Court decisions lost their legal force, they neither bound the Constitutional Court nor the ordinary courts. Thus the constitutional practice became incalculable, and one can just presuppose that in case of textual equivalence the interpretation of the FL will not changed.

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31 See Article 29 of TP-FL: "As long as the public debt exceeds 50% of the GDP, if the Constitutional Court, the CJEU, other court or other law applying that body's decision requires the state to pay a fine, and the Act on the central budget does not contain necessary reserves to pay the fine, and the amount of the fine cannot be allocated from the budget without undermining a balanced management of the budget or no other item from the budget may be eliminated to provide for the fine, a general contribution covering the common needs must be specified that relates in its name and content exclusively and explicitly to the above fine". This Article was also annulled by the Constitutional Court in its Decision № 45/2012. (XII. 29.) AB.

32 See Art. 17 of the 4th Amendment and note 8.

33 The Constitutional Court has clarified that the formulation of Art. E(2) and (4) of the FL and that of Article 2/A, (1)–(2) of the former Constitution has got a same meaning, thus during the interpretation of Article E the Court has maintained its previous precedent. Constitutional Court, Judgment of 8 May 2012, Decision № 22/2012. (V. 11.) AB, Reasoning [40]–[41]: "In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. […] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid".

34 See Art. 19 of the 4th amendment and note 8.

35 For detailed comments on the issue, see joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union, referred in note 8.

2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

The Hungarian legal system follows the dualist approach with transformation regarding the international treaties and certain decisions of international courts and other treaty bodies (hereinafter: treaties). The treaties are applicable after transformation, i.e. if they are promulgated and published in a Hungarian legal instrument (act of Parliament or decree of the Government). The procedure related to international agreements is regulated by the Act L of 2005. This Act contains the rules on arrangements, establishment, and consent to be bound by, promulgation and entering into force, provisional application, modification, suspension, termination of international treaties. Altogether, it is an updated regulation and fits to the system of Hungary's international obligations as it covers more interrelations of domestic and international law than the previous law-decree did.[36]

The Act shall be applied *mutatis mutandis* to certain EU decisions, the compulsory decisions of international courts and other organizations. Without prejudice to the EU treaty provisions, the Act shall be applied *mutatis mutandis* to those decisions of the institutions, which stem from the treaties and establish, modify or terminate international rights and duties for Hungary.[37] If the dispute on the interpretation or application of an international treaty can not be arranged by direct negotiation within a reasonable time, the competent organ for authorizing to express the consent to be bound by the treaty shall decide whether or not it is required to submit the dispute to third party – in particular to the International Court of Justice, arbitration court or conciliation commission – considering the provisions of the treaty and the rules of international law. The decision of the third party is binding and shall be executed if the statute of the organ settling the dispute or the treaty in dispute so provides or the parties so agree. The decision shall be promulgated – with the appropriate application of the provisions regarding the promulgation of the treaties – in the Official Gazette [Magyar Közlöny].[38] According to *Molnár*, the judgments of the UN International Court of Justice, Permanent Court of Arbitration, OSCE Court of Conciliation and Arbitration, International Tribunal for the Law of the Sea, other ad hoc international courts of arbitration, decisions of the WTO Dispute Settlement Body, and Council of ICAO belong to this category, as well as those rare judgments of the European Court of Human Rights (ECtHR)[39]

36 For a thorough analysis see Molnár (2012), 114–163.

37 Act L of 2005 Art. 12.

38 Act L of 2005 Art. 13(3)–(4).

39 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights – ECHR) Article 33 – thus the judgments upon individual complaints are not included.

and Court of Justice of the European Union (CJEU)[40] that resolute the disputes of states.[41]

By the force of the constitution or by transformation, the sources of international law shall be applied in Hungary, thus the application is a constitutional duty of the state organs. The Constitutional Court has competence to

- decide whether the incorporation of an international norm was constitutional, and
- ensure the harmony of the domestic and international law.

Thus the Act CLI of 2011 on the Constitutional Court is also relevant regarding to the application of international law.[42]

The Act CXXX of 2010 on legislation contains a general reference by stipulating that the legal acts shall be in compliance with the obligations stemming from international and Union law.[43] This provision closely related to the constitutional requirement of "harmony".[44]

II. Treaties

1. How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?

According to the Act L of 2005 the international treaty is a written agreement that is covered by instruments of international law, with any name or

40 Treaty on the Functioning of the European Union, Article 259.

41 Molnár (2012), 214–215.

42 Act CLI of 2011 Articles 23(3)–(4), 24, 32.

43 Act CXXX of 2010 Article 2(4) (c).

44 The Constitutional Court ruled in Decision № 7/2005. (III. 31.) AB: "The performance of the international law obligation (the performance of the task of legislation when necessary) is a duty resulting from Article 2 para. (1) of the Constitution [now Article B(1) of the FL] enshrining the rule of law including the bona fide performance of international law obligations, as well as from Article 7 para. (1) of the Constitution [now Article Q(2)–(3) of the FL] requiring the harmony of international law and domestic law, and this duty emerges as soon as the international treaty becomes binding on Hungary (under international law). Failure to act as required may result in the Constitutional Court establishing an unconstitutional omission of legislative duty. The Constitutional Court established an unconstitutional omission on the basis of the legislator's failure to perform a legislative duty resulting from an international treaty in force in Decision 16/1993 (III. 12.) AB (ABH 1993, 143, 154), Decision 45/2003 (IX. 26.) AB (ABH 2003, 474) and in Decision 54/2004 (XII. 13.) AB".

title and regardless of whether it is incorporated into one, two or more interrelated documents, concluded with other States or other subjects of international law with capacity to contract, which creates, modifies or terminates rights and obligations for Hungary under the international law.[45]

This definition complies with that of the Vienna Convention on the Law of Treaties [promulgated in Law-Decree 12 of 1987], and even more, it has wider scope covering not only treaties created by states but also by other entities (e.g. the Vatican, Taiwan, Order of Malta, national liberation movements, states *in statu nascendi*).[46] The former regulation on the procedure related to international agreements [Law-Decree 27 of 1982] was declared unconstitutional by the Constitutional Court in 2005. The Constitutional Court relied, *inter alia*, that the law-decree was not in accordance with the Vienna Convention.[47]

Thus the courts of law have to take into consideration the definition of the Act L of 2005, the rulings of the Constitutional Court, and the terminology of the Vienna Convention. They do not make attempts to create independent definition of "international treaty", or at least we did not find any concept different from the aforementioned in the judicial practice. The statutory definition clearly distinguishes the international treaties from political commitments.

2. Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?

45 Act L of 2005 Article 2(a).

46 Molnár (2012), 117.

47 Constitutional Court Decision № 7/2005. (III. 31.) AB, V.1: "In addition, the LD [Law-Decree 27 of 1982] endangers the enforcement of Article 7 para. (1) of the Constitution because its terminology is not in accordance with the Vienna Convention. For example, for the purposes of the LD the term 'ratification' means an act in domestic law by which the Parliament consents to the given international treaty becoming binding upon the Republic of Hungary. However, under the Vienna Convention, 'ratification' is a process resulting in the states acknowledging, at the level of international law, the binding force of international treaties upon themselves. […] Furthermore, Section 13 para. (4) of the LD is in conflict with Article 7 para. (1) of the Constitution guaranteeing the harmony of domestic law and international law, because it only allows the promulgation of an international treaty upon performance of the acts under international law necessary for entry into force (depositing the documents of ratification or exchanging diplomatic documents on the fulfilment of the conditions in domestic law necessary for the entry into force of the treaty). On the basis of Section 13 para. (4) of the LD, in many cases (mainly in the case of bilateral treaties), the promulgating statute cannot be adopted in the period between the performance of the acts under international law necessary for the entry into force of the international treaty and the date of entry into force of the international treaty, and this may result in the delayed performance of the treaty binding upon the Republic of Hungary under international law".

The courts distinguish the ratified, non-ratified, approved etc. treaties on the basis of the Act L of 2005. However, because of the dualist approach, the courts apply only those treaties, which are transformed, i.e. promulgated into a Hungarian legal act and entered into force. The courts refuse the application of those treaties, which did not come into effect.[48] One exception to this rule was when the Constitutional Court took into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights ECHR) in the reasoning of its landmark decision on the abolition of death penalty, although in 1990 Hungary was not the member of the Council of Europe and the Convention yet, as the government just applied for the membership after the transition and the first free parliamentary elections.[49] However, the ECHR was – and in most cases is still – just a point of reference for the Constitutional Court and the ordinary courts (referred as passing comment or *obiter dictum*), and not the rationale for the decision (*ratio decidendi*).

3. What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country?

According to the Constitutional Court's case law,

As a general rule, the parties bound by an international treaty are the states parties to the treaty. It is the duty of these states to ensure the implementation

48 E.g. in a case started in 2008 the plaintiff referred to the Charter of Fundamental Rights of the EU. The Court of Appeal, however, found it irrelevant in 2010, as the Charter surely has no retroactive effect, and the legal dispute shall be determined on the basis of the legal acts effective at the time of the injury. Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla 5.Pf.20.736/2010/6.

49 Constitutional Court Decision № 23/1990. (X. 31.) AB item V.4: "While art. 2(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, had recognized the legitimacy of capital punishment, art. 1 of the Supplementary Protocol adopted on 28 April 1983 provides that 'capital punishment shall be abolished. No one may be sentenced to death and capital punishment may not be enforced.' Also, art. 22 of the Declaration 'On Fundamental Rights and Fundamental Freedoms' endorsed by the European Parliament on 12 April 1989 declares capital punishment to be unconstitutional. Hungarian constitutional progress moves in the same direction since in Art. 54(1) capital punishment is still not clearly excluded; however, it is followed by the new text of Art. 8(2), which proscribes legal limitations upon the essential contents of fundamental rights".
It is noteworthy that this landmark decision of the Hungarian Constitutional Court was cited by the South African Constitutional Court, in its Judgment of 6 June 1995 (Case No. CCT/3/94).

of the treaty. It is an issue of domestic law how implementation takes place in the given legal system, how the international law obligations are enforced: through an act of legislation or through judicial practice. Individuals may claim rights directly on the basis of certain provisions of international treaties, more specifically, on domestic legal norms transforming international law obligations. In the case of such a self-executing treaty, the State undertakes to render the application of the treaty possible in domestic law, or at least not to exclude the possibility of the direct application of the provisions of the treaty in its legal system.

Whether an international treaty or a certain provision thereof is a self-executing one, i.e. whether it may be applied in national law without a specific implementing norm can be decided through interpretation. In some cases the states parties to an international treaty make a representation in the treaty about it being or not being a self-executive one, while in other cases it follows from the content or text of the treaty or from the provisions of the Constitution that a further internal legal act is necessary for the implementation of the transformed international treaty. There are cases where the legislator gives a clue for answering the question whether the treaty or a certain provision thereof may be directly applied in domestic law.

According to relevant Hungarian Acts, transformation, i.e. the promulgation of the treaty in a domestic statute, is necessary even in the case of a so-called self-executing treaty. If, after transformation, the international law obligation becomes part of domestic law without an explicit declaration either by the states parties or by the domestic legislator on the direct applicability of the treaty, those applying the law make a decision on the direct applicability of the given international law provision in the specific case concerned. The conditions of direct applicability are the exact definition of the subjects of private law addressed by the international treaty and the exact specification of the rights and obligations under the treaty, so that the treaty can be implemented without any further act of legislation in all states parties.

However, *the courts have the final* word in deciding whether in a given case the applicable international treaty or certain provisions thereof qualify as (a) self-executing one(s). […]

The conditions of direct applicability are the exact definition of the subjects of private law addressed by the international treaty and the exact specification of the rights and obligations under the treaty, so that the treaty can be implemented without any further act of legislation in all states parties.[50]

According to the courts' practice, the procedural condition of direct applicability is the transformation of the international treaty, and the substantive condition is whether the rights, duties and sanctions in the given convention

50 Constitutional Court Decision № 7/2005. (III. 31.) AB.

are sufficiently defined for judges in order to apply them in concrete cases, and establish subjective rights upon the treaty provisions.[51] It is in compliance with the rulings of the Constitutional Court.

Is there any influence of EU law, including the decisions of European Court of Justice?

The EU law is regarded as a separate legal system by the Constitutional Court and the courts of law since the accession. Thus the supremacy and direct applicability of EU legal acts are recognised, in most cases the courts ensure the effectiveness of Community/Union law,[52] however, it does not really influence the application of international law, except of certain cases, when the applied EU legal act refers to the ECHR. The references to the principles of direct effect or supremacy are rather automatic;[53] the courts follow the well known textbooks on EU law or utilize the ministerial explanations attached to the bill of the applied Hungarian law. If the EU legal act refers to the ECHR, then the courts cite the referred article of the Convention and sometimes the landmark decisions of the ECtHR relevant in the given case, but only rare they add further interpretation or reach individualised conclusions in the light of the particular circumstances of the case.[54] However,

51 Fejér Megyei Bíróság (Court of Fejér County, now Székesfehérvári Törvényszék/Tribunal) 25.P. 22.432/2008/61., 25.P. ügyszám/2008/80.

52 See Dezső, Márta – Vincze, Attila: *Magyar alkotmányosság az európai integrációban* [Hungarian constitutionality in the European integration], HVG-ORAC, Budapest, 2012, 208–209.

53 See e.g. the Decision of the Court of Szabolcs-Szatmár-Bereg County (now Nyíregyháza Tribunal): "Since the date of the accession of Hungary to the European Union on 1 May 2004 May 1 the Community Treaty has the highest rank in the hierarchy of legal norms. From that date the inferior laws shall be always assessed and interpreted by the courts and the authorities in the light of the aim and spirit of the Treaty. This also means that the relationship of EU law and national law is determined by the principle of primacy, as the Supreme Court stated in principle: the national law shall be interpreted in a way that is appropriate to fulfil [i.e. implement] the Community law (EBH 2006/1568)". Szabolcs-Szatmár-Bereg Megyei Bíróság 5.K.20. 631/2010/4.

See also Supreme Court Decision Kfv.I.35.052/2007/7. that referred to Costa v. ENEL and Van-Gend en Loos.

54 E.g. in the case law on expulsion the courts are used to refer to the Council Directive 2003/86/EC on the right to family reunification, which cites Article 8 of ECHR. Thus the Hungarian courts quote Article 8 of the ECHR, and then summarise the practice of the ECtHR: "According to the case law of the ECtHR, in order to determine whether the family reunification might be limited or not (ie, whether the expulsion is applicable, and if so, how long), it must first be determined whether there is a family in the country of residence (does the referred family relationship correspond to the concept of the family), and then, whether the expulsion of the family member limits the family life (the living conditions of the family are sufficient in the host country). If not, it must be considered whether the limitation of the family life is acceptable (Article 8(2) of ECHR justifies the reason), then, to what extent the coexistence may be limited (proportionality of the expulsion)". This formula was used

the Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, ECHR and domestic law, and interpret the harmonised Hungarian legal acts in the light of ECHR, if the implemented EC directive provides minimum standard.[55]

So far, the Constitutional Court has established two principles marking the boundaries of future constitutional practice. *First*, it will not treat the founding and amending treaties of the European Union as international law for the purposes of constitutional review,[56] thereby setting up a three-tier system of legal rules applicable within Hungarian legal practice that distinguishes between national, international and European law. *Second*, in the absence of jurisdiction to review substantive (un)constitutionality (as opposed to procedural constitutionality), the Constitutional Court does not regard a conflict between domestic law and EU law as a constitutionality issue[57] and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.[58]

4. **Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?**

5. **Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?**

According to the Act L of 2005 and Constitutional Court rulings, the ordinary courts may not determine completely independently whether

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by the Budapest Metropolitan Court in several cases, see Fővárosi Bíróság (Budapest Metropolitan Court) 27.K.33.900/2009/5., Fővárosi Bíróság 27.K.30.107/2010/6., Fővárosi Bíróság 27.K.32.880/2009/8., Fővárosi Bíróság 17.K.33.440/2008/5.

55 The Supreme Court (now Curia) established that only the refugees are covered by the scope of the Council Directive 2003/86/EC on the right to family reunification, however, in the light of Article 8 the ECHR, the domestic law may recognise this right of other protected persons as well. The Supreme Court (now Curia) emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. According to the Supreme Court (now Curia), there's no such international obligation that would require the equal safeguard of the right to family reunification of refugees and other protected persons, thus the domestic law may lay down different rules in term of the different groups, however, express provisions on the differentiation is needed in the domestic law, otherwise the equal protection shall be ensured with regard to the ECHR. Supreme Court Kfv. III.37.925/2009/7.

56 Constitutional Court Decision № 1053/E/2005. AB judgment of 16 June 2006, II ABH [2006] 1824.

57 Constitutional Court Decision № 72/2006. (XII. 15.) AB, I ABH [2006] 819, 860.

58 Blutman – Chronowski (2011), 329–348.

a treaty has come into existence, or has been modified or terminated relating to Hungary.

The promulgating act contains the date of coming into effect, modification, and ceasing of the treaty relating to Hungary if it is known at the time of acceptance.[59] If the above mentioned data are not known, the Foreign Minister publishes them in the Hungarian Official Journal (Magyar Közlöny) immediately after the information is known.[60] The promulgating act also contains reservations, exceptions, declarations, statements, the approval of the temporary application of the treaty (if needed), the organ which is responsible for the execution, and, if necessary, changes in acts, legal rules and other steps which need to be taken to harmonize international and national law.[61] Thus the courts determine whether the treaty claimed to be binding on Hungary has come into existence, etc. on the basis of promulgating act. Of course, in case the treaty concerned was not ratified by any of the participating states, the courts may declare this fact on the basis of the Vienna Convention of the Law of the Treaties, and refuse the application of the treaty.[62]

The courts may determine independently neither the constitutionality of an international treaty, nor the collision of domestic law and international law, instead they have to initiate the proceedings of the Constitutional Court (see point IV.1 of the questionnaire).

Quoting the case law of the Constitutional Court:

> In the examination of an obligation under international law, it is the Constitutional Court that is in a position to decide whether it has been incorporated into domestic law in line with the first part of Article 7 para. (1) of the Constitution [now Article Q(2)-(3) of the FL].[63]

> It follows from the second part of Article 7 para. (1) of the Constitution [now Article Q(3) of the FL] that the harmony of an international obligation undertaken in any form (e.g. in an international treaty) with domestic law must be ensured. *Finally* it is the Constitutional Court that is to guarantee this by adopting decisions – binding on everyone – on the constitutionality of the international

59 Act L of 2005, Article 10(1) (c).

60 Act L of 2005, Article 10(4).

61 Act L of 2005, Article 10(1).

62 See the Decision of the Supreme Court Gfv.IX.30.165/2008/11. In this case the Supreme Court declared that a bilateral agreement between the Hungarian Republic and Ukraine is not applicable because it was not ratified by Ukraine. The court applied Article 11 of the Vienna Convention. The plaintiff referred to the Article 18 of Vienna Convention; however, the court found that the principle of bona fide proceeding has no legal consequences in the given case, because the agreement has no binding force.

63 Constitutional Court Decision № 53/1993. (X. 13.) AB, ABH [1993] 323.

treaty to be concluded or already promulgated in a statute (and on the constitutionality of the promulgating statute), as well as on issues related to the international law obligation in terms of competence, authorisation and procedure.[64]

6. Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)

The Hungarian courts usually refer to the interpretations of international tribunals when they apply an international treaty and usually put aside the national interest. The Vienna Convention is not cited very frequently by the courts. The most popular is definitely the ECHR and the case law of the ECtHR, while the foreign judgments related to the ECHR are never referred. The most consequent is the Constitutional Court in the field of the application of the Convention.[65] In the recent years (2011–2013) the references of the Constitutional Court became more and more explicit and definite.

According to the Constitutional Court, if the essential content of a certain fundamental right in the Constitution/FL is defined in the same way as it is formulated in international treaties [e.g. International Covenant on Civil and Political Rights (hereinafter ICCPR) or ECHR], the level of the fundamental rights protection provided by the Constitutional Court in no case may be lower than the level of international protection (typically that of elaborated by the ECtHR). It follows from the principle of *pacta sunt servanda* that the Constitutional Court shall pursue the case law of the ECtHR even if it were not derived from its own previous "precedents".[66] For interpretation and clarification of a certain provision of the ECHR the Constitutional Court takes as a basis the practice of the ECtHR, which body was authorised by the contracting parties for the authentic interpretation of the Convention. Foremost those decisions (precedents) are taken as a basis, in which the ECtHR interprets the Convention itself, and points out what is in compliance with it and what violates it.[67] The interpretation of international treaties given by the Constitutional Court obviously shall coincide with the official interpretation given by the Council of Europe.[68]

64 Constitutional Court Decision № 4/1997. (I. 22.) AB, ABH [1997] 41.

65 See Szalai, Anikó: 'Az Emberi Jogok Európai Bírósága ítélkezésének megjelenése a magyar Alkotmánybíróság gyakorlatában' [The judgments of the ECtHR in the practice of the Hungarian Constitutional Court], *Kül-Világ*, 2010/4, 14–21.

66 Constitutional Court Decision № 61/2011. (VII. 13.) AB, ABH [2011] 290, 321.

67 Constitutional Court Decision № 166/2011. (XII. 20.) AB, ABH [2011] 545, 557, Constitutional Court Decision № 43/2012. (XII. 20.) AB on the protection of families.

68 Constitutional Court Decision № 41/2012. (XII. 6.) AB, reasoning section [17].

Molnár even assessed the phenomenon as if the Constitutional Court were declare so called "double unconstitutionality" by declaring first the collision with – or potential infringement of – the ECHR, and second the "domestic unconstitutionality" upon the interpretation of the provisions of the Constitution or FL.[69] The best examples for this are the Constitutional Court Decisions 1/2013. (I. 7.) on electoral registration and 4/2013. (II. 21.) on using a five-pointed red star.[70] In the latter case the Constitutional Court explicitly overruled its previous practice on the criminalizing the use of totalitarian symbols with regard to the decisions of ECtHR related to Hungary. In these decisions the ECtHR rulings seem to determine the *ratio decidendi* indeed and they not remain just *obiter dictum*.

The ordinary courts also respect the ECHR and they should also respect the case law of the ECtHR, however, their practise is not unambiguous and consistent in this field. The Strasbourg case law does not fall within the scope of Act L of 2005, thus formally it does not bid the courts.[71] It is also true, that the government communication or action in certain cases might indirectly influence the enforcement of international courts' judgments, but the effect of the expressed "national interest" did not appear yet in the domestic courts' decisions.[72]

However the above mentioned rulings of the Constitutional Court may encourage the ordinary courts to follow also the ECtHR practice. Despite this, there were cases, when the ordinary court completely refused to apply the ECtHR judgments referred by the plaintiff,[73] or the court of appeal clar-

69 Molnár (2012), 210.

70 See also the attached templates.

71 An exception to this rule that the Act XIX of 1998 on Criminal Procedure prescribes: Review proceedings may be instituted in favour of the defendant if a human rights institution set up by an international treaty has established that the conduct of the proceedings or the final decision of the court has violated a provision of an international treaty promulgated by an act, provided that Hungary has acknowledged the jurisdiction of the international human rights organisation and that the violation can be remedied through review. The claim shall be judged on the basis of the decision of the human rights institution and disregard to the domestic law infringing the treaty provision. Cf. with Act XIX of 1998 Art. 416(1) (g) and Art. 423(3).

72 E.g. in the Fratanoló case [Fratanoló v. Hungary, Application no. 29459/10, Judgment of 3 November 2011; subject matter: wearing five-pointed red star; ruling: violation of Article 10 of ECHR] the Hungarian Parliament adopted a resolution on 2 July 2012 [58/2012. (VII. 10.) OGY határozat], which expresses the disagreement of the Parliament with the ECtHR judgment. Cited by Molnár (2012) 211. See also point VII.5 of the Questionnaire.

73 In 2003 the Budapest Metropolitan Court drew the attention to the fact that the Hungarian judiciary does not apply a precedent system, and the judgments of the ECtHR cannot be referred in the proceedings the courts and administrative authorities before the EU accession. [This is obviously a professionally incorrect position.] Decision of Budapest Metropolitan Court, Fővárosi Bíróság 20. Kpk.45.434/2003/2. Cited by Szalai (2010), 18, and Molnár (2012), 2010. In the famous Fratanoló case the Pécs Regional Court of Appeal in 2012 also declared that the judgments of the ECtHR are not directly applicable. Pécsi Ítélőtábla Bfv.

ified for the court of first instance, that although the judgments of the ECtHR shall be considered, it does not mean that – regarding the differences between the applicable law and the parties concerned – it could be implemented generally and automatically.[74]

An opposite, however, rare example is the landmark judgment in the Hungarian Guard case. The Budapest-Capital Regional Court of Appeal directly applied the ECHR, and deliberated the admissibility of the restriction of the given fundamental right (i.e., dissolution of the concerned association and movement) on the basis of ECtHR measures. Thus, instead of relying on the Constitution and the necessity – proportionality test of the Constitutional Court, the criteria elaborated under Article 10 of the ECHR was implemented (i.e. the restriction is prescribed by law, has a legitimate aim, and is necessary in a democratic society). The court also referred to the International Convention on the Elimination of all forms of Racial Discrimination (New York, 1965) so as to strengthen the argumentation.[75]

7. Do the courts refer to the opinion of the Executive?

The Constitutional Court and courts of law may ask the opinion of the Executive (e.g. Ministry of Foreign Affairs, Ministry of Justice) if it seems necessary for the decision making, however this opinion is not mandatory for them.

The Constitutional Court has requested and considered the relevant opinions of the Minister of Justice, the Minister of Economy and Transport and the Minister of Foreign Affairs, when the President of the Republic sought a prior constitutional examination of an Act of Parliament on

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III.570/2012/2. Cited by Molnár (2012), 2010, and Bárd, Petra: *Strasbourg kontra Magyarország* [Strasbourg versus Hungary], Szuverén, 16.08.2012, http://szuveren.hu/jog/strasbourg-kontra-magyarorszag.

74 Decision of the Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla 5.Pf.20.736/2010/6. The subject matter of the case was the right to a judicial decision within reasonable time, and the court of first instance referred Article 6 of the ECHR, several judgement of the ECtHR, even the jurisprudence (textbooks, German commentaries), and interpreted the Article 2 of the Hungarian Civil Procedure Code (CPC) in that light. Article 2 of the CPC provides for the courts to ensure the right to completion of the trials within reasonable time. Article 6 of ECHR guarantees the right to a fair and public hearing within a reasonable time. The judge assessed that the CPC shall be interpreted in compliance with the ECHR, and the right to completion of the trial shall not be restricted to the right to a final judgment, instead it also covers the interim decisions and the hearings during the whole proceeding. The judge partially awarded for the plaintiff (against the defender court). The Court of Appeal, however, stated that Article 6 of the ECHR cannot be independent legal basis, and the legislator did not intend to encourage such a broad interpretation of Article 2 of the Civil Procedure Code.

75 Decision of the Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla 5.Pf.20.738/2009/7.

the promulgation of an international treaty,[76] adopted by the Parliament but not yet promulgated.[77]

The court may ask the opinion of the Foreign Affairs Ministry, if the question of privilege or immunity of a person or organisation arises regarding jurisdiction.[78] The court, however, shall stay the proceeding and ask for the decision of the Ministry of Justice if in a given case the question of diplomatic or similar immunity occurs.[79]

8. Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?

No, or at least we did not find such a case.

III. Customary international law

1. Is customary international law automatically incorporated into domestic law?

According to Article Q(3) of The Fundamental Law "Hungary shall accept the generally recognized rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law".[80] Constitutional Court Decision 53/1993. (X.13.) states that the generally recognized rules of international law are part of the Hungarian

76 Montreal Protocol No. 4 signed in Montreal on 25 September 1975 on the amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and amended by the Protocol signed on 28 September 1955 in the Hague.

77 Constitutional Court Decision № 7/2005. (III. 31.) AB.

78 See e.g. the judgment of Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla No. 3.Pf.21.120/2012/1.

79 Law Decree 7 of 1973 on the Proceedings concerned diplomatic or similar privileges and immunities.

80 See also point I.1 of the Questionnaire. Article 7(1) of the former Constitution addressed the relationship between international law and domestic law in essentially the same manner. It stated: "The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law".

legal system without any further transformation by general transformation ensured by the Constitution itself.[81]

The expression "generally recognized rules of international law" may cover universal customary international law, peremptory norms (*ius cogens*) and general principles of law recognized by civilized nations. According to international law, these two categories belong to the sources of international law adopted by the whole international community. Customary international law is considered as generally recognized rule of international law;[82] however in decision 823/B/2003 the Constitutional Court did not share this view.[83] Customary norms become part of domestic Hungarian law by means of general transformation into the domestic legal system by Article Q(3) of the FL, but they cannot amend the provisions of the FL. Customary international law is not on the same level of the normative hierarchy either as constitutional provisions but it can have a supplementary interpretative role through the provisions of Article Q(3).[84] For instance, Article 57 of the Constitution which guarantees the principle of *nullum crimen sine lege* gains its absolute effectiveness through international criminal provisions transformed by Article 7(1).[85] According to constitutional judge *Péter Kovács* the question of technical solution that transforms international rules can be debated, but the fact that the principle of *pacta sunt servanda* obliges Hungary cannot be questionable.[86]

Remarkably, certain authors disagree with the approach of the Constitutional Court. As for general transformation of customary international law through the Constitution, *Molnár* states that the reasoning is logically inaccurate as "incorporating customary international law into the internal legal order with transformation technique is conceptually impossible, since the domestic legislature has no 'written customary law' to transpose. A broad inexact norm, which often requires interpretation in international adjudication to determine its precise content, cannot be transformed".[87]

2. Do the courts apply customary international law in practice? Do the national courts always take account of developments in the practice of

81 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 327.

82 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 220.

83 Constitutional Court Decision № 823/B/2003 Alkotmánybírósági Közlöny [Gazette of the Constitutional Court] (ABK) [2006] 1143.

84 Constitutional Court Decision № 4/1997. (I. 22.) ABH [1997] 83.

85 Constitutional Court Decision № 2/1994. (I.14.) ABH [1994] 41.

86 Dissenting opinion of Péter Kovács: Constitutional Court Decision № 95/2009. (X. 16.) ABH [2009] 863.

87 Molnár, Tamás: 'Relationship of International Law and the Hungarian Legal System 1985–2005', in *The Transformation of the Hungarian Legal Order 1985–2005 Transition to the Rule of Law and Accession to the European Union* (eds. Jakab, András – Takács, Péter – Tatham, Allan F.), Kluwer Law International, Alphen aan den Rijn, 2007, 458.

States, as well as in case law and jurisprudence while determining the existence and content of customary international law?
What are the primary subject areas or contexts in which customary international law has been invoked or applied?

The Constitutional Court refers to *customary international law* but as relevant argumentation it is only cited in the form of its codified version. Sometimes the Constitutional Court only add the information that the cited norm is a *generally recognized rule of international law* but bases its argumentation on the treaty provision that codifies the customary law content.[88] Constitutional Court jurisprudence mainly refers to customary law in the field of criminal law. Apart from this field, only the principle of *pacta sunt servanda* is referred as a general rule of interpreting international obligations but no argumentation is fundamentally based on it.

The term "customary international law" is not used neither in the text of the Fundamental Law nor in that of the former Constitution, but it is covered by the expression "generally recognized rules of international law" and the practice of the Constitutional Court mainly focuses on norms that can be regarded as customary international law and peremptory norm as well. For instance, in decision 32/2008. (III. 12.) the principles of *nullum crimen sine lege* and *nulla poena sine lege* are declared to be *fundamental principles of international law*;[89] or the principle of *pacta sunt servanda* is referred to as *ius cogens* and customary international law as well.[90]

The practice of the Hungarian Constitutional Court includes only a small number of cases in which customary international law appears and an even smaller number of cases cite an exact customary norm. In cases referring to the principle of *nullum crimen sine lege* and the rule that war crimes and crimes against humanity shall be punished is declared to be *ius cogens*. It is to be noted, that the principle of *nullum crimen sine lege* also constitutes customary international law.[91]

In decision 53/1993. (X. 13.) the Constitutional Court pursued a preliminary norm control[92] concerning modification of the Hungarian criminal code and its conformity with international norms relating to prescription of crimes committed in violation of Common Article 2 and 3 of the 1949 Ge-

88 See Constitutional Court Decision № 53/1993. (X.13.) ABH [1993] 327.
89 Constitutional Court Decision № 32/2008. (III. 12.) ABH [2008] 334.
90 Constitutional Court Decision № 4/1997. (I. 2.) ABH [1997] 41, 52.
91 See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 327.
92 Article 23 of the FL (1) Based on a petition containing an explicit request submitted by an authorised person pursuant to Article 6 (2) and (4) of the Fundamental Law, the Constitutional Court shall, in accordance with Article 24 (2) a) of the Fundamental Law, examine for conformity with the Fundamental Law the provisions of adopted but not yet promulgated Acts referred to in the petition.

neva Conventions. Concerning these kinds of crimes against humanity and war crimes, the Constitutional Court derives the legal basis for punishability without time limit from the fact that they are considered *ius cogens* as they threaten the whole humankind. In a later decision, the Court explicitly stated that Hungarian courts can apply customary international law concerning war crimes and crimes against humanity even in the absence of explicit definition in the Hungarian Criminal Code since "It is international law itself which defines the crimes to be persecuted and to be punished as well as all the conditions of their punishability".[93]

In decision 32/2008. (III. 12.), for instance, the argumentation of the Constitutional Court concerning general and retroactive criminality of war crimes and crimes against humanity prescribed by universal principle of international customary law is declared to be effective in domestic law through the provisions of Article 7(1) of the Constitution. Detailed obligation issued from this norm is analyzed and interpreted in the view of the principle of *nullum crimen sine lege* which is set forth in the ECHR and that of the ICCPR but the provision of these conventions contain exceptions which allow the retroactive effect of criminalization of war crimes and crimes against humanity based on customary international law. Thus the Constitutional Court concluded that international legal obligations must be taken into account in the interpretation of the Constitution as Article 57(4) of the Constitution declaring the *principle of nullum crimen sine lege* in domestic law does not allow any exceptions.[94]

Concerning the practice of ordinary courts, customary international law is invoked only exceptionally. Hungarian criminal courts tried 9 cases in connection with criminal acts committed during the 1956 Hungarian revolution.[95] Since in decision 53/1993. (X. 13.) the Constitutional Court erroneously linked violation of Common Article 3 of the Geneva Conventions with crimes against humanity, i.e. equated them with war crimes committed

93 Constitutional Court Decision № 36/1996. (IX. 4.) [1996].

94 Constitutional Court Decision № 2/1994. (I. 14.) ABH [1994] 41; 53–54. For the analysis of the decision see Bodnár, László: 'Igazságtétel – most már kizárólag a nemzetközi jog alapján?' [Doing Justice – Only on the Basis of International Law from Now?], *Acta Universitatis Szegediensis – Acta Juridica et Politica*, Tom. 53, Fasc. (1998) 6, 77–84; Hoffmann, Tamás: 'A Nemzetközi Szokásjog Szerepe a Magyar Büntetőbíróságok Joggyakorlatának Tükrében' [The Role of Customary International Law in the Jurisprudence of the Hungarian Criminal Courts], *Jogelméleti Szemle*, [2011] (4), http://jesz.ajk.elte.hu/hoffmann48.html.

95 For more details see Hoffmann, Tamás: 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases', in: Manacorda, Stefano and Nieto, Adán (eds.), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Cuenca, 2009, 735–753.

in a non-international armed conflict,[96] ordinary courts tried to establish the threshold of non-international armed conflict. However, the Review Bench of the Supreme Court treated the issue not as a question of determining the customary definition of non-international armed conflict but as a matter of treaty interpretation of the 1949 Geneva Conventions. Therefore, it relied on the official commentary of the International Committee of the Red Cross not as an evidence of customary international law but as an interpretative tool.[97] Similarly, in 2008 the Supreme Court relied on the definition of crimes against humanity set forth in the Korbély v. Hungary case of the ECtHR[98] to incorrectly conclude that the concept of armed conflict incorporates widespread and systematic attack without realizing that the question concerns customary international law.[99]

How do the courts prove existence of customary law?

Although the Constitutional Court refers to customary international law in some cases, it never attempts to systematically prove its existence. Even though in its argumentation it sometimes cites authorities which might viewed as evidence of a general practice accepted as law, it never clarifies that it is engaged in proving the customary statues of a norm and often simply states that the cited norm constitutes customary international law.[100] Generally, it refers to the convention or treaty that incorporates the customary norm as, for example, in decision 5/2001. (II. 28.) in which the Court referred to the *principle of free consent* as a customary international norm declared as such in the preamble of the Vienna Convention on the Law of Treaties of 1969.[101]

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96 See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 327. The Court explicitly asserted that "Acts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity".

97 Supreme Court Bfv.X.713/1999/3, 28 June 1999.

98 *Korbély v. Hungary* (European Court of Human Rights, Grand Chamber, Application No. 9174/02, 19 September 2008) [95].

99 Supreme Court Bfv.X.1.055/2008/5. See more in detail in Hoffmann, Tamás: 'Trying Communism Through International Criminal Law? – The Experiences of the Hungarian Historical Justice Trials' in: Heller, Kevin Jon and Simpson, Gerry (eds.), *Hidden Histories of War Crimes Trials*, O.U.P., 2013 [forthcoming].

100 For instance, in Decision № 53/1993. (X. 13.) the Constitutional Court cited the Nicaragua Judgment of the International Court of Justice and the Report on the Statute of the International Criminal Tribunal for the former Yugoslavia to establish the concept of crimes against humanity without stating that it was proving its customary status. See Constitutional Court Decision № 53/1993. (X. 13) ABH [1993].

101 See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [VCLT] preamble "*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", Constitutional Court Decision № 5/2001. (II. 28.) ABH [2001] 90.

Ordinary courts similarly do not clearly pronounce that they are proving the customary status of a norm. While sometimes courts cite authorities, it is generally regarded as an interpretative tool to establish the meaning of treaty provisions.[102]

3. Do the courts refer to the opinion of the Executive?

See point II.7. of the Questionnaire.

4. What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?

The legal bases for the cases on diplomatic or consular immunities or state immunity are the provisions of the two main conventions regulating this subject. The Vienna Convention on Diplomatic Relations of 1961 was published by Decree No. 22 of 1965 and the Vienna Convention on Consular Regulation of 1963 was published by Decree No. 13. of 1987. As these international norms have already been incorporated into the dualist Hungarian legal system due to the provisions of Article 7(1) of the Constitution (Article Q of the FL) they are the legal basis for the above mentioned legal areas.

The practice of the Constitutional Court has never decided on a case related to the diplomatic or consular immunities or State immunity, however, the initiative that was the base of decision 49/2003. (X. 27.) suggested the examination of conflict with international treaties, namely Vienna Convention on Diplomatic Relations of 1961 and that on Consular Regulation of 1963 and the Convention on the privileges and immunities of the Danube Commission of 1963 but it was rejected due to the lack of competence.[103] In the practice of the ordinary courts the above mentioned conventions were not discussed in the context of immunity.

The Constitutional Court has never referred to the UN Convention on Immunities of States and Their Property of 2004, nor did the ordinary courts.

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102 See Supreme Court Bfv.X.713/1999/3, 28 June 1999.

103 The Constitutional Court shall examine legal regulations on request or ex officio. At the time of the above mentioned procedure the *examination of conflicts with international treaties* could only be requested by the Parliament, its Commission or a Member of the Parliament; the President of the Republic; the Government or a Member of it; the President of the Court of Auditors; the President of the Supreme Court; and the Attorney General. See § 44. of Act XXXII. of 1989 on Constitutional Court. On the provisions in force see point IV.1 bellow.

IV. Hierarchy

1. How are treaties and customary international law ranked in the hierarchy of domestic legal system?[104]

In light of the constitutional obligation to ensure harmony, any international norms implemented in domestic law will take the incorporating provision's place in the hierarchy of norms. Hence, deriving purely from the requirement of harmony, international treaties shall be placed below the constitution and above all "secondary legal sources" (laws as well as other forms of state administration).

However, the FL itself does not clarify the rank of norms derived from international law in the Hungarian hierarchy of legal norms, and the related rules are scattered: the relevant acts of Parliament are the Act on procedure related to international agreements and the Act on Constitutional Court.

First, an international treaty shall be in harmony with the FL. The Constitutional Court has competence to *prior constitutional examination* of conformity of certain international treaty provisions with the FL. Before the acknowledgement of the binding force of an international treaty by the President of the Republic, the President of the Republic, or in case the international treaty is promulgated by a Government decree, before the consent to the binding force of that treaty, the Government may request the Constitutional Court to carry out this preliminary review.[105] If the Constitutional Court declares that a provision of an international treaty is contrary to the FL, the binding force of the international treaty shall not be recognised until the States or other legal entities of international law having the right to conclude treaties under international law eliminate such conflict with the FL or until Hungary, by making a reservation – if making a reservation is permitted by the international treaty – or by way of another legal instrument recognised in international law eliminates the conflict between the international treaty and the FL.[106] However, eliminating the unconstitutionality this way in some cases (e.g. in case of multilateral agreements) may take a long time, thus a amendment of the FL can be an appropriate instrument as well.[107]

The Constitutional Court also used to admit the initiations of the President of the Republic seeking for the prior examination of an Act promulgating

104 The answer is based on Chronowski – Drinóczi – Ernszt (2011), 259–287. For hierarchical position of "generally recognized rules of international law" please see question II.1.

105 Act CLI of 2011 on the Constitutional Court (ACC) Article 23(3)-(4).

106 ACC Article 40(3).

107 See Constitutional Court Decision № 4/1997. (I. 22.) AB.

an international treaty.[108] However, this examination is not unlimited: the date of entry into force of the promulgating Act (and of the commencement of the application of the international treaty) and the statutory provision specifying the authority responsible for implementation – as new normative provisions – may be subjected to a prior constitutional examination. If the promulgating Act is in conflict with the FL, the Parliament has to modify it. Under Article 6 the FL, the Parliament may also initiate the prior constitutional examination of any Acts, thus this competence may cover the Acts promulgating international treaties.

The Constitutional Court also extended its competence to *posterior examination* of the constitutionality of international treaties in 1997.[109] Although this was not spelled out explicitly in the former Act on the Constitutional Court, the Court held that laws enacting international treaties can be subject to a subsequent examination for constitutionality.[110] These types of laws are basically "normal" acts that can be referred to the Constitutional Court for *ex post* review. In its decision, the Constitutional Court found that *ex post* review can be extended to review the constitutionality of the international treaty becoming part of any law that implementing it. If the Constitutional Court holds that the international treaty or any provision of it is unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty. The decision of the Constitutional Court in which the Court declares the whole international treaty or any provision thereof unconstitutional has no effect on the obligations assumed by the Republic of Hungary under international law. As a result of the Constitutional Court's decision the legislation should – if it is necessary *by amendment of the Constitution* – harmonise the internal laws and statutes of the country

108 Constitutional Court Decision № 7/2005. (III. 31.) AB, II: "The right of the President of the Republic […] to initiate the prior constitutional examination of the provisions of an Act of Parliament prior to its signature naturally applies to the challenged provisions of an Act of Parliament promulgating an international treaty".

109 It was in the era of *actio popularis* initiation. Petitioner stated that it is unconstitutional that the Act on Constitutional Court permits only the *ex ante* constitutional review of international treaties. He suggested that the Constitutional Court should examine the possibility of *ex post* review of promulgating acts of international treaties.

110 Constitutional Court Decision № 4/1997 (I. 22.) AB. It was not obvious according to the former decisions. Cf. Decisions № 30/1990 (XII. 15.), and Decision № 61/B/1992 AB.
According to the Constitutional Court, there was no constitutional basis to deal with a law promulgating a treaty differently from any other legal rule when it came to constitutional review. Since it was derived from the Constitution that ex post facto review was to cover all kinds of legal rule, this universality could not be restricted even by statute. In this way the examination of international treaties, after they became part of domestic law, fitted into the logic of constitutional review. In those countries where this review process was universal and no specific reference was made to review of international treaties, constitutional courts reviewed the latter on the same basis as domestic law.

with the obligations assumed under international law.[111] After the FL, in the light of the new Act on CC and the 4th amendment of the FL, it is not clear again, whether the Constitutional Court will maintain the above mentioned practice. However, the ex post norm control proceeding may be initiated this time only by the Government, the Ombudsman, one-quarter of the MPs, the President of the Curia, the Attorney General or by a judge in concrete cases.[112]

Second, the pieces of domestic legislation shall be in harmony with international treaties, the guardian of which is the Constitutional Court again. An international treaty within the Parliament's competence shall be enacted and published in an act of Parliament. Other treaties shall be enacted and published in Government decree.[113]

By virtue of the Act on the Constitutional Court it is the duty of the Constitutional Court to examine a conflict between national law and international treaties. The Constitutional Court shall examine legal regulations conflicting with international treaties upon request or ex officio in the course of any of its proceedings. This proceeding may be requested by one quarter of MPs, the Government, the President of the Curia, the Attorney General or the Commissioner for Fundamental Rights. Judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.[114]

As to the legal consequences, the new Act on the Constitutional Court is rather ambiguous at this point.[115] Under Article 42(1) the Constitutional

111 Constitutional Court Decision № 4/1997. (I. 22.) AB, ABH 1997, 41.

112 FL Art. 24, ACC Article 24–25. Under the former Constitution on the basis of *actio popularis* initiation, any individual had the right to file a claim for posterior constitutional review regardless to being affected by the claimed legal act.

113 Act L of 2005 on the procedure related to international agreements Article 9(1).
According to Act L of 2005 Article 7(3), the following international treaties are relevant to the Parliament's competence:
- treaty in the field of EU cooperation (pursuant to Article E(2) of the FL);
- the subject matter of the treaty is regulated already by an Act of Parliament or pursuant to the FL, it shall be regulated in cardinal or other Act of Parliament;
- the treaty influences other matter belonging to the competence of the Parliament on the basis of Article 1(2) (a)-(c) and (e)-(k) of the FL.

114 ACC Article 32.

115 Just see the official translation of the ACC, Article 42 "(1) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty. (2) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in consideration of the circumstances and setting a time-limit – invite the Government or

Court shall annul the domestic legal act conflicting with an international treaty, if the given domestic legal act may not conflict with the act promulgating the given international treaty on the basis of the FL. I.e., if an international treaty is promulgated by an act of Parliament, and the challenged domestic legal act is e.g. a government decree then the latter shall be annulled. Under Article 42(2) the Constitutional Court shall call the Government or the law-maker to eliminate the conflict, if a domestic legal act conflicts with an international treaty, and the act promulgating the given international treaty may not conflict with the concerned domestic legal act on the basis of the FL. That is the case when an international treaty is promulgated by a government decree, and the domestic legal act conflicting with it is an act of Parliament. The new regulation does not answer the question of the same rank collisions, i.e. if the international treaty is promulgated by the act of Parliament, and the domestic legal act conflicting with it is also the act of Parliament. The Constitutional Court shall resolve this conflict with regard to the constitutional principle of "harmony".

Furthermore, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform it task and set a time-limit for that. It shall be considered as omission, if the law-maker fails to perform a task deriving from an international treaty.[116]

Thus, the preservation of harmony between international treaties and domestic law could be accomplished also in the future by the principle of the primacy of treaties in the hierarchy of legal norms. However, this system does not fully ensure the enforcement of constitutional obligations stemming from international law.[117] The organ requested to resolve any contradiction between domestic law and a treaty is obliged to fulfil its duty within an appointed time. However, this obligation to resolve contradictions is not legally enforceable. Consequently, sometimes there is no harmony between the international obligation and domestic law; and yet the constitutional order specified under Article Q(2)-(3) of the FL will not prevail.[118]

2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice?

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the law-maker to take the necessary measures to resolve the conflict within the time-limit set". Because of the complicated formulation the two cases seem to be the same! However, the Hungarian text shows the difference.

116 ACC Article 46(1)-(2).

117 International obligations become constitutional obligations by virtue of Article Q(2)-(3) of the FL.

118 Nevertheless, it does not mean the obligation effective under international law would not bind Hungary on the international level.

The Constitutional Court recognize the concept of *ius cogens* as generally accepted obligation which is transformed into the Hungarian legal system by Article Q(3) of the Fundamental Law [former Article 7(1)]. In Decision 53/1993. (X. 13.) it states that "national law shall not be applied as against an explicit peremptory norm of international law contrary to it".[119]

According to the practice of the Constitutional Court, the term "generally recognized rules of international law" covers peremptory norms as customary international law. The same rules refer to *ius cogens* concerning its role and place in the Hungarian hierarchy of norms. One of the main problems is, as *Molnár* states, that the exact set of these peremptory norms is uncertain; they have no exhaustive enumeration in the present state of international law.[120] This problem arises in the context of hierarchy of norms. In Decision 53/1993. (X. 13.) for instance, the Constitutional Court states that the principle *nullum crimen sine lege*, incorporated in Article 57(4) of the Constitution, had to give way *to ius cogens* norms on the prosecution and punishment of war crimes and crimes against humanity. According to *Molnár*, in such cases a constitutional provision contrary to a *ius cogens* rule is not deprived of its validity; the former is simply not applicable in the particular case (priority of application).[121] As regards the status of customary law and the general principles of law covered by the same term as *ius cogens* in the Hungarian hierarchy of norms, it can first of all be asserted that these international legal norms may not be above the Constitution.[122]

In Decision 30/1998. (VI. 25.) the Constitutional Court declares that Article 7(1) of the Constitution orders the harmonization of obligations assumed under international law with the whole of domestic law, including the Constitution.

At the same time, under Article 7 para. (1) of the Constitution, the legal system of the Republic of Hungary accepts the universally recognized principles of international law, and a similar constitutional order applies to the enforcement of the international *ius cogens* norms as well. However, contractual obligations assumed under international law outside the scope of international *ius cogens* rules may not be enforced as far as their unconstitutional content is concerned.[123]

119 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 332.
120 Molnár (2007), 458.
121 Molnár (2007), 463.
122 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993]; Molnár (2007), 464.
123 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] p. VI. 3.

In addition, the Constitutional Court defined the term "*ius cogens*" by virtue of Vienna Convention on the Law of Treaties but no further enumeration has been given.[124]

Ius cogens is not cited directly in the practice of the Constitutional Court. The fact of being the peremptory norm of international law was cited as an argumentation in the above mentioned case of prosecution and punishment of war crimes and crimes against humanity with retroactive affect i.e. contrary to the constitutional provision of *nullum crimen sine lege*. No other case revealed any other norms of *ius cogens* neither before the Constitutional Court, nor before ordinary courts.

What is the role of the international law doctrine, decisions of international or foreign courts?

Examining the practice of the Constitutional Court, the role of decisions of international or foreign courts is only secondary; i.e. they interpret treaty based international obligations and this way help the Court to determine whether domestic law is in accordance with international law or they support the reasoning of the Court and thus put an emphasize on the fact that its practice conforms international standards.[125] Concerning ordinary courts, it is the Curia which has the competence to unify legal practice by the means of special uniformity decisions[126] that is not considered legislative norms but serves for the unified application and interpretation of legal pro-

124 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 237–238.

125 See Constitutional Court Decision № 159/B/2003. ABH [2005] 1156.; Constitutional Court Decision № 102/B/2008. ABH [2008] 2839.; Constitutional Court Decision № 64/1993. (XII. 22.) ABH [1993] 380.; Constitutional Court Decision № 10/2001. (IV. 12.) ABH [2001] 137.; Constitutional Court Decision № 3/1998. (II. 11.) ABH [1998] 67.; Constitutional Court Decision № 6/1998. (III. 11.) ABH [1998] 94.; Constitutional Court Decision № 154/2008. (XII. 17.) ABH [2008] 1211.; Constitutional Court Decision № 50/2004. (XII. 6.) ABH [2004] 676.

126 Article 25(3) of the FL; Article 25 of Act CLXI of 2011 on the organisation and administration of courts of Hungary stating that: As part of the fulfilment of its duties determined in Article 25(3) of the FL, the Curia shall make legal standardisation decisions, shall conduct jurisprudence analyses in cases completed on a final and absolute basis and shall publish authoritative court rulings and authoritative court decisions.
Article 32(1) A law standardisation procedure shall be instituted if
a) it is necessary to adopt a law standardisation decision or to alter or to repeal a previously adopted law standardisation decision in the interest of the further development of jurisprudence or the maintenance of standard practices in the administration of justice, or
b) a justice administration chamber of the Curia wishes to depart from the ruling of another justice administration chamber of the Curia published as an authoritative court ruling or from a published authoritative court decision on a legal issue.
(2) In the case mentioned in Paragraph (1), (b), the chamber of the Curia shall suspend its proceedings until the adoption of a law standardisation decision, subject to the initiation of a law standardisation procedure.

visions. Reference to international law doctrine, decisions of international or foreign courts might be found in the reasoning of these instruments to support that way of interpretation that is supported by the Curia. Generally those legal problems are discussed in this context which has significant foreign practice like in the case of the right for compensation of children born with teratology and genetic disorders.[127]

3. Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

Apart from the superiority of *ius cogens*, the practice of the Constitutional Court does not indicate any higher status for any specific part of international law; however among all the international instruments it cites mostly the ECHR so as the practice of the ECtHR and the ICCPR in order to confirm and to support its argumentation. Since the establishment of the Constitutional Court in 1990 until 31 December 2011, it elaborated 4407 judgments.

The fact that these international instruments are invoked for the most of the time does not mean that human rights and fundamental rights have a higher status among international law areas but it shows that the Constitutional Court uses the most international legal instruments in this field. Regarding the available decisions, ordinary courts do not invoke *ius cogens* therefore no part of international law has a higher status in their practice.

V. Jurisdiction

1. Do the courts exercise universal jurisdiction over international crimes?

In principle, Hungarian criminal law provides for the exercise of universal jurisdiction over international crimes. According to Article 4(1) (c) of the Criminal Code, Hungarian criminal law shall be applied to prosecute crimes committed outside the territory of Hungary by non-Hungarians if the perpetrator committed an act within the purview of Chapter XI of the Criminal Code, i.e. genocide, war crimes, crimes against peace and apartheid or an act criminalized by an international convention.[128] Since

127 See for example uniformity decision for civil law № 1/2008.

128 Act IV of 1978 on the Criminal Code. See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 323–339. Paradoxically, although Chapter XI of the Criminal Code is entitled "Crimes against Humanity", it does not actually include the category of crimes against

Hungary has ratified the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, there is no prescription under Hungarian criminal law concerning such crimes.[129] The exercise of universal of universal jurisdiction, however, is based on the decision of the Attorney General to indict the alleged perpetrator, i.e. it depends on the discretion of the Attorney General.[130]

The new Hungarian Criminal Code, which will come into effect on 1 July 2013, does not change the procedural rules of the exercise of universal jurisdiction, however, as the new Code criminalizes a wider scope of international crimes – including crimes against humanity – these provisions might be more effectively used.[131]

Based on the available decisions, ordinary courts do not seem to actually exercise universal jurisdiction over international crimes. Even though Hungarian criminal courts have in the past tried international crimes, those proceedings were not under the principle of universality. Although according to press reports in certain cases private individuals have attempted to invoke it, the Attorney General has not initiated proceedings for crimes committed abroad by foreigners – no doubt primarily due to practical problems (such as collection of evidence, taking witness statements etc.) and the desire to avoid potential political conflicts with other states.

For instance, in 2009 a member of the far-right party Jobbik denounced acts committed by Israeli soldiers in the Occupied Palestinian Territories and requested the Attorney General to charge the alleged perpetrators with genocide, apartheid and crimes against humanity.[132] Similarly in 2012, two Members of the Parliamentary faction of Jobbik requested the Attorney General to initiate proceedings against perpetrators of atrocities committed against ethnic Hungarians in 1944–1945, in Vojvodina, Yugoslavia.[133] In neither case there is any official data concerning the initiation of criminal proceedings by the authorities.

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humanity. Nevertheless, based on Constitutional Court Decision № 53/1993. (X. 13.) Hungarian criminal courts can still prosecute such crimes by recourse to customary international law. See Hoffmann, Tamás: 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases', in: Manacorda, Stefano and Nieto, Adán (eds), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Cuenca, Ediciones de la Universidad de Castilla-La Mancha, 2009, 735–753.

129 Act IV of 1978 on the Criminal Code, Article 33(2) (a)-(b).

130 Article 4(2) of Act IV of 1978 on the Criminal Code.

131 Article 3(2)-(3) of Act C of 2012 on the Criminal Code

132 See http://nol.hu/belfold/morvai_krisztina_feljelentese_szo_szerint.

133 http://index.hu/belfold/2012/01/10/a_jobbik_feljelentest_tett_a_44–45-os_delvideki_meszarlas_miatt/.

2. **Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?**

   The Constitutional Court has not yet dealt with questions concerning this problem. According to the Hungarian Code of Civil Procedure, Hungarian courts only have jurisdiction over cases that have a connecting factor to Hungary such as Hungarian residence of the applicant or in case of non-contractual delicts (torts) that the wrongful act was committed in Hungary.[134] Consequently, ordinary courts cannot exercise jurisdiction over civil actions concerning international law violations that are committed in other countries without any connection to Hungary.

3. **Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?**

   In the practice of the Constitutional Court no case has ever been examined concerning jurisdictional issues. While the civil and criminal jurisdiction of Hungarian courts is exhaustively regulated by domestic provisions, Hungarian law implicitly accepts "forum shopping". In case of criminal proceedings, if a foreign country requests that an ongoing criminal investigation or trial should be conducted in front of its criminal for a, it is possible to transfer the case.[135] In case of civil proceedings, if the Hungarian court determines that foreign courts had already initiated proceedings in the same subject-matter (*lis pendens*), it has to refuse to proceed with the case.[136]

VI. Interpretation of domestic law

1. **Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?**

   The Constitutional Court declared that domestic law shall be made and interpreted in the view of international obligations no matter if the obligation

134 Act III of 1952 on the Civil Procedure, Articles 29–41; Law Decree 13 of 1973 on Private International Law, Article 54.

135 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, Articles 11–17.

136 Law Decree 13 of 1973 on Private International Law, Article 65.

issues from customary international law or incorporated in treaty.[137] Using international law as an interpretational tool is based on Article Q(2) of FL as regards international law. The problem arise in connection with non-binding sources of international law, however, the Constitutional Court noted that invoking them would help the positivist foundation of argumentation.[138] *Blutman* says that due to its independence, the Constitutional Court is free to choose its tools for the argumentation and interpretation. Only the validity, casualty and verifiability of conclusions form limitation to the interpretation.[139] The aim is to elaborate a politically and ideologically neutral judgment. It can easily be achieved by considering the (non-binding) decisions of international organisations and interpretative solutions of judgments of third States courts.[140]

According to the practice of the Constitutional Court, obligation derived from Article 7(1) means that the Hungarian State takes part in the community of nations and this participation is constitutional order for domestic law.[141] The basis of international cooperation is formed by common principles and goals which are subtly affected by non-binding norms and expectations to ensure the peace and well functioning of interactions. The State can avoid many of these norms but it cannot extricate herself from the whole system as it would mean isolation from the community.[142] Participation in the community of nations thus presumes the application of international norms containing social and moral standards as instruments for interpretation. This way the citation of non-binding international documents and foreign jurisprudence as a tool for interpretation of the FL can be justified.[143]

According to *Blutman*, the main question is whether the application of Article 7(1) [now Article Q of the FL] creates the obligation to use or at least

137 Constitutional Court Decision № 4/1997. (I. 22.) ABH [1997] 41, 48–49.; Constitutional Court Decision № 380/B/2004. ABH [2007] 2438., Constitutional Court Decision № 61/2011. (VII. 13.) ABH [2011] 320. Blutman, László: 'A nemzetközi jog használata az Alkotmány értelmezésénél' [Using International Law to Interpret the Constitution], *Jogtudományi Közlöny*, 2009/7–8, 304.

138 Kovács Péter concurring opinion: Constitutional Court Decision № 41/2005. (X. 27.) ABH [2005] 459. Blutman (2009) 302–303.

139 Sólyom László concurring opinion: Constitutional Court Decision № 23/1990. (X. 31.) ABH [1990] 88., See Bragyova, András: *Az alkotmánybíráskodás elmélete* [The Theory of Constitutional Judging], KJK – MTA, Budapest, 1994, 171; Kis János: 'Az első magyar Alkotmánybíróság értelmezési gyakorlata' [The Practice of Interpretation of the Constitutional Law], in: *A megtalált Alkotmány?*, INDOK, Budapest, 2000, 49; Blutman (2009), 303.

140 Constitutional Court Decision № 21/1996. (V. 17.) ABH [1996] 74. Sólyom, László: 'Az emberi jogok az Alkotmánybíróság újabb gyakorlatában' [Human Rights in the Practice of the Constitutional Court], *Világosság*, 1993/1, 28, 17–19; Blutman (2009), 303.

141 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 323; Constitutional Court Decision № 15/2004. (V. 14.) ABH [2004] 269.

142 Blutman (2009), 303.

143 Blutman (2009), 304.

consider the application of these instruments as well. In his view the obligation of participation in international cooperation cannot transform those norms that are not undertaken explicitly by Hungary as it would be contrary to the principle of rule of law, legal certainty and the content of Article 7(1) as well. However, non-binding norms might be taken into consideration for interpretation of norms that oblige the State.[144]

Regarding the available decisions, ordinary courts, for the most of the time, invoke the practice of the ECtHR if the case before them concerns fundamental law issues to interpret domestic legal provisions correctly mainly in those cases when they are quite ambivalent or seem to be not in conformity with international obligations.[145] It is not rare that the ECtHR practice is invoked as it was discussed and analyzed in a Constitutional Court decision, and not the relevant decisions of the ECtHR are cited directly,[146] or only the "practice of the European Court of Human Rights" is invoked without any exact decision to support the statement.[147]

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

Concerning the role and effect of international legal instruments on the reasoning of the Constitutional Court, three categories can be established.

International law has *constitutive* effect on the reasoning when it serves the basis for the judgement. For example in 1993 the Hungarian Parliament passed a law on *Procedures Concerning Certain Crimes Committed during the 1956 Revolution*. This law tried to make possible some form of "historical justice" in order to prosecute Communist offenders as they committed crimes against humanity. The President of the Republic did not promulgate the act, but turned to the Constitutional Court for a preventive norm control. The President asked the Court to review the law for its conformity with both the Constitution and two international agreements – Article 7 of the ECHR and Article 15 of the ICCPR declaring the principle of *nullum crimen and nulla poena sine lege*. The constitutionality of the provision referring to war crimes and crimes against humanity as defined by the Geneva Conventions of 1949 for the Protection of War Victims was upheld. The Constitutional Court cited the New York Convention on the Non-Applicability of Statutory

144 See concurring opinion of Kovács Péter: Decision № 45/2005. (XII.14.) ABH [2005] p. 569.; Blutman (2009), 304.

145 See Supreme Court Kfv.VI.38.071/2010/4.; Kfv.II.38.073/2010/4.; Kfv.III.38.074/2010/4.; Kfv. 38075/2010/4.; Bfv.I.1.117/2008/6.; Budapest Regional Court of Appeal 5.Pf.20.738/2009/7.

146 See for example Budapest Metropolitan Court, Fővárosi Bíróság 19.P. 23.191/2006./19.; Supreme Court Kfv.III.37.385/2008/4.szám.

147 See for example Court of Békés County 5. P. 20259/2008/7.; Budapest Metropolitan Court, Fővárosi Bíróság 20.Bf.6162/2009/2.

Limitations to War Crimes and Crimes against Humanity of 1968 which declares that no statutory limitation shall apply to several categories of war crimes and crimes against humanity irrespective of the date of their commission.[148] By signing and ratifying this convention, Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and crimes against humanity.[149] The Constitutional Court even highlighted the fact that the possibility of ignoring the principle of *nullum crimen and nulla poena sine lege* in the case of this kind of crimes is based on customary international law thus the non-applicability of statutory limitations obliges Hungary without any conventional provisions.[150]

International law has *additional constitutive effect* when the international norm plays supplementary role in the reasoning with other national legislative acts. In this case the final decision is based on the two types of sources as well, with the same emphasize. For example in 1990 the capital punishment was declared to be unconstitutional. The relevant provisions of the Criminal Code which permitted capital punishment as a criminal sanction conflicted with the constitutional prohibition against any limitation on the essential content of the right to life and to human dignity. This statement based on the Constitution was supplemented by international obligations and thus it is clarified as such: capital punishment conflicts with provisions that declares that human life and human dignity form an inseparable unit, thus as having a greater value than other rights; and thus being an indivisible, absolute fundamental right limiting the punitive powers of the State. The reasoning is based on the relevant articles of the ICCPR;[151] and the ECHR with its Protocol № 6 dealing with the right to life.[152] These international norms clarified the provisions of the Constitution in the view of international obligations, thus they had significant role in the final reasoning of the decision.[153] Usually, if the decisions of international organizations and

148 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. 26 November 1968, New York, 754 UNTS 73. [hereinafter: 1968 New York Convention] Article II.

149 See 1968 New York Convention, Article III-IV.

150 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 323–338.

151 International Covenant on Civil and Political Rights, 19 December 1966, New York, 999 UNTS. 171. Article 6.1. declares that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life. Paragraph 6 of the same article states that nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

152 While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognized the legitimacy of capital punishment, Article 1 Protocol 6 ECHR adopted on 28 April 1983 provides that the death penalty shall be abolished. No one shall be condemned to such penalty or executed. Also, Article 22 of the Declaration on Fundamental Rights and Fundamental Freedoms, adopted by the European Parliament on 12 April 1989, declares the abolition of capital punishment. Constitutional Court Decision № 23/1990. (X. 31.) ABH [1990] 102–103.

153 Constitutional Court Decision № 23/1990. (X. 31.) ABH [1990] 94–145.

judicial organs appear as the integrant part of the reasoning and the formation of the final decision, they never stand alone, they are accompanied by treaty based provision and judicial practice but to replace and complement the lack of constitutional practice related to a fundamental right.[154]

International law has *supportive effect* in those cases whereby the reference to international legal instruments is to strengthen a decision based on domestic law. Recommendations of the Council of Europe are frequently invoked as relevant interpretation of the provisions of the ECHR and the Constitutional Court relies many times on these sources as guidance so as the judgments and decisions of international judicial organs. However, for the most of the time they are just invoked to support argumentation, to justify that the opinion of the Constitutional Court echoing in the reasoning is in accordance with international standards, with international obligations; thus recommendations are not constitutive sources of obligation. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations issued from the ECHR, thus generally they are invoked in the company of treaty based provisions and ECtHR judgments, and for the most of the time they are not the source and base of the final decision, they are just invoked to support the argumentation based on domestic law. In these cases the used terms and phrases such as "Parliamentary Assembly of the Council of Europe also urges" or "the opinion of the Constitutional Court is in accordance with…" reveal the purpose of citation. The same is true with decisions of the United Nations and its specialized agencies and the communications of the institutions of the EU which are also cited to strengthen and to validate the argumentation. For instance when the Constitutional Court had to decide upon a case in which the rights of homosexual people were concerned, the Court invoked many international instruments to evince the conformity of domestic law with international standards.[155]

As regards the practice of ordinary courts, no such categorization can be made, as in the most of the cases the invocation of international law has only supportive effect, and there is a very few cases that international law plays significant role in the reasoning of the court. When international law has constitutive effect on the case, it is usually the practice of the Court of Justice of the European Union or that of the ECtHR which form the base

154 See for example Constitutional Court Decisions № 386/B/2005. ABH [2011] 1536–1538.; 36/2000. (X. 27.) ABH [2000] 260.; 17/2001. (VI. 1.) ABH [2001] 224–225.; 5/2001. (II. 28.) ABH [2001] 87–92.; 30/1998. (VI. 25.) ABH [1998] 220.

155 See for example Constitutional Court Decisions № 1006/B/2001. ABH [2007] 1374.; 49/1998. (XI. 27.) ABH [1998] 378.; 5/1999. (III. 31.) ABH [1999] 88–89.; 36/2000. (X. 27.) ABH [2000] 260.; 17/2001. (VI. 1.) ABH [2001] 225.; 32/2002. (VII. 4.) ABH [2002] 160. 1152/B/2007. ABH [2010] 1746.; 14/2004. (V. 7.) ABH [2004] 249.; 18/2004. (V. 25.) ABH [2004] 306.

of the reasoning. The common feature of these cases is that the applicable law is deducted from the jurisprudence. The case of the registration fee to be paid in Hungary for those cars which were bought in another EU Member State is a typical example. As this legal practice confronted the principle of free movement of goods the Supreme Court take into consideration that at the time of its procedure the EU Court had already judged the case of the Hungarian registration system of foreign cars and based its own judgment on this decision and several former ones to support the fact that the applicant has right to deny the payment of the registration fee.[156]

As regards the ECtHR practice, the Supreme Court analyzed in details Article 6 (the right to fair trial) and 8 (the right to respect for his private and family life, his home and his correspondence) of the ECHR in connection with a case on legality of perquisition.[157]

There is a special practice mainly followed by the Budapest Metropolitan Court, i.e. international law is cited through the decisions of the Constitutional Court and thus the relevant statements are that of the constitutional judges based on the practice of the ECtHR.[158]

3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

It is not a general practice of the Constitutional Court to cite treaties to which Hungary is not a party. However, the EU Constitution adopted in 2004 was the subject of four decisions which supervised the objections against the decisions of the National Election Commission (NEC). In Hungary it used to be the NEC which authorizes national referendum and until 31 December 2011 the Constitutional Court had the competence to revise objections against the permitting or refusing decisions of the NEC. There are some special fields that cannot be consulted by the way of this instrument of direct democracy. As regards international law, no national referendum may be held on any obligation arising from international treaties.[159] In the above mentioned four decisions the Constitutional Court pursued the procedure to revise objections against the decisions of the NEC concerning authorization of referenda set forth in questions related to the unratified Euro-

156 Supreme Court Kfv.III.37.454/2010/5.

157 Supreme Court Kfv.III.37.451/2008/7.

158 See Budapest Metropolitan Court Decisions, Fővárosi Bíróság 19.P.24. 472/2006/4.; 19.P.24. 473/2007/17.; 7. P. 26.047/2008/5.; 18. P./P.21.661./2006/6; 19.P. 24.053/2009.; 31.P. 25.751/2009., 18. P/P.- III. 20.339./2006/19.; 19.P. 25–386/2006/8.; 19.P. 631.904/2004.; 31.P. 23.691/2009.; 19.P. 24.213/2006.; 19.P. 24.327/2008., 19.P. 23.752/2005., 31.P. 24.109./2010.; 31.P. 22.002./2009.

159 Article 8(3) (d) of the FL.

pean Constitution. Through these decisions of the Constitutional Court, its competence related to international treaties was clarified and summarized as the European Constitution was not treated as a source of international obligations.[160] However, some years later, it was cited as the source of the Charter of Fundamental Rights of the European Union. In this decision, referring to its competence and the treaty establishing the European Constitution, the Constitutional Court held that it "will not treat the founding and amending treaties of the European Union as international treaties even though they arise from treaties",[161] and refused the procedure due to lack of competence as the Community law is not international law in the meaning of Article 7(1) of the Constitution.[162]

The Constitutional Court referred to EU law, the jurisprudence of the Court of Justice of the European Union and other norms as well, even before the entry into force of the accession treaty (1st May 2004). Decision 23/2010. (III. 4.) declared that the consideration of EU law is stated in Decision 37/2000. (IX.4.) and this might be due to the obligation of harmonization as the citation of *acquis communautaire* did not serve as source of law but rather as a reference to show that domestic law is in accordance with international and EU standards, so these instruments have only supportive role in the reasoning.[163]

The same situation happened to the ECHR before it entered into force in Hungary. The Constitutional Court had cited its provisions in its early practice even before the State ratified and promulgated it by Act XXXI of 1993. In those times when Hungary was not a party to the ECHR it was invoked as the standard of Europeanization.[164]

Apart from these fundamental and basic documents of different field of law, it rarely happens that a convention is invoked without Hungary being a party to. For instance, the provisions of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo, 1997) were cited once as bioethical

160 See Constitutional Court Decision № 56/2004. (XII. 14.) ABH [2004] 797–804.; Constitutional Court Decision № 57/2004. (XII. 14.) ABH [2004] 809–817.; Constitutional Court Decision № 58/2004. (XII. 14.) ABH [2004] 822–829.; Constitutional Court Decision № 1/2006. (I. 30.) ABH [2006] 39–48.

161 Constitutional Court Decision № 61/2011. (VII. 13.) ABH [2006] 325.

162 See Constitutional Court Decision № 61/2011. (VII. 13.) ABH [2006] 290–327.; Constitutional Court Decision № 72/2006. (XII. 15.) ABH [2006] 819, 861.; Chronowski – Drinóczi – Ernszt (2011), 273.

163 See Constitutional Court Decision № 23/2010. (III. 4.) ABH [2010] 138–139. See other decisions citing EU law before the accession: 37/2002. (IX. 4.); 28/2000, 209/B/2003; 37/2000.

164 Sólyom, László: 'Kölcsönhatás az Emberi Jogok Európai Bíróságának esetjoga és a szólásszabadság védelme között Magyarországon' [Interaction between the Case Law of the European Court of Human Rights and the Freedom of Expression in Hungary], *Állam- és Jogtudomány*, 1996/97, 3–4, 151, cited by Blutman (2009), 303–304.

standards before Hungary even became the party to it (the Convention was promulgated by Act VI of 2002).[165]

In decision 41/2005. (X. 27.) the Constitutional Court made a basic mistake by invoking Magna Charta Universitatum Europaeum signed by university rectors in 1988 in Bologna, to commemorate the 900th anniversary of the founding of the oldest university of Europe.[166] According to the general perception of international obligations, it is not a treaty, nor an obligation that binds the State, however, the Constitutional Court explicitly referred to it as a source of law in the question of autonomy of higher education. Justice *Kovács* gave a concurring opinion which expressed the same thought and stated that the Constitutional Court should have specifically dealt with the aspects of international law related to the autonomy of higher education.[167]

Regarding the available decisions, ordinary courts do not have the practice to cite and invoke treaties that Hungary is not party to.

VII. Other international sources

1. Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?

In its practice the Constitutional Court declares the sources of international law in accordance with Article 38 (1) of the Statute of the International Court of Justice.[168]

In the constitutional practice the expression "generally recognized rules of international law" may cover universal customary international law, the peremptory norms (*ius cogens*) and the general principles of law recognized by civilized nations. Customary law and general principles take

165 See Constitutional Court Decision № 36/2000. (X. 27.) ABH [2000] 260; Constitutional Court Decision № 386/B/2005. ABH [2011] 1536. Constitutional Court Decision № 22/2003. (IV. 28.) p. 258.; Constitutional Court Decision № 43/2005. (XI. 14.) ABH [2005] 556.; Dissenting opinion of Judge Harmathy Attila: Constitutional Court Decision № 39/2007. (VI. 20.) ABH [2007] 512–513.

166 See The Bologna Declaration, http://www.magna-charta.org/cms/cmspage.aspx?pageUid={d4bd2cba-e26b-499e-80d5-b7a2973d5d97}#

167 Constitutional Court Decision № 41/2005. (X. 27.) ABH [2005] 486.

168 Constitutional Court Decision № 988/E/2000 ABH [2003]1289.

precedence over domestic laws, except for the FL and only *ius cogens* rules can prevail even over the basic law.[169]

In Decision 53/1993. (X. 13.) the Constitutional Court talks about this hierarchy of the Constitution, international law and domestic law, and legal literature also supports this ranking, so as the other legal systems of several EU Member States or the constitutions of some ex-communist countries.[170] *Molnár* notes that putting customary law and general principles to a level superior to the Constitution would have a great (unwanted) impact on the standard of protection of fundamental rights since, in many cases, guarantees offered by customary law are under the human rights guarantees of the Constitution.[171]

In the practice of the Constitutional Court the general principle of international law is not a fundamental part of legal argumentation but it appears as an example nearby other instruments to support the reasoning of a decision.[172]

Regarding the available decisions, there is no evidence to prove that ordinary courts deal the question of general principle of law in accordance with the Statute.

2. Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?

In general, it can be stated that the Constitutional Court frequently refers to resolutions of international organizations but for the most of the time, to clarify treaty based obligations.

As regards binding resolutions of international organizations, the FL does not contain any provisions. Since the entry into force of the UN Charter, the States have to face unforeseen legal obligations without their explicit consent as the Security Council is entitled to elaborate binding resolutions containing sanctions and coercive measures. There are other international organizations that make binding decisions like the North Atlantic Treaty Organization, the International Civil Aviation

169 For example see Constitutional Court Decision № 4/1997. (I. 22.) ABH [1997] 51.; Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 237–238.; Molnár (2007), 465; Blutman (2009), 304.

170 For example Austria, France, Germany, Greece, Italy, the Netherlands, and Portugal as EU member States and Belarus, Turkmenistan, and Uzbekistan as ex-communist countries. Molnár (2007), 463–464.

171 Molnár (2007), 462–463.

172 For example see Constitutional Court Decisions № 7/2005. (III. 31.) ABH [2005] 83–101.; 32/2008. (III. 12.) ABH [2008] 325–360.; 53/1993. (X. 13.) ABH [1993] 323–339.; 2/1994. (I. 14.) ABH [1994] 41–58.; 45/2000. (XII. 8.) ABH [2000] 344–352.; 30/1998. (VI. 25.) ABH [1998] 220–233.

Organization, the World Health Organization and some regional fishing organizations.[173]

Concerning Security Council [hereinafter: SC] resolutions the Hungarian practice is incoherent, confusing and contradictory. Sometimes they are promulgated by government decrees or regulations and very rarely by acts.[174] Sometimes they do not even appear in the Hungarian legal system such as many of the resolutions concerning sanctions against Iraq, Angola, Sierra Leone and Afghanistan,[175] and it happens quite often that they are published in the form of Foreign Office informant (*külügyminiszteri tájékoztató*). This latter solution is a monist technique thus this kind of publication of resolutions is absolutely contrary to the provisions concerning Hungarian legal order and legal certainty.[176] In legal practice it causes problems in determining the applicable law. During the years of Yugoslav disturbances the SC embargoed the State. In Hungarian territory, a smuggler was arrested and condemned for violation of it but at second instance the judgment was modified and he was let free to go. In fact the embargo was suspended for a while but at the time of the crime it was in force again.[177] The former resolution suspending the embargo was promulgated late, so at the time of the trial of the second instance the judge could only rely on the Foreign Office informant providing for the suspension. It resulted that the committed act was not qualified at the time of the appellate procedure despite the fact that in that time Yugoslavia was embargoed again as the latter resolution providing for it was not promulgated in time.[178]

In the practice of the Constitutional Court only two Security Council resolutions has ever been invoked. They appear as example for punishment of international crimes in Decision 53/1993. (X. 13.) whereby the Constitutional

173 Molnár, Tamás – Sulyok, Gábor – Jakab, András: 'Nemzetközi jog és belső jog; jogalkotási törvény', in: Jakab, András (szerk.), *Az Alkotmány kommentárja I. kötet*, Századvég Kiadó, 2009, 411.

174 Security Council Resolutions and the Hungarian legal system is discussed in details in Molnár, Tamás: 'Mit kezd a magyar jog az ENSZ Biztonsági Tanácsának kötelező erejű határozataival? (az utóbbiak beépülése és helye a belső jogban)' [What does the Hungarian Law do with Binding Resolutions of Security Council? (transformation and place of Security Council Resolutions in domestic law)], *Grotius*, 2011, http://www.grotius.hu/publ/displ.asp?id=JTIYVQ (18.11.2012).

175 UN S/Res. 864 (1993), 1127 (1997), 1173 (1998) and 1221 (1999) concerning Iraq; UN S/Res. 1132 (1999) concerning Angola and UN S/Res. 1267 (1999) concerning Sierra Lone.

176 Molnár – Sulyok – Jakab (2009), 412.

177 See UN S/Res. 757 (1992), 760 (1992) and 820 (1993) providing for sanctions against Yugoslavia; UN S/Res. 1022 (1995) suspending the embargo and 1074 (1996) providing for the embargo again.

178 Court of Bács Kiskun County (now Bács Kiskun Tribunal) I. Bf. 657/1997., BH 1998/409. See Schiffner, Imola: 'Nemzetközi jog a magyar bíróságok gyakorlatában' [International Law in the Practice of Hungarian Courts], *Acta Universitatis Szegediensis – Acta Juridica et Politica Publicationes Doctorandorum Juridicorum*, tom. 4 fasc. 14. (2004), 464–465.

Court dealt with the question of *nullum crimen sine lege* and the prosecutions and punishment of war crimes and crimes against humanity.[179]

3. To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?

The recommendations and resolutions of the Council of Europe are frequently invoked as relevant interpretation of ECHR provisions and the Constitutional Court relies many times on these sources as guidance. However, for the most of the time they are just invoked to support argumentation, i.e. to justify that the opinion of the Constitutional Court echoed in the reasoning is in accordance with international standards thus recommendations are not constitutive sources of obligation. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations thus generally they are invoked in the company of treaty based provision and ECtHR judgments and for the most of the time they are not the source and base of the final decision, just the support for the argumentation based on domestic law. In these cases the used terms and phrases such as "Parliamentary Assembly also urges" or "the opinion of the Constitutional Court is in accordance with…" reveal of the purpose of citation.[180] The same is true with decisions of the United Nations and its specialized agencies and the communications of the institutions of the EU which are also cited to support the argumentation with the same expressions. For instance when the Constitutional Court had to decide upon a case in which the rights of homosexual people were concerned, the Court invoked many international instruments to evince the conformity of domestic law with international standards.[181]

However, sometimes these instruments have a more important role i.e. they form the integrant part of the reasoning and the formation of the final decision. In these cases they never stand alone, they are accompanied by treaty based provision and judicial practice but to replace and complement the lack of constitutional practice related to a fundamental right.[182]

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179 UN S/Res. 808 (1993) Tribunal (Former Yugoslavia); UN S/Res/827 (1993) Tribunal (Former Yugoslavia). 53/1993. (X. 13.) ABH [1993] 329.

180 For example see Constitutional Court Decisions № 14/2004. (V. 7.) ABH [2004] 249–252.; 57/2001. (XII. 5.) ABH [2001] 496–498.; 10/2007. (III. 7.) ABH [2007] 215–217.; 154/2008. (XII. 17.) ABH [2008] 1211–1212.; 60/2009. (V. 28.) ABH [2009] 523., 97/2009. (X. 16.) ABH [2009] 876., 30/1998. (VI. 25.) ABH [1998] 220.

181 See Constitutional Court Decision № 37/2002. (IX. 4.) ABH [2002] 240.

182 See Constitutional Court Decisions № 18/2004. (V. 25.) ABH [2004] 306. and 40/2005. (X. 19.) ABH [2005] 446.

Regarding the available decisions, ordinary courts rarely invoke non-binding instruments of international law and only by referring to Constitutional Court decisions that analyses or refer to them therefore there is no practice of direct citation of non-binding international legal instruments.[183]

4. Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?

In the decision № 988/E/2000 the Constitutional Court had to determine the legal status of the International Court of Justice judgment in the *Gabčikovo-Nagymaros Project*.[184] In that case, the international judicial forum declared that the 1977 Treaty, the basic of construction works, was still in force and consequently governed the relationship between the parties. The ICJ accepted that new norms and standards of international environmental law had been developed since 1977 and that the parties were obliged to interpret the original Treaty in light of the new provisions of international environmental law. It held that Hungary and Slovakia must negotiate in good faith and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty. Since the 1997 judgment of the ICJ, the parties had been engaged in negotiations, but no substantive progress

183 See for example Supreme Court Kfv.IV.37.138/2010/4.; Metropolitan Court of Budapest 19.P.24.473/2007/17.

184 In 1977, Hungary and Czechoslovakia had concluded a Treaty on the Construction and Operation of the Gabcíkovo-Nagymaros Barrage System (16 September 1977) ("1977 Treaty"), for the building of dam structures in Slovakia and Hungary for the production of electric power (the Gabcíkovo power plant), flood control, and improvement of navigation on the Danube. In 1989, Hungary suspended and subsequently abandoned completion of the project alleging that it entailed grave risks to the Hungarian environment and the water supply of Budapest. Slovakia (successor to Czechoslovakia) denied these allegations and insisted that Hungary carry out its treaty obligations. It planned and subsequently put into operation an alternative project only on Slovak territory, whose operation had effects on Hungary's access to the water of the Danube. In Gabčikovo-Nagymaros Project, Hungary v. Slovakia, Judgment, Merits, (1997) ICJ Rep 7; ICGJ 66 (ICJ 1997), 25 September 1997, the ICJ found that Hungary was not entitled to suspend and subsequently abandon its part of the works in the dam project. The ICJ held that Hungary and Slovakia must negotiate in good faith in the light of the present situation, and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty. On 3 September 1998, Slovakia filed a request with the ICJ for an additional judgment on the basis of Article 5 of the Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabcíkovo-Nagymaros Project, signed at Brussels on 7 April 1993 ("Special Agreement"): "If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment". On 7 October 1998, Hungary submitted its written statement.

had been made and the petitioner asked the Constitutional Court to declare unconstitutionality and order the Government to take steps to enforce the ICJ decision.

The petition was rejected as the judgment of the ICJ was not considered as a "generally recognized principle of international law" in the sense of Article 7 of the Constitution. Moreover, the judgment did not amount to an international obligation transformed into domestic law. The ICJ proceedings were based on the Special Agreement concluded between the two states, but the judgment was neither a norm nor a treaty: it only settled litigation. The ICJ had no jurisdiction to annul domestic rules of law or to obligate states to legislate. It was possible that a state could fulfil its obligation purely by legislative acts. It was possible also for the other party to enforce the judgment (for example by requesting an additional judgment, or by initiating the procedure of the Security Council), but the Constitutional Court had no jurisdiction in this respect.[185] According to Article 5 of the Special Agreement, 'either party may request the ICJ to render an additional judgment'. However, the Constitutional Court had no jurisdiction to oblige Parliament or the Government to initiate this procedure.[186]

The Constitutional Court held in this case that the ICJ judgment as such was not a part of the domestic legal system. For this reason, legal obligations may have arisen from the judgment only in international law and not in domestic law, and conflicts may have arisen between international law obligations and domestic law provisions. In its previous decisions, the Constitutional Court had declared that, irrespective of domestic law provisions, due to the primacy of international law, Hungary shall fulfil its international legal obligations by ensuring the conformity of international legal obligations with domestic legislation.

In general, the decision of an international judicial organ is binding only on the parties of the case.[187]

As for the application of international judgments, Constitutional Court decision 61/2011. (VII. 13.) states that the principle of *pacta sunt servanda* obliges the Constitutional Court to follow the ECtHR practice and its level of fundamental rights protection even it is contrary to the previous practice of Hungary.[188] This point of view is in conformity with Arti-

185 Constitutional Court Decision № 988/E/2000. ABH [2003] 1290.

186 Constitutional Court Decision № 988/E/2000. ABH [2003] 1290.

187 Molnár, Tamás: 'Két kevéssé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi büntetőbíróság döntései, valamint az egyoldalú állami aktusok esete a magyar jogrendszerrel' [The Place of Two Barely Known International Source of Law in Domestic Law: the Case of International Judicial Decisions and Unilateral State acts with the Hungarian Legal System], *Közjogi Szemle*, 2012/3, 1; Molnár (2012a).

188 Constitutional Court Decision № 61/2011. (VII. 13) Magyar Közlöny, 2011/80. 23046.

cle 13(1) of Act L of 2005 on the procedure regarding treaties stating that the previous decisions of the organ having jurisdiction over the disputes in relation to the treaty shall be considered in the course of the interpretation of the treaty.[189]

The Curia (former Supreme Court) is frequently asked to take into consideration in its review procedure those judgments of the ECtHR that were delivered in one or another aspect of the actual case before it. It is only a procedural step to get justice in the view of the decision of the ECtHR as there is a previous procedure with a judgment in force and the review procedure serves for the adjustment of it.[190]

Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?

The Constitutional Court has never been asked to apply directly or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty. However in some cases the submission to the Court may contain that kind of instruments as a source of obligation but even if the Constitutional Court deal with the problem, only the treaties and conventions are appeared as sources of law or as legislation taken into account. Decisions and recommendations of non-judicial treaty bodies such as conferences or meetings of the parties to a treaty are just to support argumentation and that is the maximum role they play in the reasoning.[191]

Regarding the available decisions, ordinary courts are not asked to apply or enforce decisions or recommendations of non-judicial treaty bodies.

189 Molnár (2012a), 2.

190 See the series of decisions of the famous Vajnai case (Kfv.VI.38.071/2010/4.; Kfv.II.38.073/2010/4.; Kfv.III.38.074/2010/4.; Kfv. 38075/2010/4.; Bfv.I.1.117/2008/6.); or Bt.I.1136/2008/3., Pfv.V.20.120/2008/5.; Pfv.IV.20.214/2010/9. See the legal analysis of the decision of European Court of Human Rights in Vajnai case: Koltay, András: 'A Vajnai-ügy' [The Vajnai case], *JeMa*, 2010/1, 77–82. See the relevance of the Vajnai case and the statements of the European Court of Human Rights in the Hungarian criminal law: Szomora, Zsolt: 'Az alkotmánykonform normaértelmezés és a büntetőjog – problémafelvetés' [Criminal Law and the Interpretation of Norms in Conformity with the Constitution – the Problem], in: *Sapienti Sat – Ünnepi kötet Dr. Cséka Ervin Professzor 90. Születésnapjára*, *Acta Universitatis Szegediensis. Acta Juridica et Politica*, 2012/LXXIV, 465–466.

191 For example see Constitutional Court Decisions № 32/2006. (VII. 13.) ABH [2006] 441.; 5/2001. (II. 28.) ABH [2001] 89.; Blutman (2009), 311.

VIII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?**

   Hungarian national courts apply law based on the *iura novit curia* principle, i.e. they are presumed to be aware of the content of every norm in the entire legal system – including the rules of international law. This implies that the Hungarian courts should ascertain the meaning of international norms in light of the generally accepted framework of treaty interpretation as laid out in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties and determine the content of international legal provisions in accordance with the formal sources of international law under Article 38(1) of the Statute of International Court of Justice.

   However, in practice Hungarian courts seldom prove their familiarity with the methods followed by international tribunals. The Constitutional Court often quotes international jurisprudence – especially case-law of the ECtHR – as an evidence of the existence of a generally agreed interpretation of a norm without explicitly relying on the methods used by international fora.

2. **May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?**

   In criminal law cases, courts might request information from the Department of International Criminal Law and Government Agency to the Strasbourg Court of the Ministry of Public Administration and Justice about the existence and relevant provisions of international conventions applicable to the case. In private international law cases the Department of Justice Cooperation of the Ministry of Public Administration and Justice might provide similar service. However, the Executive can only provide information to the courts, which are free to determine whether the specified international conventions are actually applicable to the case and how their provisions should be interpreted.

3. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

The political questions doctrine does not exist in Hungarian law therefore courts are obliged to exercise their jurisdiction whenever it is feasible. Nevertheless, courts have to uphold the immunity of foreign states.[192]

4. Do the national courts decline to give effect to foreign public acts that violate international law?

Hungarian courts are obliged to give effect to foreign court orders and judgments provided they are not in contravention to the Hungarian public order.[193] This implies that any public acts that violate international law has to be denied any legal effect in Hungary since it would correspondingly violate the Hungarian public order as well.

5. In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?

Many times the conventions and treaties are referred as international treaties, in their original form; however, there are many examples when they are mentioned as international obligations but they are cited in the form of their promulgating act. It has nothing to do with the content of the obligation but makes a little dogmatic disturbance. An international treaty based obligation is transformed into domestic law by virtue of promulgation in the form of a national legislation form and it gets inserted into the hierarchy of norms. Formally, the international obligation is not international anymore as it prevails in a domestic legislation form.[194] For example the "Constitutional Court indicated that it took into consideration the Decree 12 of 1987 promulgating the 1969 Vienna Convention on the Law of Treaties (hereinafter: Vienna Convention)".[195] In other decisions it refers to the same source of international law as a convention and simply adds the information that it was promulgated by the above mentioned decree.[196] The following practice is quite confusing but in the same time clearly shows that the form of citation has no importance in the content of the obligation.

192 Law Decree 13 of 1973 on Private International Law, Article 62/C (c).

193 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, Article 47; Law Decree 13 of 1973 on Private International Law, Article 72 (2) (a).

194 For example see Constitutional Court Decisions № 152/B/2009. ABH [2010] 1984; 1154/B/1995. ABH [2001] 829.; 49/2003. (X. 27.) ABH [2003] 561.; 562.

195 Constitutional Court Decisions № 36/2003. (VI. 26.) ABH [2003] 413.; 43/2003. (IX. 26.) ABH [2003] 464, 467.; 44/2003. (IX. 26.) ABH [2003] 470; 472. The same can be noticed in Constitutional Court Decisions № 45/2003. (IX. 26.) ABH [2003] 476–477.

196 Constitutional Court Decision № 37/2002. (IX. 4.) ABH [2002] 239–240.

Concerning the legal effect of a decision of an international judicial body, recently, the reaction of the legislative power is to be worried about. As regards the *Fratanoló case*[197] the Parliament adopted a decision declaring that the alleged provision of the Hungarian Criminal Code is correct and even if the ECtHR stated otherwise, the Parliament does not agree with the opinion of the ECtHR.[198] However, this attitude of the Parliament does not impede ordinary courts to follow the ECtHR decision and on the same day of the adoption of the negative declaration of the Parliament, the Supreme Court rendered a Strasbourg-conform judgment and relieved the accused on the ground that in a similar case no crime had been committed in the view of the decision of the ECtHR.[199]

Concerning the practice of international judicial decisions, the ECtHR is the most frequently cited, however, it happens that in the reasoning that decisions of the ECtHR are cited and invoked which are indirectly connected to the case, and sometimes the foreign names of these decisions are even misspelled. The famous *Babus case* of the Regional Court of Appeal is the example of the significance of ECtHR judgments in the interpretation and clarification of the Hungarian legal practice, and in the same time it serves as an anti-example for the application of international law as well: the decoration of reasoning with irrelevant and incorrectly cited decisions of the ECtHR.[200]

6. Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?

Foreign notions are not imported by the Hungarian courts; they refer to the principles of rule of law, democracy, human dignity, etc. on the basis of

197 *Fratanoló v. Hungary*, Application no. 29459/10, Judgment of 3 November 2011 [violation of article 10 of the Convention by using of totalitarian symbols].

198 See Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szóló J/6853. számú jelentés (elfogadva az Országgyűlés 2012. július 2-i ülésnapján) [Report No. J/6852 of the Parliament on the execution of the judgement of the European Court of Human Rights in the case of Fratanoló v. Hungary, adopted on the session of 2 July, 2012] Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szólójelentés elfogadásáról szóló 58/2012. (VII. 10.) OGY határozat [Resolution No. 58/2012. (VII. 10.) of the Parliament on the execution of the judgement of the European Court of Human Rights in the case of Fratanoló v. Hungary] Molnár (2012a), 3.

199 Curia Bfv.III.570!2012/2.; Molnár (2012a), 3.

200 Budapest-Capital Regional Court of Appeal Decision 3.Bhar.341/2009/6. Koltay, András: 'A Fővárosi Ítélőtábla határozata Babus Endre újságíró rágalmazási ügyében [Budapest-Capital Regional Court of Appeal Judgment of the Defamation case of the Journalist Endre Babus], *JeMa*, 2010/3, 35.

the Constitution/FL. They do not consider concepts of other jurisdictions either in the light of their own interpretation.

7. Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?

The decisions of the European Court of Justice as well as the decisions of the ECtHR are not considered as direct sources of international law, they are rather interpretations. In decision 18/2004. (V. 25.) the Constitutional Court declared that the jurisprudence of the ECtHR forms and obliges the Hungarian practice. This kind of obligation refers to the interpretation of the different provisions of the Convention and not to the judgment itself.[201] However, in decision 988/E/2000 it highlights that the judgment of the International Court of Justice is neither a norm nor a treaty. It decides upon a unique legal dispute even if its statements have theoretical significance and become precedent.[202]

As for the content of decisions of the ECtHR related to interpretation of provisions of the Convention, the Metropolitan Court of Budapest highlighted that the judgments of foreign courts do not oblige Hungarian courts, however the legal reasoning is to be taken into consideration even if the ECtHR decisions in question was rendered one year later than the facts of the case before the Hungarian court. In this case the statutory limitation is not to apply. The Metropolitan Court of Budapest emphasized that the retroactivity of interpretative reasoning is also supported by decision 75/2008. (V. 29.) of the Constitutional Court.[203]

In general, ordinary courts cite frequently foreign decisions and mainly that of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases. In most of the cases the citation of judicial practice of the ECtHR serves only for a subsidiary support of the statements even without invoking *expressis verbis* the relevant judgment.[204] It is more often that the practice is invoked indirectly by citing the statements of the Constitutional Court based on the practice of the ECtHR. This phenomenon is mainly seen in the judicial activity of the Budapest Metropolitan Court.[205]

201 Blutman (2009), 310.
202 Constitutional Court Decision № 988/E/2000. ABH [2003] 1290.
203 Budapest Metropolitan Court Decision, Fővárosi Bíróság 24.K.35.639/2006/25.
204 See Supreme Court Decision Kfv.IV.37.629/2009/70.
205 See Budapest Metropolitan Court Decisions, Fővárosi Bíróság 19.P.24. 472/2006/4.; 19.P.24. 473/2007/17.; 7. P. 26.047/2008/5.; 18. P./P.21.661./2006/6; 19.P. 24.053/2009.; 31.P.

IX. Judicial dialogue on international law in Eastern Europe

1. **Do the courts refer to decisions of international and/or foreign courts?**

   The Constitutional Court frequently refers to international court decisions but very rarely to foreign ones.

2. **For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?**

   The Constitutional Court tends to support its argumentation by invoking foreign legislation or foreign court decisions to demonstrate the "*international tendencies*"[206] that rule a certain legal question and thus enumerates the judicial practice of different States. The jurisdiction of the Constitutional Court does not indicate any political character and the cases in which foreign State practice is cited are usually related to fundamental rights such as right to life for instance, which usually divide the society. Invocation of foreign State practice occurs in majority[207] and minority opinions as well.[208] Hungarian Constitutional Court follows the jurisprudence of other States, even its website lists a collection of the sites of the Constitutional Courts of the world. Apart from the EU Member States, 20 other European, 24 Asian, 25 American, 19 African and the Australian Constitutional Courts are directly available through the links.[209]

25.751/2009., 18. P/P.- III. 20.339./2006/19.; 19.P. 25–386/2006/8.; 19.P. 631.904/2004.; 31.P. 23.691/2009.; 19.P. 24.213/2006.; 19.P. 24.327/2008., 19.P. 23.752/2005., 31.P. 24.109./2010.; 31.P. 22.002./2009.

206 Constitutional Court Decisions № 36/2000. (X. 27.) ABH [2000] 260.

207 For example see Constitutional Court Decisions № 14/2000. (V. 12.) ABH [2000] 99. 18/2000. (VI. 6.) ABH [2000] 124–125.; 57/2001. (XII. 5.) ABH [2001] 490–491.; 37/2002. (IX. 4.) ABH [2002] 2.; 5/2004. (III. 2.) ABH [2004] 83.; 43/2005. (XI. 14.) ABH [2005] 539–541.

208 For example see Constitutional Court Decisions № 13/2000. (V. 12.) ABH [2000] 76.; 6/2001. (III. 14.) ABH [2001] 107.; 35/2002. (VII. 9.) ABH [2002] 223.; 37/2002. (IX. 4.) ABH [2002] 238.; 22/2003. (IV. 28.) ABH [2003] 250–257.; 260.

209 See Constitutional Courts in the world, http://www.alkotmanybirosag.hu/useful-materials/constitutional-courts-in-the-world (20.12.2012).

Concerning the practice of domestic courts on lower level, sometimes the application of international judicial decisions is beyond the scope of domestic norms. For instance, the interpretation and application of the benchmark of "good faith" established by the ECtHR is far beyond the provisions of the Hungarian Criminal Code concerning defamation and libel and the dogmatic frames and basics. Thus, the applications of ECtHR decisions to support the argumentation related to the meaning of *bona fides* in the case of a journalist called *Babus* directly conflicted with the relevant decision of the Constitutional Court [36/1994. (VI. 24.)] echoing the Hungarian constitutional practice.[210]

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?

Concerning the practice of the Constitutional Court, there is no unitary guidance for citation thus even in the case of citing international legal instruments there is a lack of consequent method and sometimes the retrieval is problematic. The same is even more so if the foreign court decisions and legislations are invoked.

Two categories can be separated in the practice of the Constitutional Court. First, when the Constitutional Court refers to the name of the State to demonstrate a point of view represented by that country without citing any instruments to support the statement. For example in the question of organ donation the Constitutional Court categorized the States based on their legislation on the subject and mentioned only the name of them and not the exact norms.[211] The common feature of the citations is that the Constitutional Court never criticizes the foreign decisions; it just refers to them as the example of international tendencies.

The other category is formed by those reasoning which categorize the States but cites the concrete legislation or decision. One of the most demonstrative decisions of the Constitutional Court is the one dealing with the legality of euthanasia. It reviewed the most remarkable standpoints concerning the relationship between the right to life and the right to self-determination. It examined in details the history of the legislation of euthanasia in the United Kingdom, including the *Dianne Pretty case* which was later judged by the ECtHR as well, that of the Netherlands, Belgium, the United States of America with the practice of different States, and the Australian legislation. However, there is a long description of different legal practices; it has no significant effect on the reasoning of the decision of

210 Szomora, Zsolt: 'Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn Grundrechtsbeeinflusste Widersprüche im ungarischen Strafrecht', *Zeitschrift für Internationale Strafrechtsdogmatik*, 2001/1, 33; Koltay (2013), 36.

211 For example see Constitutional Court Decisions № 386/B/2005. ABH [2011] 1531.

the Constitutional Court.[212] A few lines further down it even declares that its reasoning is in accordance with international tendencies but this time it cites the judgments of the Canadian Supreme Court and that of the ECtHR to support the statement.[213]

4. What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason of non-referral?

As regards the practice of the Constitutional Court, it is not a frequent phenomenon that it invokes foreign State practice; however it consults foreign practice to demonstrate how democratic States handle a special legal issue, usually in the sphere of fundamental rights. It has already pursued legal comparison in the case of, for instance, state symbols [13/2000. (V. 12.)], right to vote [57/2001. (XII. 5.)], euthanasia [22/2003. (IV. 28.)], publishing the results of poll [6/2007. (II. 27.)], television and radio broadcasting of the sessions of the Parliament [20/2007. (III. 29.)], and domestic violence [53/2009. (V. 6.)].[214]

Concerning the role of foreign legal practice the Constitutional Court summarized its point of view in its recent decision. It states that the constitutionality of a legal institution is based on the Constitution, the legal system, the historical and political background of the State, thus the Constitutional Court does not consider that any foreign legal practice is determinative to the examination of conformity of any legal acts with the Fundamental Law (Constitution). The fact that a special field of law is regulated in the same way as in Hungary is not a relevant argument and it has no relevance when the Constitutional Court deals the question whether domestic law and the international obligations of Hungary are in conformity.[215]

Regarding the available decisions of ordinary courts, there is no practice of considering foreign court decisions. The Supreme Court had the chance to form a short opinion on the plaintiff's reference to the French regulation as a model solution to be taken into consideration. It only declared that no foreign jurisdiction or legislation bounds the Hungarian courts.[216] As for the decisions of the international judicial organs see VIII. 7.

212 Constitutional Court Decision № 22/2003. (IV. 28.) ABH [2003] 250–257.
213 Constitutional Court Decision № 22/2003. (IV. 28.) ABH [2003] 261.
214 See Constitutional Court Decision № 1/2013. (I. 7.) ABH [2013]. 3.4. 55.
215 Constitutional Court Decision № 1/2013. (I. 7.) ABH [2013] 3.4. 55.; see also Constitutional Court Decision № 32/1991. (VI. 6.) ABH [1991] 146, 159.
216 Supreme Court Kfv.IV.37.488/2006/7.

5. **Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?**

   Concerning the practice of the Constitutional Court, the quality and level of using international legal instruments and foreign court decisions or legislation mainly depends on the judges, their skills and their field of expertise. For instance there are judges who avoid and neglect international legal instruments or just join to other minority opinions, but there are those who are quite active concerning application of international law.

6. **Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?**

   Apart from judicial decisions, the Constitutional Court prefers citing German legislation as guidance or a desirable model regulation. However, the application of the highly respected norms is sometimes inverted. For instance, in the case of regulation of incitement against a community the Constitutional Court refused the implication of the German model twice, in 2004 and 2008, as it did not meet the Hungarian constitutional benchmark. Surprisingly, in Decision 95/ 2008. (VII. 3.) the Constitutional Court cited the German legislation even though it was not in conformity with its own benchmarks, thus the foreign source cannot be applied to strengthen the argumentation; in fact, it rather weakened the legal reasoning. The legal comprehension is superficial, and it leads to wrong conclusion such as the invocation of the *Tucholsky case* of the German Court which raised the problems of punishability in the crime of defamation to the Hungarian case related to incitement against a community.[217]

   Judicial dialogue is very rare in ordinary court practice. In a case related to forestry the Supreme Court *expressis verbis* stated that foreign legislation invoked by the applicant as an example (hereby the French regulation) cannot be taken into consideration by the Hungarian court.[218]

7. **Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).**

217 Szomora (2001), 39.
218 Supreme Court Kfv.IV.37.488/2006/7.

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Names of the referred Hungarian courts before and after the FL

Hungarian	*BEFORE FL*	*AFTER FL*
… Megyei Bíróság ↓	Court of … County	
Törvényszék		Tribunal of …
Fővárosi Bíróság ↓	Budapest Metropolitan Court (in other texts it is also called Budapest-Capital Regional Court, and – in ECtHR judgments – Budapest Regional Court)	
Fővárosi Törvényszék	–	Metropolitan Tribunal of Budapest
Fővárosi Ítélőtábla	Budapest-Capital Regional Court of Appeal	Budapest-Capital Regional Court of Appeal
Pécsi Ítélőtábla	Pécs Regional Court of Appeal	Pécs Regional Court of Appeal
Legfelsőbb Bíróság ↓	Supreme Court	
Kúria		Curia

International Law through the National Prism:
the Impact of Judicial Dialogue

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Country Report – Lithuania

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I. Legal basis for application of international law in domestic legal order

1. What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?

In the first constitutional act of 11 March 1990 "On re-establishment of independence" it is *inter alia* written that "Lithuania stresses its adherence to universally recognised principles of international law". According to Art. 135 of the 1992 Constitution, "in implementing its foreign policy, the Republic of Lithuania shall follow the universally recognized principles and norms of international law". According to the Art. 138 of the Constitution, international treaties, ratified by Lithuanian parliament shall be consistent part of Lithuanian legal system and according to the 1999 Law "On international treaties", ratified international treaties and agreements should have direct effect and priority towards national legislation. The Constitutional court in its jurisprudence approved this priority principle of ratified international treaties, stressing nevertheless that the latter international treaties should not contradict the Constitution itself.[1] On the other hand, 2004 Constitutional act "On membership in the EU" (which is a part of the 1992 Constitution itself) the priority principle over national legislation extends not only to the EU founding treaties, but to all "EU legal norms".

1 Superiority principle of ratified international treaties over national legislation has been approved by Constitutional court's conclusion of 24 January 1995, ruling of 17 October 1995, decisions of 25 April 2002 and 7 April 2004 etc. In 14 March 2006 ruling Constitutional Court stressed: "Thus, the observance of international obligations undertaken on its own free will, respect to the universally recognized principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania […]. It needs to be noted that the Constitutional court has held that the international treaties ratified by the Seimas should acquire the power of the statute (i.e. parliamentary legislation). This doctrinal provision cannot be interpreted as meaning that the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its legislation than that established by international treaties. On the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken on its own free will and respects universally recognized principles of international law implies that in cases when national legal acts (*inter alia* parliamentary legislation) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied".

In this context should be said, that a "ratification" procedure in Lithuanian legal system means that national parliament needs to adopt a formal ratification act (statute), but not including the text of particular international treaty under ratification. The text of particular international treaty/agreement, which is to be ratified by the parliament, as a rule, is published in Official gazette ("Valstybės žinios") later on (sometimes it can last for several years). Therefore, priority status over parliamentary legislation extends only to those international treaties and agreements, which receive parliamentary approval. Not ratified international treaties and agreements, but approved by the Government – have status lower than parliamentary legislation and higher than governmental decrees and should also be applied directly by the courts.

Independence of judiciary, including application of judicial international law, is guaranteed by the Constitution (Art. 109) and jurisprudence of the Constitutional court. But Lithuanian courts do not have a long tradition of application of international legal instruments in its case law, especially – concerning declarative texts and non-binding soft law international instruments (e.g. principles).

2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

Art. 138 of the Constitution concerning direct application of ratified international treaties might be treated as certain constitutional principle and encouragement to apply those international legal instruments in judicial case law. According to art. 456 of the Code of Criminal Procedure, the investigation of decided case might be reopened, when the UN Human Rights Committee decides that sentence judgment of national court have been adopted violating International Covenant on Civil and Political Rights and its Additional Protocols or when European Court of Human Rights decides that the said national judgment breaches the European Convention and reopening of the case is the only way to revise those violations (therefore, this does not apply to Constitutional Court decided judgements).

According to Article 33 of the Law on Courts,[2] which lays down the "Sources of law for adjudicating cases", the courts are to follow the Constitution, national laws, "international treaties of the Republic of Lithuania", resolutions of the Government and other acts, which do not contradict with the laws. The Lithuanian Law on Administrative Proceedings[3] lays down a general rule that the court must not apply any law, which contradicts the Constitution (Art. 4, para. 1). With regard to supranational law, the Law on Administrative

2 Law on Courts (Lietuvos Respublikos teismų įstatymas), Valstybės žinios, 1994, Nr. 46–851; 2002, Nr. 17–649.

3 Law on Administrative Proceedings (Lietuvos Respublikos administracinių bylų teisenos įstatymas), Valstybės žinios, 1999, No. 13–308; 2000, No. 85–2566.

Proceedings only refers to EU law, i.e., Article 4 paragraph 3 establishes that the administrative courts are bound by the judgments and preliminary rulings of the Court of Justice of the European Union (ECJ), as well as that, in cases provided for by law, the national courts are to refer to the ECJ for a preliminary ruling on questions of application and validity of EU law. However, the Article 4 paragraph 6 of the mentioned law also allows for a possibility to follow the "fundamental principles of law" (including international ones) as well as the principles of fairness and reasonableness in cases when there is no legislation governing a certain administrative dispute or a dispute similar to it.

3. **For Russia as federal state: do the constitutions of the republics refer to international law, are there constitutional or statutory provisions at the federal level addressing federal authority over matters concerning international law?**

II. Treaties

1. **How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?**

In 24 January 1995 conclusion "On constitutionality of European Convention of Human Rights" Lithuanian Constitutional court made a distinction between direct application of civil and penal international legal sources, but in practice this controversial distinction has been disregarded by Lithuanian judiciary.[4] In the 17 October 1995 ruling of the Constitutional court made a distinction between ratified and not ratified international treaties. According to the Court, only ratified international treaties have the status of parliamentary statute (but should not contradict the Constitution), while not ratified but acceded treaties should not contradict not only the Constitution, but also – to parliamentary legislation. Another important point of this ruling is that the Court here also distinguished between international treaties and agreements, concluded by officials *ex officio* having authority to do so in the name of the State of Lithuania (president of the republic, prime

4 According to the said conclusion, only those international treaties regarding "civil jurisdiction" should be applied directly and should have priority towards Lithuanian laws; on the other hand, international legal instruments of "criminal jurisdiction" do not have priority and direct effect application rule in Lithuanian legal system according to the Court.

minister and minister of foreign affairs) and international agreements of various public agencies concerning cooperation with relevant foreign partners, which might be not necessarily directly applied by the courts.[5]

Administrative courts, in their application and evaluation of the nature of international legal acts, refer to relevant constitutional doctrine and national law. The legal power of international acts applied by administrative courts is also often reflected in the title of the document, therefore, does not require additional definition, however, the circumstance (and date) of ratification being of essential importance is usually stressed explicitly (e.g., the Supreme Administrative Court has pointed out that "the concept of a permanent establishment is laid down in Article 5 of the *bilateral agreement* of 22 July 1997 between the Republic of Lithuania and the Federal Republic of Germany 'On the Avoidance of Double Taxation of Income and Capital' (*ratified* by Law No. VIII-490 of 4 November 1997)"[6]).

2. Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?

All international treaties and agreements approved by the parliament (by ratification) or by the government should have direct effect and might be applied directly by Lithuanian judiciary. Although in 24 January 1995 conclusion "On constitutionality of European Convention of Human Rights" Lithuanian Constitutional court made a distinction between direct application of civil and penal international legal sources, in practice this controversial distinction has been disregarded by Lithuanian judiciary.

It was already mentioned that according to the Constitutional court's ruling of 17 October 1995 should be a distinction between ratified and not ratified international treaties. According to the Court, only ratified international treaties have the status of parliamentary statute (but should not

5 "[…] international agreements of ministries or institutions of the Government concerning cooperation with relevant institutions of foreign state […] are not international treaties in the meaning of item 1a of Article 2 of the Vienna Convention, […] [where] 'treaty' means an international agreement concluded between States in written form and governed by international law […]' The wording 'concluded between States' specifies that an international treaty may be concluded only by the officials, who have constant or *ad hoc* authority to represent the State. On this matter it is established in Article 8 of the Vienna Convention, that 'an act related to the conclusion of a treaty performed by a person who cannot be considered […] as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State. Meanwhile, no special authorization is necessary for said agreements, thus they have no force of the source of law either from the standpoint of international law or of the law of the Republic of Lithuania".

6 Ruling of the Supreme Administrative Court of Lithuania of 28 November 2011 in the administrative case No. A438- 2713/2011.

contradict the Constitution), while not ratified but acceded treaties should not contradict not only the Constitution, but also parliamentary legislation. The Court here also distinguished between international treaties and agreements, concluded by officials *ex officio* having authority to do so in the name of the State of Lithuania (president of the republic, prime minister and minister of foreign affairs) and international agreements of various public agencies concerning cooperation with relevant foreign partners, which might be not necessarily directly applied by the courts.

Therefore, Lithuanian Constitutional court in distinguishing legally binding international documents, first of all, analyses, whether this document is ratified or not by the parliament. For instance, in 13 June 2000 ruling on religion rights – before applying Art. 14 of the 1989 UN Convention of the rights of the child, which also guarantees that the right of the child to freedom of religion should be respected, it has said that this international document has been ratified and therefore it is a part of Lithuanian legal system.[7] In 29 December 2004 ruling Constitutional court was examining constitutionality of some Criminal code's preventive measures for persons suspected to be involved into organised crime. In approving such measures the Court relied also on Art. 31 of UN Convention against organized crime (which sanctions some preventive measures), mentioning that this document has been ratified by Lithuanian parliament and should be directly applied by ordinary courts.[8]

The administrative courts of Lithuania precisely follow the doctrine of the Constitutional Court with regard to this matter. However, sometimes the administrative courts in their reasoning refer to international documents in general as to "international acts" (e.g. irrelevant of their binding or

7 "[…] Therefore if the teaching or education agency knows about the religion of traditional churches or religious organizations professed in the family of the child, the child, while taking into account his interests, may be taught this religion. If it is not known about the religion professed in the family of the child, account should be taken of the request of the child himself. The child may not be coerced to adopt or profess any religion or faith, neither his constitutional freedom of thought, conscience and religion might be restricted. Only interpreted in such a manner, the provisions of Part 2 of Article 20 of the Law on Education are in compliance with the Constitution".

8 "[…] Prevention of organised crime is also provided for in other international legal acts. On 13 December 2000, in Palermo, the authorised persons of governments of member states of the United Nations signed the United Nations Convention against Transnational Organised Crime. The Seimas ratified this convention […]. Under Article 31 of the said convention, State Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organised crime; State parties *inter alia* shall, through appropriate legislative, administrative or other measures, endeavour to reduce existing or future opportunities for organised criminal groups to participate in lawful markets with proceeds of crime, to prevent the misuse by organized crime groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity, and to prevent the misuse of legal persons by organised criminal groups".

non-binding nature, etc.), with the probable primary intention of demonstrating the conformity of national legal requirements with the general legal standards acknowledged by international law.[9]

3. What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country? Is there any influence of EU law, including the decisions of European Court of Justice?

One of requirements of direct application of international treaty, which is applied also in Lithuanian legal system, is to examine, whether text of particular international document provides any rights for individuals. Lithuanian Constitutional court does not have a competence of so called "constitutional complain" (in Spanish *recurso de amparo*, in German *Verfassungsbeschwerde*), therefore, individuals may address the Constitutional court not directly, but only through ordinary or administrative courts. It means, that the Constitutional court does not "apply" international treaties in the proper meaning of the word in protecting infringed human rights, but rather refers to it in interpreting the national legislation and even the Constitution (including 2004 Constitutional act "On Lithuania's membership in the EU", which is a part of the 1992 Constitution itself). Case law of European Court of Justice is also quoted in jurisprudence of Lithuanian Constitutional court, but only in context of application of the EU law in Lithuanian legal system (i.e. not in context of application or interpretation of international law).[10]

With regard to the case law of administrative courts, a conclusion is to be made that international treaties may be directly applied when the national regulation does not meet Lithuania's legal obligations. For instance, the Aarhus Convention on Access to Information, Public Participation

9 For example, in one case the Court rejected all of the arguments of the applicant and declined its request to address the Constitutional Court, stressing that previous judgement of district administrative court on independence of judiciary was issued relying not only to national law, but also to "multiple international acts: the Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms, the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations, the Council of Europe Committee of Ministers Recommendation on the Independence, Efficiency and Role of Judges adopted on 13 October 1994, the Universal Charter of the Judge of 17 November 1999 […]" (ruling of the Supreme Administrative Court of Lithuania of 20 August 2012 in the administrative case No. AS146- 585/2012).

10 Constitutional court in 22 December 2011 ruling concluded that "jurisprudence of the European court of justice is important, as source of interpretation and application of national law" (also see rulings of 21 December 2006, 15 May 2007, 26 February 2008, 4 December 2008, 27 March 2009, 21 June 2011, 27 February 2012).

in Decision-Making and Access to Justice in Environmental Matters was ratified in Lithuania in 2001 and since then, according to the Art. 138 of the Constitution, is a constituent part of the legal system of the Republic of Lithuania. Consequently, until amendments were made in 2010 in the Environmental Protection Law and other relevant national laws concerning specific fields of environmental law (e.g. Law on Environmental Impact Assessment of the Proposed Economic Activity, etc.), courts applied the Aarhus convention directly, as this convention, since its ratification, has priority towards ordinary legislation in Lithuania.[11]

The administrative courts of Lithuania often quote case law of the ECJ with regard to both, the application of EU law, including general principles of law, as well the application of national law and principles, implementing EU provisions. While such jurisprudence is not very common, in some instances the Supreme Administrative Court of Lithuania has in its judgments relied on the case law of the ECJ regarding the doctrine of direct application of EU directives (according to which, in all cases when the provisions of a Directive are unconditional and sufficiently precise in its content, they may be relied on before national courts against the State if the latter failed to transpose the directive into national law within the prescribed period of time or has not done so properly).[12]

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11 For example, in a case regarding the lawfulness of a permit for landfill operations, the Supreme Administrative Court concluded that, inter alia, the court of first instance did not properly evaluate whether "public participation in decision-making had been guaranteed in the scope of the provisions of the United Nations' Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) regarding public participation and access to courts in environmental matters". Consequently, the contested judgment of the court of first instance was overruled and the matter was referred back to the latter court for reconsideration (Ruling of the Supreme Administrative Court of Lithuania 15 January 2009 in the administrative case No. A822-50/2009).

12 For example, a case was brought before the Supreme Administrative Court with regard to the duty of the applicant (a beer brewery) to adjust its input VAT deductions (for the raw materials purchased and used for brewing) following the destruction of the beer preparation made from the raw materials bought due to the cancellation of the brewing licence. Though the Law on Value Added Tax of the Republic of Lithuania was directly applicable in the case, the Supreme Administrative Court stressed that in order to evaluate the circumstances of the case, it had to "take into account the provisions of the [VAT] Directive [i.e., Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax] and appropriate case law of the ECJ". This argumentation was based on the fact that though the VAT Directive is implemented into Lithuanian national law in the Law on VAT, the provisions of the latter national act in force at that time have been possibly not in full accordance with EU law (to the disadvantage of the applicant). The Supreme Administrative Court referred to the provisions of the Treaty on the Functioning of the EU and the doctrine of direct applicability of directives developed in the case law of the ECJ (among others, judgments in cases Francovich and others (19–11–1991), C-6/90 and C-9/90; Marks & Spencer, C-62/00 (11–7–2002); Pfeiffer et al. (5–10–2004)). This, inter alia, resulted in a partial overrule of the contested

4. **Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?**

   The administrative courts are independent in such determinations. The same rule applies to administrative courts regarding the applicability (including all changes (amendments), termination, etc.) of law irrelevant of the fact of it being national or international. This rule is closely linked to the principle of judicial independence. E.g., according to the Constitution and Law on Administrative Proceedings, in the administration of justice, judges and courts are independent and subject only to the law. Judges and the courts are under an obligation to decide cases in accordance with the laws and under such conditions that do not enable any external influence (see Art. 7, para. 1).

5. **Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?**

   Although Constitutional Court has a competence to overview international treaties before and after their ratification, but in practise during 20 years of its existence it made only one conclusion (that said 1995 conclusion). What concerns administrative courts, they are independent in determining, whether the law is applicable, as well as under an obligation to apply law, which is in force and is in conformity with the Constitution, general principles of law, ensures protection of human rights and fundamental freedoms. The only exception to this rule is the possibility for the administrative courts to address the ECJ with questions regarding the applicability of EU law (through the preliminary ruling procedure).

6. **Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)**

   Until 2012 the Vienna Convention of the Law of Treaties was referred only once in Constitutional court's case law (in the said 17 October 1995 ruling), saying that according to this Convention, "treaty" means an international agreement only concluded by the officials, who have *ex officio* authority to represent the State (i.e. head of the state and government and minister of

judgment of the administrative court of first instance (ruling of the Supreme Administrative Court of Lithuania 29 March 2010 in the administrative case No. A556–593/2010).

foreign affairs). Therefore, according to the Court, "a conclusion of a treaty performed by a person who cannot be considered as authorized to represent a State, is to be without legal effect unless afterwards confirmed by that State". Generally, the administrative courts cite and follow the jurisprudence of international courts with the aim of following the uniform practice of the application of various treaties. It is, therefore, correct to say that in most of the cases, administrative courts interpret treaties in the same manner as international tribunal would do.

7. Do the courts refer to the opinion of the Executive?

Lithuanian Constitutional Court tries to avoid any reference to opinion of the Executive in interpreting Constitution or any other national and international document. The Supreme Administrative Court of Lithuania, with regard to the jurisprudence of the Constitutional Court, has many times stressed the principle of the supremacy of law over legislative acts, as well as the principle establishing that justice may only be administered by courts:

> […] in the interpretation of Article 109 of the Constitution […], the Constitutional Court has more than once concluded (*inter alia* in its rulings of 21 December 1999, 9 May 2006, 6 June 2006, 27 November 2006, 24 October 2007, 21 January 2008) that Courts, in the administration of justice, according to the Constitution […], laws and other legal acts, must guarantee the supremacy of law, protect human rights and freedoms. This obligation for the courts follows from Article 109 paragraph 1 of the Constitution to adjudicate cases in fairness and objectiveness, to adopt reasoned and substantiated judgments (rulings of the Constitutional Court of the Republic of Lithuania of 15 May 2007, 24 October 2007). The principle of justice enshrined in the Constitution, as well as the provision according to which justice administered by courts, mean that constitutional value is not the adoption of a court judgment in itself, but the adoption of a just judgment of the court; the constitutional concept of justice implies not only formal, nominal administration of justice by the court, not just the outer appearance of the justice administered, but also – most importantly – such judgments (other final acts of the court) which are not incorrect in their content; merely formal administration of justice performed by the courts is not that justice, which is established, protected and defended by the Constitution of the Republic of Lithuania (rulings of the Constitutional Court of the Republic of Lithuania of 21 September 2006, 24 October 2007, 21 January 2008, 20 February 2008).[13]

Following the mentioned constitutional doctrine, the opinion of the Executive, if received, is seen as evidence equal to any other evidence gathered in the case.

13 Ruling of the Supreme Administrative Court of Lithuania of 1 February 2010 in the administrative case No. A662-171/2010.

Though this instrument is used by the court rather seldom, the Supreme Administrative Court of Lithuania sometimes refers to various public institutions (also – the Legislator and the Executive), various non-governmental organizations or academic institutions for opinions regarding certain aspects of the case, when it believes there is such a need.[14] This usually happens in the so-called "normative cases" (non-individual administrative cases) in which the administrative courts have to resolve an abstract question on the constitutionality and legality of lower administrative acts. Consequently, such normative cases usually touch upon issues, which are of greater importance and sensitivity to a bigger part of the society. However, the opinions received from the Executive so far have been very formal in their nature.

Therefore must be concluded, that such a possibility exists on a theoretical level, but there have been no instances of reference to the Executive with regard to international acts. If received, the opinion of the executive would not be binding on the court and would be considered as equal to other evidence gathered in the case.

8. **Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?**

III. Customary international law

1. **Is customary international law automatically incorporated into domestic law?**

2. **Do the courts apply customary international law in practice? How do the courts prove existence of customary law? Do the national courts always take account of developments in the practice of States, as well as in case law and jurisprudence while determining the existence and content of customary international law?**

The Constitutional court does not apply international customary law in its case law.

14 For example, ruling of the Supreme Administrative Court of Lithuania of 11 May 2011 in the administrative case No. I444-14/2011, ruling of 2 January 2013 in the administrative case No. I492-46/2012, etc.

Applying customary international law is not common in the practice of administrative courts. Though in some cases application of norms of international customary law can be derived from a number of international treaties which Lithuania has so far joined.[15]

3. **Do the courts refer to the opinion of the Executive?**

   As it was mentioned before, courts may ask for some executive institutions or organisations to provide their opinion about the cases to the court, but this opinion does not bind the courts, nor is it in any case necessary to ask for it.

4. **What are the primary subject areas or contexts in which customary international law has been invoked or applied?**

5. **What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?**

IV. Hierarchy

1. **How are treaties and customary international law ranked in the hierarchy of domestic legal system?**

   Ratified international treaties have priority against national legislation, but acquire lower rank than Constitution. As Lithuania is a part of the Council

15 For example the Supreme Administrative Court has stated that "One of the universally recognized principles of international law is the principle of Sovereign equality of states. This principle is expressed in legal form in Article 2 of the Charter of the United Nations, Article 23 of the Vienna Convention on Diplomatic Relations and other legal acts […]. The obligation of the applicant to pay personal income tax follows from the domestic legislation. Therefore, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations are applicable only with respect to the possible obligations of the Embassy. These conventions include provisions of customary international law. On 29-01-1991-01, the Seimas of the Republic of Lithuania declared that respect and honestly fulfil all international obligations set out in the 18-04-1961 Vienna Convention on Diplomatic Relations and in the 24-04-1963 Vienna Convention on Consular Relations, and, therefore, the applicant's arguments with regard to the validity of the said conventions are to be considered invalid […]" (ruling of the Supreme Administrative Court of Lithuania 24 June 2003 in the administrative case No. A7-335/2003).

of Europe, Lithuanian courts usually indicate a special status for the European Convention on Human Rights (including case law of the European Court of Human Rights in Strasbourg) among ratified international treaties. In the case law of the Supreme Administrative Court it, for example, has stressed that a bilateral international agreement has primacy over national law: "[…] the applicant is a company of the Federal Republic of Germany, therefore, the tax dispute falls within the scope of the bilateral agreement between the Republic of Lithuania and the Federal Republic of Germany 'On the Avoidance of Double Taxation of Income and Capital', which has supremacy over the provisions of national law. Such a rule is established by the provisions of the Law on Administration of Taxes of the Republic of Lithuania[16] (Art. 5 para. 1) and in the mentioned international agreement itself (Articles 2, 3, 4 and 7).[17]

2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice? What is the role of the international law doctrine, decisions of international or foreign courts?

The Constitutional court up to 2012 did not apply *ius cogens* concept in its case law.

Administrative courts do not usually directly apply the *ius cogens* concept in their jurisprudence. However, bearing in mind that *ius cogens* norms are applied in the case law of European Court of Human Rights and the fact that administrative courts follow the decisions of the latter law, an answer to the question raised would logically follow that aspects of the concept of *ius cogens* are reflected in the determinations of the Lithuanian administrative courts if not directly, then through the case law of the ECtHR.[18]

16 Law on Administration of Taxes (Lietuvos Respublikos mokesčių administravimo įstatymas), Valstybės žinios, 2004, No. 63–2243.

17 Ruling of the Supreme Administrative Court of Lithuania of 31 March 2012 in the administrative case No. A442–325/2012.

18 For example, a district administrative court has concluded that the "European Convention on Human Rights and Fundamental Freedoms as amended by Protocol No. 11, together with the Additional Protocols 1, 4, 6, 7, 14 and the Universal Declaration of Human Rights […], 1993 United Nations Vienna Declaration […] state that 'Human rights are universal, indivisible, interdependent and interrelated. The international community around the world must treat them fairly and equally under the same conditions and with the same emphasis.' Moreover, the very concept of the indivisibility of human rights negates the hierarchy of human rights, because it means that all human rights are of equal status. However, it is recognized increasingly often that certain human rights are or may be granted greater protection than other rights. However, to claim that the European Convention on Human Rights and Fundamental Freedoms does not acknowledge hierarchy of rights in general would not be true. […] of especially great importance with respect to the hierarchy of human rights in international public law are *ius cogens* norms, which, following the Vienna Convention on Law of Treaties

3. **Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?**

   As it was already mentioned, the ECHR has a special status in Lithuania not only because it is ratified international treaty (formally the ECHR has the same legal status as any other ratified international treaty in Lithuania), but also because of its human right's content and international prestige. Therefore, the ECHR is the most often referred international treaty in the case law of the Constitutional court. There has been no jurisprudence of Constitutional court up to 2012 concerning UN Security Council decisions. Administrative courts, in their application and evaluation of the nature of international legal acts, refer to relevant constitutional doctrine and national law. As well as the Constitutional court, administrative courts attach great importance to human rights as the greatest value and because of that, ECtHR is most likely the most important international treaty in the jurisprudence of administrative courts.

V. Jurisdiction

1. **Do the courts exercise universal jurisdiction over international crimes?**

   Lithuanian courts did not have any case law on international crimes. January 13, 1991 *coup d'état* case and 1991 Medininkai case, which include war crimes suspected citizens of Russian Federation and Belarus Republic, is still under investigation, but both mentioned countries do not cooperate in investigation of this case with Lithuanian office of Prosecution General.

2. **Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?**

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and mean a norm from which no derogation is possible and which can only be amended by a later norm of the same nature, i.e., the introduction of a *ius cogens* norm. Thus, it is recognized that a certain group of norms are ranked higher than other rules in the system of international rules of law. Although there is no exhaustive list of which provisions are considered to be *ius cogens* norms, the doctrine acknowledges that in the sphere of human rights, the principle of racial non-discrimination, rules prohibiting slavery and piracy, crimes against humanity, torture and other cruel behaviour or treatment degrading human dignity or punishment are considered to be *ius cogens* norms" (ruling of the Šiauliai District Administrative Court of 7 May 2008 in the administrative case No. I-189-84/2008).

3. **Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?**

VI. Interpretation of domestic law

1. **Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?**

   Although Constitutional court did not develop any presumptions or doctrines of application of international law, but it tends to make references to binding or non-binding international (e.g. UN or CE) documents in interpretation of national law. For instance, in 9 June 2009 ruling it referred to Article 5 of the 1999 International Convention for the Suppression of the Financing of Terrorism, Article 10 of the UN Convention against Transnational organized crime, Article 18 titled "Corporate Liability" of the 1999 Council of Europe Criminal Law Convention against Corruption (which have been ratified by Lithuanian parliament) and some other international and European legal sources, in order to legitimize 2000 Lithuanian Criminal Code's provision on criminal liability (of not only of natural persons, but also) of "legal persons" for participation in transnational organized crime, which was a novelty for Lithuanian legal system[19]. On this regard interesting

19 "[…] While summing up the legal regulation enshrined in the said acts of international law linked to establishment of liability for legal persons for deeds of criminal nature, it needs to be noted that the states are obliged or they are recommended (taking account of the obligation of the legal act) to establish, for deeds of criminal nature, such sanctions to legal persons, which would be effective, proportionate and dissuasive measures […]. In other words, while establishing liability to legal persons for unlawful deeds, the states should assess whether these unlawful deeds are regarded as crimes according to the national law, or whether they are recognised as offences of different nature (torts, administrative violations, etc.), and, taking account of that, apply the corresponding liability and sanctions provided for these deeds in the national law […]. It also needs to be noted that certain legal acts of international law not only enshrine the basic requirements and principles for establishment of liability of the legal persons for the deeds of criminal nature, but also regulate the conditions of application of that liability. For example, Article 18 of the aforementioned Criminal Law Convention on Corruption signed by the Member States of the Council of Europe and other states in Strasbourg on 27 January 1999 provides that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person,

is 29 November 2010 ruling, in which Constitutional court ruled that some provisions of Law "On Liability for Genocide of Residents of Lithuania", to the extent that do not establish that the persons who sustained damage due to genocide have the right to demand (without limitations of any time periods) compensation of the damage from the natural persons who committed this crime, is in conflict with the Constitution. This conclusion was made relying also on ratified 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[20]

What concerns reference to non-binding international documents, UN General Assembly Resolutions has to be mentioned, first of all. Already in one of the first its rulings (ruling of 13 December 1993), in justifying a property confiscation order as an effective criminal punishment, the Constitutional court made a reference to item 8.2 of Standard Minimum Rules for the Measures Unrelated with Imprisonment (A/RES/45/110, "The Tokyo Rules"), adopted by UN General Assembly, in which it is recommended (besides other punishments), to apply also a confiscation of property order. In interpreting constitutional provision on independence of the judiciary it referred to Article 12 of Basic principles of the independence of the judiciary, adopted by 13 December 1985 UN General Assembly Resolution No. 40/146, which sais that judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.[21]

It should be mentioned that the Supreme Administrative Court of Lithuania followed the case law of ECJ as a good practice even prior to Lithuania's membership in the European Union.[22] The Supreme Administrative Court of Lithuania has also followed the standards laid down by the Council of

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acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person […]. It needs to be noted that the provisions of Article 20 of the [Lithuanian] Criminal Code which are disputed in this case enshrine an essentially analogous regulation of application of criminal liability to the legal persons to the one mentioned".

20 "[…] Under the 26 November 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, genocide is among the gravest crimes in international law and punishment, for it is an important element in the prevention of such a crime (as it is established in the preamble to this convention). It is *inter alia* established in this convention that no statutory limitation shall apply to genocide, irrespective of the date of its commission".

21 22 December 1994 ruling of the Constitutional court.

22 The Supreme Administrative Court of Lithuania concluded that the "Court of Justice of the European Communities in its constant case law, while analyzing the application of the principle of proportionality in limiting economic activity, has emphasized that the legality of every limitation depends on whether the prohibitive measures are appropriate and necessary in order to achieve the objectives pursued. When there is a need to choose one of several measures, the solution should be the least complicated instrument, while the losses endured must not be disproportionate to the objectives achieved (see, e.g., *C-331/88 The Queen v. Minister for*

Europe/UNESCO (Convention on the Recognition of Qualifications concerning Higher Education in the European Region) for the resolution of disputes regarding the legal recognition of higher education, acquired at a foreign university, e.g., the Bialystok University of the Republic of Poland.[23]

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights? 3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

The Constitutional court's competence is broader than protection of individual rights, but in human rights cases normally it tends also to refer to international law. For instance, in 13 November 2006 ruling the Court ruled that the distinction of persons, having a right for double citizenship, based on the concept of "repatriation" – *de facto* is unconstitutional discrimination based on ethnicity. This conclusion was strengthen referring to 1949 Geneva Conventions for the Protection of the Victims of War and Additional Protocols of 1977 (these international documents have been ratified by Lithuanian parliament)[24].

On the other hand, the Constitutional court rather often refers also to non-binding international law documents in human right cases. For instance, in interpreting one's constitutional right to have legal assistance the Court referred to the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by December 9, 1998 UN General Assembly Resolution A/RES/43/173 and its17 principle, which indicated that "the detained person shall be entitled to have assistance of a legal counsel" ant that he should be informed about his rights promptly after the arrest[25]. In interpreting one's right to obtain a status of attorney at law in Lithuania, the Court referred to "Implementation of the Basic Principles on the Independence of the Judiciary", adopted in the 8th UN Congress and its provision, that respective governments, lawyers' professional association and educational institutions should guarantee an adequate education required for lawyers[26]. In ruling, declaring death penalty unconstitutional, one's right to life was interpreted also relying on Article 3 of 1948 UN

Agriculture, Fisheries and Food, ex p FEDESA and others)" (ruling of the Supreme Administrative Court of Lithuania of 20 February 2004 in the administrative case No. A1-362/2004).

23 Ruling of the Supreme Administrative Court of Lithuanian of 14 December 2004 in the administrative case No. A11-1002/2004.

24 "[…] Thus, in these conventions, the notion 'repatriation' is used in the context of the return of persons to the state whose citizens they are (taking the legal bond of the person with a corresponding state as a basis) and not in the context of the ethnical origin of the person".

25 18 November 1994 ruling.

26 See 10 July 1996 ruling. The same provision of this international document was applied also in 12 February 2001 ruling, approving national legal rule, prohibiting working (for a limited period of 3 years) as a lawyer in court, for a person, who use to be a judge in this court.

Universal human rights declaration. In 13 November 2006 ruling, limiting one's right to obtain double citizenship, the Court in order to strengthen its negative opinion towards double citizenship in Lithuania according to Article 12 of the Constitution[27], referred also to 1963 Council of Europe Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (which has not been signed by the Republic of Lithuania). Although in this ruling the 1997 European Convention on Nationality (which is more liberal towards double citizenship) was also mentioned, but the Court stressed its reasoning on the 1963 Convention, saying that "even though the said [1963] convention has been amended and/or supplemented later more than once, *inter alia* establishing additional conditions, reservations and possibilities for a person to keep citizenship of another state besides original citizenship, the principle provision that a person may usually hold citizenship of only one state remained".

In the interpretation or application of domestic law, administrative courts do not make any references to treaties to which Lithuania is not a party to. However, in one case, the Supreme Administrative Court of Lithuania dealt with a question on whether the applicant could rely on a convention (in this case – the Convention on the Contract for the International Carriage of Goods by Road (CMR)), which had not been ratified by the parliament of the Republic of Lithuania, but which Lithuanian had joined. In this case, the court decided that accession to the convention means the agreement between member states of the convention and, therefore, non-application of the latter convention may not justified based on the fact that the Convention had not been ratified, as it would infringe the principles of international law.[28]

VII. Other international sources

1. **Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?**

2. **Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?**

27 Article 12, para 2: "With the exception of cases, provided by law, no one may be a citizen of both, the Republic of Lithuania and another state at the same time".

28 Ruling of the Supreme Administrative Court of Lithuania of 5 June 2002 in the administrative case No. A2-567/2002.

What concerns the Constitutional court, according to its general competence of constitutional (judicial) review, it does not tend to determine the existence or content of any general principle of law nor it refer to binding resolutions of international organizations.

In the jurisprudence of the Supreme Administrative Court of Lithuania some cases may be found where the Court refers to the resolutions of the Parliamentary Assembly of the Council of Europe. For example, references to the Parliamentary Assembly Resolution 1266 (2000) (e.g., ruling of the Supreme Administrative Court of Lithuania of 18 April 2008 in the administrative case No. A248-58/2008, as well as its ruling of 14 April 2008 in the administrative case No. A[575]-164/2008).

3. To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?

When Constitutional court tends to strengthen its reasoning in interpreting national law by reference to international documents, practically, it does not matter, whether this international instrument is to be considered binding or not, including Council of Europe recommendations.[29] In the latter case, the Court only provides with appropriate citation (quotation) of particular rule of such recommendation. For instance, in 6 December 1995 ruling announcing unconstitutional the executive's competence to award some extra bonus/premium for judiciary, it quoted also the 13 Oct 1994 Council of Europe recommendation "On the Independence, Efficiency and Role of the Judges".[30] This recommendation was referred to also in other rulings of Constitutional court, e.g.: in 21 December 1999 ruling, in which a law use to give a competence for minister of justice to nominate or remove from office chairmen of various courts or divisions of those courts; in 12 July 2001 ruling, which proclaimed unconstitutional some provisions of legislation, reducing salaries of judges; in 22 October 2007 ruling, where some reductions of judiciary pensions have been proclaimed anti-constitutional. In 9 December 1998 ruling in declaring death penalty unconstitutional,

29 From 1993 to 2012 the Constitutional court in 11 rulings made a reference to various Council of Europe recommendations and in 2 rulings – a reference to Council of Europe resolutions.

30 "[…] On 13 Oct 1994 the Committee of Ministers of the Council of Europe adopted Recommendation No. 94/12 'On the Independence, Efficiency and Role of the Judges'. Item 3 of its rule 5 prescribes the following duties for the judges: a) to act independently and freely from an outside influence in all cases; b) to conduct an impartial investigation of the case based on the assessment of the established evidence and in conformity with the laws, and ensure an impartial hearing of all parties and compliance with provisions of the European Convention of Human Rights and Freedoms".

it relied also on 4 Oct 1994 Council of Europe recommendation 1246, calling for the abolition of capital punishment. In 19 September 2000 ruling the Court recognized that some provisions of Lithuanian Criminal Procedure Code to the extent that do not guarantee the right of the accused to give questions to an anonymous witness or victim, and due to this – to participate in the investigation of evidence – are to be unconstitutional restrictions of one's right to defense and fair trial. This conclusion was made also relying on 10 Sep 1997 Council of Europe recommendation No. R (97) 13 "Concerning intimidation of witnesses and the rights of the defence".[31] In 23 October 2002 ruling the Court referred to CE recommendation "On the right of journalists not to disclose their sources of information" in declaring unconstitutional some provisions of Mass media law, which in that time have defended in absolute terms the right of journalist not to disclose the source of information even in the necessary cases due to vitally important interests of democratic society.[32] In 5 March 2004 ruling the Court ruled unconstitutional some governmental provisions, which established some additional conditions and limitations to receive the social allowance also referring to CE recommendation "On the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship".[33]

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31 "[…] Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe concerning intimidation of witnesses and the rights of the defence pays heed to the fact that, while respecting the rights of the defence, witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face to face confrontation with the accused. However, where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defense. The defense should, through this procedure, have the opportunity to challenge the alleged need for anonymity of witness, his credibility and origin of knowledge".

32 "[…] In the 8 March 2000 Recommendation of the Committee of Ministers of the Council of Europe to member states on the right of journalists not to disclose their sources of information No. R (2000) 7 it is stated that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media. It is held in the recommendation that such protection has its limits and is not absolute as well as it is pointed out therein that competent authorities may order a disclosure of the source of information if there exists a public interest and if circumstances are of a sufficiently vital and serious nature. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure".

33 "[…] Recommendation No. R(2000)3 of the Committee of Ministers of the Council of Europe 'On the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship' of 19 January 2000 recommends to the Governments of the member states to

With regard to administrative courts, there are cases, where the Supreme Administrative Court of Lithuania based its determinations on the recommendations of the Committee of Ministers of the Council of Europe. For example, in its ruling of 13 July 2012 in the administrative case No. AS[146]-380/2012, the Supreme Administrative Court of Lithuania interpreted a provision of the Law on Administrative Proceedings establishing the preconditions for the application of interim measures in the light of the regulation established by the Recommendation No. R (89) 8 on provisional court protection in administrative matters (adopted by the Committee of Ministers of the Council of Europe on 13 September 1989).

4. **Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?**

Administrative Courts follow the official doctrine of the European Court of Human Rights and apply the standards established in the judgments thereof.[34]

5. **Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?**

Competencies of administrative courts are strictly defined in the national legal acts, which do not establish a duty for courts to apply or enforce decisions or recommendations of non-judicial treaty bodies, nor an obligation to treat such decisions as legally-binding. However, such recommendations may be relied on in the motivation of the judgments, as acts demonstrating an acknowledgment of certain general standards, principles, etc., when it is considered important to do so by the court.

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implement in their law and practice *inter alia* the following principles: 'Member states should recognize in their law and practice, a right to the satisfaction of basic material needs of any person in a situation of extreme hardship' (Principle 1); 'The right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care' (Principle 2); 'The right to the satisfaction of basic human material needs should be enforceable, every person in a situation of extreme hardship being able to invoke it directly before the authorities and, if need be, before the courts' (Principle 3)".

34 For instance, see ruling of Supreme Administrative Court of Lithuania of 15 February 2012 in the administrative case No. A63-1343/2012 where the said court directly followed the interpretation of ECtHR in its evaluation of a possible violation of the right to human dignity as guaranteed by the ECHR.

VII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?**

2. **May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?**

   In an administrative case the court may ask for an opinion of the executive on questions related to the case if the court finds it important to do so. The opinion of the executive does not bind the court in any way.

3. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

   According to the Law on Administrative Proceedings, administrative courts adjudicate cases in the field of public administration (Art. 3 para. 1). An administrative court does not assess the contested administrative act and actions (or inaction) from the perspective of political or economic expediency, but only determines whether the law or other legislation has been violated in a certain case or whether *an entity of public administration* has exceeded its competence, as well as whether an act thereof is compatible with the objectives and tasks for which the institution was established and was granted the appropriate authority (Art. 3 para. 2). All parties to such an administrative dispute must have legal standing. According to the national Law on Public Administration, *an entity of public administration* may only be a state institution or agency, a municipal institution or agency, an official, civil servant, a state municipal enterprise, a public establishment whose owner or stakeholder is the State or a municipality, an association authorised in accordance with the procedure laid down by the latter law to engage in public administration (Art. 2 clause 4).

4. **Do the national courts decline to give effect to foreign public acts that violate international law?**

There are no examples of case law of administrative courts regarding the applicability or non-applicability of such foreign acts.

5. **In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?**

Constitutional court has referred to the UN Charter only in two rulings until 2012 (see 24 September 2009 and 15 March 2011 rulings). In 24 September 2009 ruling it examined constitutionality of decision of the Lithuanian parliament to move over the professional army (from mandatory military service). In the end of its reasoning it decided, that particular law is in the light of constitutional principles, *inter alia*, just referring on Article 5 of the North Atlantic Treaty, concerning "exercise of the right of collective self-defence recognised by Article 51 of the Charter of the United Nations". In ruling of 15 March 2011, in which the Court approved constitutionality of a rule, which empowers Lithuanian military units for the purposes of collective defence to take part in military operations on the foreign territory, as well as to allow the deployment of military units of other states for the same purpose on the territory of the Republic of Lithuania. In this case Constitutional court interpreted Lithuanian Constitution in the light of the UN Charter much stronger than in previous case. It quoted many different provisions of the Charter (including already mentioned article 51 concerning collective self-defence), stressing Lithuania's international responsibility under this document in maintaining international peace and security.

6. **Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?**

In March 11, 1990 Lithuania declared independence and its acknowledgment towards democracy, human rights and rule of law after 50 years of occupation and experience of soviet totalitarian regime. It means that Lithuania had to change its all political system and form of government, including judicial system. Therefore, entire legal education had to be changed into democratic one. It is normal that human rights and democracy judicial reasoning did not appear instantly after restoration of democratic state. The role of the Constitutional court in democratising entire legal system may not be overestimated. From the beginning of its existence

(1993) the Constitutional court adopted a democracy[35] and (natural/inborn) human rights[36] terminology in its case law. Such concepts as civil society[37], principles of (defence of) legitimate interests[38], legal certainty and legal security[39], proportionality[40], responsible governing[41] and some others have been used by this Court as legal transplants, borrowed, first of all, from case law of Strasbourg and Luxembourg courts. It is worthy to mention that all these legal transplants have been adopted into Lithuanian le-

35 See e.g. 20 April 1995 ruling: "The possibility for every individual to formulate freely his/her own opinion and views, as well as freely disseminate them, is the indispensable condition for creation and maintaining of democracy" or 25 May 2004 ruling: "The Constitution reflects a social agreement – a democratically accepted obligation by all the citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules entrenched in the Constitution and to obey them in order to ensure the legitimacy of the governing power, the legitimacy of its decisions, as well as to ensure human rights and freedoms, so that the concord would exist in the society". In 29 November 2010 ruling the concept of democracy was used in order to legitimise one's right to obtain a damage inflicted by the USSR occupation: "[…] during the occupations of Lithuania (carried out both by the USSR and by the Nazi Germany), not only democracy was denied, but also crimes against the residents of the occupied state were committed, *inter alia* genocide was perpetrated. It is obvious that, during the years of the occupation, the persons who had suffered from crimes of genocide perpetrated by the natural persons who were serving the occupation regimes were unable to implement their right to demand that the natural persons who had perpetrated the crimes of genocide compensate the damage".

36 For instance, concept of natural (inborn) human rights was mentioned in 9 December 1998 ruling in order to proclaim death penalty as unconstitutional punishment.

37 E.g. in 30 September 2003 ruling: "The requirement to treasure state-owned property and not to waste it follows from the striving for an open, harmonious and just civil society which is mentioned in the Preamble of the Constitution […]" or in 25 May 2004 ruling: "Justice together with open and harmonious civil society would not be possible, if all public power would be concentrated in one public agency".

38 For instance, in 25 November 2002 ruling a reference to principle of (defence of) legitimate interests was made in order to rule unconstitutional some legal provisions reducing amount of elderly pensions in Lithuania after so called 1999–2000 "Russian economic crises".

39 For example, the Court referred to principles of legal certainty and legal security in 11 February 2011 ruling in order to strengthen unconstitutionality reasoning in the case of reduction of salaries of judges under economic crises legislation.

40 E.g. the Constitutional court in 29 March 2012 ruling referred to principle of proportionality in order to weight and balance some statutory requirements for candidates in presidential, parliamentary and European elections (e.g. to submit a document attesting to the payment of a deposit amounting to 5 most recent average monthly work remunerations in the national economy; to file in (submit) the extracts of the basic data from income and property declarations of candidates as well as their declaration of private interests; to conclude the agreement with the political campaign treasurer (during political campaign period) and some others).

41 For instance, in 1 July 2004 ruling (*inter alia*, referring to principle of responsible governing) the Court decided to recognise that some provisions of Standing Orders of the Seimas (Parliament) to the extent that it provides the right of a member of the parliament to receive a remuneration for pedagogical activities (e.g. to work as a Professor at University) is in conflict with the Constitution.

gal system by the Constitutional court through the constitutional principle of rule of law (*teisinės valstybės principas*), mentioned in the Preamble of the Constitution.

7. **Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?**

What concerns the Lithuanian Constitutional court, it should be said that European courts do not have any influence on the Court's jurisprudence concerning interpretation, application and perception of international law (with exception of Strasbourg court case law).

As already mentioned, the administrative courts relied on the ECJ and ECtHR's case law even before Lithuania's accession to the European Union. Upon accession, the importance of the latter jurisprudence, has increased.

VIII. Judicial dialogue on international law in Eastern Europe

1. **Do the courts refer to decisions of international and/or foreign courts?**

As Lithuania is a member of the Council of Europe and the European Union, it is obvious that most popular judicial references concern European Court of Human Rights, European Court of Justice and supreme courts of EU member states. But the European Court of Justice should not be considered a "foreign" or "international" court in Lithuania. What concerns Lithuanian Constitutional court, it also refers to case law of ECtHR and sometimes to judgments of constitutional courts of other EU member states. Up to July, 2012 there have been 30 rulings with references to jurisprudence of Strasbourg court and only 5 rulings with references to constitutional courts of other EU member states.

Administrative courts of Lithuania, as it was mentioned before, often refer to decisions of the ECtHR and the ECJ. According to the Law of the Administrative Proceedings, the Supreme Administrative Court of Lithuania forms a uniform practice of administrative courts with respect to the interpretation and application of laws and other legal acts. Within this obligation it twice a year publishes a court bulletin entitled "Administrative

Jurisprudence".[42] In the latter bulletin, the Supreme Administrative Court of Lithuania not only publishes the most important of its own case law, but also an overview of the relevant case law of international and foreign administrative courts (including supreme administrative jurisdictions of France, Germany, Sweden, etc.). These bulletins are given out to all of the judges in Lithuania, other institutions determined by law, and are available (for sale) to all interested parties.

2. For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?

In majority cases Lithuanian Constitutional Court tends to interpret Lithuanian Constitution in the light of judgments of ECtHR, just to make sure that Lithuanian legislation is in conformity with minimal standards of European human rights provided in ECtHR case law. Nevertheless, there have been at least one ECtHR judgment (*Paksas v. Lithuania*, 06/01/2011), when the Strasbourg court held a violation of a rule settled down by the ruling of Lithuanian Constitutional court. This concerns rather politicised impeachment procedure of the President Rolandas Paksas Constitutional court (31 March 2003 conclusion and 25 May 2004 ruling), in which it did not refer to any European or international legal instruments. On the other hand, in order to strengthen its conclusion, in politically sensitive 28 September 2011 ruling on constitutionality of National family policy concept it cited not only some judgments of Strasbourg court, but also some relevant case law of constitutional courts of some EU member states (Czech, Slovenian, Croatian, Hungarian, French and German).

Administrative courts most commonly refer to the decisions of international courts in cases related to the protection of human rights. For instance, after 2007 ECtHR's decision *L v. Lithuania* concerning gender reassignment, Supreme Administrative court in its case law, following Strasbourg's court advise to adopt a special legislation in Lithuania on this issue, tends to award non-pecuniary damages for those persons, unable to undergo a gender reassignment surgery in Lithuania, relying on the decision of ECtHR mentioned above (see November 29, 2010 judgment of Supreme Administrative Court, case No. A^{858}-1452/2010). In affirming one's right to assembly during

42 Article 13 of the Law of the Administrative Proceedings (Lietuvos Respublikos administracinių bylų teisenos įstatymas), Valstybės žinios, 1999, No. 13-308; 2000, No. 85-2566.

so called Baltic-Pride march (promoting sexual minority rights) this court partly relied on Strasbourg's court May 3, 2007 case *Bączkowski v. Poland*, citing certain senteces on importance of pluralistic society and protection of minority rights from this decision (see May 10, 2010 judgement of Supreme Administrative court, case No. AS[822]-339/2010). In awarding non-peciunary damages for detainees, facing non-adequate detention conditions, the Supreme Administrative Court also relies on the ECtHR's case-law, e.g. *Savenkovas v. Lithuania, 2008* (see e.g. October 11, 2010 judgement of Supreme Administrative Court, case No. A[525]-1181/2010).

3. How the courts refer to „external" judgments? By citing, critique or according legal relevance to decisions of external courts?

In majority cases Lithuanian Constitutional court in its rulings gives citations of "external" judgment, which could strengthen its own conclusion. There is no a tradition in Lithuania to quote "external" judgments in criticising it.

Administrative courts usually refer to "external" judgments in search of legal argumentation for the strengthening of their own position and in order to stay "in-track" with the uniform international legal practice. For this reason, if "external" judgments are, they, as a rule, not criticized.

What concerns the Lithuanian Supreme Court, it sometimes even does not quote the "external" judgement, but gives its essence, for instance in October 23, 2010 judgment *I. B. v. Vilnius University hospital* the Court said, that according to jurisprudence of ECtHR – appellate court does not need to answer *in details* to all arguments raised in appeal.

4. What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason of non-referral?

Firstly, it is important to mention that Lithuanian Constitutional court adopts only appr. 15 rulings a year. It does not make frequent references to foreign constitutional courts or ECtHR. From its establishment in 1993 up to July 2012 it adopted 30 rulings with references to jurisprudence of ECtHR (appr. 2 such rulings a year) and only 5 rulings – to case law of other constitutional courts of EU member states. For instance, in 2007 it was only one case with reference to ECtHR judgment; in 2008 – two cases; in 2009 there were no any such references; in 2010 – one reference and in 2011 there were four cases with reference to ECtHR jurisprudence. The first reference to ECtHR's case law was done in 20 April 1994 ruling.

What concerns a reference to judgments of foreign national constitutional courts, it should be said that this is rather recent practice for Lithuanian Constitutional court. Until July 2012 there have been only 5 judgment of Lithuanian Constitutional court with such references (12-07-2001, 08-10-2001, 28-09-2011, 25-10-2011, 29-03-2012). The first time, when such a reference was made was a ruling of 12 July 2001 on constitutionality of reduction of salaries of public officials, including judges. In this judgment Lithuanian Constitutional court ruled unconstitutional some reductions of salaries of judges also relying on 4 October 2000 judgment of Polish Constitutional tribunal. 28 September 2011 ruling might be mentioned in this regard also, because here the Court referred to jurisprudence of the European Court of Human Rights together with case law of certain constitutional courts of the EU member states. Two times case law of common law courts have been referred to (Canadian and USA Supreme courts): in 12 July 2001 and 1 October 2008 rulings.

In 2011, the Supreme Administrative Court of Lithuania resolved 196 administrative cases related to the law of the European Union and 308 cases related to the application of ECHR.

5. **Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?**

The main obstacle for judicial dialogue in Lithuanian lower courts is, of course, a workload, therefore, as a rule, only higher courts have enough time and personnel to use it. What concerns Constitutional court and other high courts in the country, it should be said, that absence of a tradition referring to foreign or international court also plays a substantial role here. Lack of English translations and poor language skills could be another obstacle of it.

Judicial dialogue with international and foreign courts is most commonly upheld by the Supreme Administrative Court of Lithuania, i.e. the administrative court of highest instance. The other administrative courts, i.e., the 5 regional administrative courts are not as active in this sphere. There is no evidence, however, that the administrative courts would be facing problems, such as lack of translations, poor language skills, etc.

6. **Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?**

Most recently cited is, of course, European Court of Human Rights. What concerns foreign constitutional courts – decisions of constitutional courts of the EU member states are cited in majority cases.

Cooperation between Lithuanian administrative courts and administrative courts of other countries usually depend on the legal issue the court is dealing with. There is no such known tradition at the Lithuanian administrative courts as to divide between foreign courts on the basis of them being "prestigious" or "non prestigious". However, the most frequently relied upon courts in Lithuanian administrative doctrine are the German courts, due to the similarity of Lithuanian and German models of administrative justice (the previous being in great part based on the latter). It must be stressed, however, that administrative courts refer to the jurisprudence of foreign courts as they refer to other doctrinal sources.

In addition to this, as was mentioned before, the jurisprudence of foreign courts is overviewed twice a year in the official bulletin of the Supreme Administrative Court of Lithuania. Such overviews give opportunity for courts to be familiar with foreign legal practice and be reflected it in the judgments thereof. These bulletins tend to influence the legal thinking of judges. Therefore, even if there are no direct and explicit references to the case law of foreign administrative courts, the said influence can be felt indirectly.

7. Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).

The first time, when Lithuanian Constitutional Court widely referred to ECtHR jurisprudence was its 24 January 1995 conclusion "On constitutionality of European Convention of Human Rights". The President of the Republic before ratification of the ECHR in the Parliament addressed the Court with the question, whether some provisions of the ECHR does not contradict to human rights provisions, formulated in the Lithuanian Constitution. In this conclusion the Court in principle agreed to the idea that the European Convention theoretically might be in contradiction with the Lithuanian Constitution. The Court, inter alia, was asked to rule, whether provision of Article 4 of the Convention ("No one shall be required to perform forced or compulsory labour" and "for the purpose of this article the term "forced or compulsory labour" shall not include any work required to be done in the ordinary course of detention or during conditional release from such detention") does contradict to the provision of the Article 48 Constitution, that "work performed by persons convicted by court shall not be considered forced labour", saying that this constitutional provision may include some penitentiary labour. But the Court interpreted Article 48 of the Constitution in the light of jurisprudence of ECtHR (e.g. Van Droogenbroeck case, 1982) and concluded that Lithuanian Constitution does not

allow a penitentiary labour (*pataisos darbai*) without imprisonment as criminal punishment. The same way of interpretation was used in interpreting Article 20 of Lithuanian Constitution, which says that "a person detained *in flagrante delicto* must, within 48 hours, be brought before a court for the purpose of deciding, in the presence of the detainee, on the soundness of the detention". The Court said that constitutional meaning of „soundness" of detention should also include "lawfulness" – mentioned in Article 5 of the ECHR. According to the Court, constitutional non-discrimination clause also should include broader non-discrimination cases, mentioned in Article 14 of the Convention. Finally, the Court concluded that interpreting the Constitution in the light of ECtHR' jurisprudence – the European Convention does not contradict to Lithuanian Constitution.

Another important judgment was held 9 December 1998, in which Constitutional Court has ruled a capital punishment (still existed in Lithuanian Criminal code in that time) unconstitutional. Provisions of Article 18 ("human rights and freedoms shall be inborn"), Art. 19 ("the right to life shall be protected by law") and Article 21 ("it shall be prohibited to torture, injure a human being, degrade his dignity, subject him to cruel") of Lithuanian Constitution were interpreted in the light of the European Convention on Human Rights (especially, its 6th Protocol) and jurisprudence of ECtHR. In the findings it was concluded that the capital punishment contradicts the natural (inborn) human rights concept together with constitutional protection of one's right to life (Arts. 18 and 19) and that death penalty even might be interpreted as inhuman, cruel and degrading punishment, prohibited by Art. 21 of the Constitution, taking in consideration with Article 3 of the European Convention and the jurisprudence of the ECtHR (*Ireland v. UK, 1978*).

What concerns administrative courts, it was already mentioned November 29, 2010 judgment of Supreme Administrative Court (case No. A^{858}-1452/2010) in which the Court relying on 2007 ECtHR's decision *L v. Lithuania* concerning gender reassignment awarded non-pecuniary damages for person, unable to undergo a gender reassignment surgery in Lithuania. May 10, 2010 judgement of Supreme Administrative court (case No. AS^{822}-339/2010) was also mentioned, which affirmed one's right to assembly during so called Baltic-Pride march (promoting sexual minority rights) relying on Strasbourg's court May 3, 2007 case *Bączkowski v. Poland*, citing certain senteces concerning importance of pluralistic society and defence of minority rights. In October 11, 2010 judgment (case No. A^{525}-1181/2010) Supreme Administrative Court awarded non-peciunary damages for detainees, facing non-adequate detention conditions relying on the ECtHR's case *Savenkovas v. Lithuania, 2008*.

International Law through the National Prism:
the Impact of Judicial Dialogue

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Country Report – Poland

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I. Legal basis for application of international law in domestic legal order

1. **What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?**

The 1952 Polish Constitution did not explicitly recognise international law, including human rights instruments, as part of the internal Polish legal order.[1] Some distinguished Polish scholars advocated the idea that ratified international treaties should be acknowledged to form part of domestic law and be applied ex proprio vigore.[2] Courts however, were rather reluctant to apply international law at the time, mainly for political reasons.[3] Exceptions were areas where domestic statutes clearly referred to a particular international treaty.[4]

But already in the 1980s, forerunners of future transformations emerged in Poland. Polish courts tried to use international law as a source to enhance the protection of human rights and fundamental freedoms.[5]

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1 For more details see S. Pomorski, 'International Law in the Polish Municipal Legal Order: A Historical Overview and the Current Constitutional Status', in: R. Clark, F. Feldbrugge and S. Pomorski (eds), *International and National Law in Russia and Eastern Europe, Essays in Honor of George Ginsburgs* (The Hague–Boston: M. Nijhoff Publishers, 2001), 295–317, at 295–300.

2 For more details see L. Garlicki, M. Marsternak-Kubiak and K. Wójtowicz, 'Poland', in: D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009), 371–373. See also K. Skubiszewski, 'Traktaty a prawo krajowe', *Państwo i Prawo* 8–9 (1977), 255–265, at 257–9; K. Skubiszewski, 'Prawa jednostki, umowy międzynarodowe i porządek prawny PRL', *Państwo i Prawo* 7 (1981), 9–23, at 9–12.

3 As it has been rightly noticed by Czaplinski: "the courts under communist rule, for manifestly political reasons, did not accept the possibility of direct application and effectiveness of international law within the Polish legal order. Individuals could not claim any rights granted under human rights treaties". See W. Czaplinski, 'International Law and the Polish Constitution', in: M. Wyrzykowski (ed.), *Constitutional Essays* (Warsaw: Instytut Spraw Publicznych, 1999), 289–306, at 291.

4 In the decision of 1987, the Polish Supreme Court stated that: "Under the Polish Constitution there is no ground to recognise that ratification of a treaty results in its transformation into domestic law […]". Decision of 25 August 1987, Ref. no II PRZ 8/87 (translation after L. Garlicki, M. Marsternak-Kubiak and K. Wójtowicz, 'Poland', *op. cit*, p. 373).

5 See especially: Polish Supreme Court, judgement of 10 November 1980, Ref. No. I CR 283/81 on the registration of the trade union Solidarność and the judgement of Military Court in Olsztyn of 8 June 1982, in which the Court recognised article 61 of Martial law contrary to article 15 of

The Polish Constitutional Court was established in 1985.[6] However, it was only in the 1990s, when the true transformation process gained pace that the direct effect of ratified treaties was recognised by Polish courts.[7] This transformation process from a socialist to a democratic system in Poland and other Eastern European states has been influenced and dynamised to a large extent by European rule of law standards and the common framework for the protection of human rights.[8] The main reason for this was the recognition that "a democratic system after the collapse of a communist system require[d] a new legal axiology; restoration of the adequate relations between the state and the individual, a dramatic breakthrough in legal thinking, [and] a localisation of fundamental constitutional rights in the centre of legal system".[9] In line with this acknowledgment, in the beginning of the 1990s, there was a strong political motivation in Eastern Europe to follow international standards of human rights protection, to enshrine these standards in national constitutions and states' practice, and to join the Council of Europe (CoE)[10] and the European Union (EU).[11] In 1992, the Polish Supreme Court declared that both the European

ICCPR (*lex retro non agit principle*). Cp. A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza, 2006), at 545. However, courts were still rather reluctant to apply international agreements. See K. Skubiszewski, 'Umowy międzynarodowe w porządku prawnym PRL', *Państwo i Prawo* 6 (1989), 135–145, at 143.

6 The Act of 29 April 1985 on the Constitutional Tribunal. For more information about the role of constitutional courts in the process of systemic transformation see W. Sadurski, *Postcommunist Constitutional Courts in Search of Political Legitimacy*, available at http://law.wustl.edu/harris/conferences/constitutionalconf/Constitutional_Courts_Legitimacy.pdf; L. Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary', *International Sociology* 18:1 (2003); J. Kurczewski and B. Sullivan, 'The Bill of Rights and the Emerging Democracies, Law and Contemporary Problems', *Law and Contemporary Problems* 65:2 (2002), 251–294; R. Müllerson, M. Fitzmaurice and M. Andenas (eds), *Constitutional Reforms and International Law in Central and Eastern Europe* (The Hague: Brill, 1997).

7 In the judgement of 12 June 1992 the Supreme Court stated that, "[t]he relationship of international treaty norms to municipal law will be explicitly defined in the new Constitution of the Republic of Poland. Before this happens, it can be recognised, as in jurisprudence of the interwar period, that the issuance of a statute expressing consent to ratification of an international agreement transforms a treaty into municipal law of statutory rank" (translation by author). The same argument was made by the Supreme Court in a judgement of 12 December 1992, Ref. No. CZP III 48/92. The Supreme Court stated that when ratifying international treaties, the parliament grants its consent in the form of statute. Therefore, ratified international agreement should be applied by all courts as statutes.

8 See E. Łętowska, 'Human Rights as a Pillar of Transformation: A Polish Perspective', in: R. Arnold (ed.), *The Universalism of Human Rights*, *Ius Gentium: Comparative Perspective on Law and Justice* (Berlin: Springer, 2013), 341–355, at 344.

9 M. Safjan, 'Transitional Justice: the Polish Example, the Case of Lustration', *European Journal of Legal Studies* 1:2 (2007), 1–20, at 2.

10 Poland acceded to the CoE in 1991 and ratified the ECHR in 1993.

11 See A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', *Vienna Online Journal on Int'l Constitutional L.* 3:3 (2009), 170–198, at 174.

Convention of Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) are sources of universally binding law in Poland.

In the transformative years, human rights and rule of law standards were "re-imported" form international law into Polish law and the legal orders of other Eastern European states.[12] Judicial dialogue has been an important element in this process. History has shown that judicial activity cannot be reduced to the mechanical application of the law in the form of judicial syllogism, and in recent years the role of judges has become increasingly relevant, in particular when it comes to the effective protection of human rights.

The Constitution of the Republic of Poland of 1997 has explicitly incorporated international law into the Polish legal order.[13] Article 9 of the Polish Constitution sets out the general rule on the position of international law in Polish law: "The Republic of Poland shall respect international law binding upon it". This provision is understood as a universal one, referring not only to treaties but also to other sources of international law (customary law, general principles of law and legally binding decisions of international organisations).[14] The Polish Constitutional Court has described article 9 of the Constitution not only as "a grandiose declaration addressed to the international community, but also an obligation of state authorities, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland."[15] The provision is also the basis of state organs' obligation to interpret and apply national law in conformity with international law,[16] an obligation that also addresses Polish courts.

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12 *Ibid*., at 175.

13 See W. Czapliński, 'Relationship between International Law and Polish Municipal Law in the Light of the 1997 Constitution and of the Jurisprudence', *Revue Belge de Driot International* 1 (1998), 259–271. On the practice of application of international law in Poland see: A. Preisner, 'Prawo międzynarodowe w orzecznictwie sądów polskich', in: M. Kruk-Jarosz (ed.,) *Prawo międzynarodowe i wspólnotowe w orzecznictwie sądów polskich* (Warszawa: Wydawnictwo Sejmowe, 1997); A. Wyrozumska, 'Zapewnianie skuteczności prawu międzynarodowemu w prawie krajowym w projekcie konstytucji', *Państwo i Prawo* 11 (1997), 16–34.

14 See L. Garlicki, M. Masternak-Kubiak and K. Wójtowicz, 'Poland', *op. cit*, at 376.

15 See Polish Constitutional Court, judgment of 27 April 2005, Ref. No. P 1/05 available in English at http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf.

16 See *inter alia* Polish Supreme Court, judgment of 29 November 2005, Ref. No. II PK 100/05 in which the Court held that from the article 9 of the Constitution of the Republic of Poland which declares preservation of international law binding upon the Republic of Poland streaming an obligation on courts to favour an interpretation that is sympathetic to international law. This means courts should interpret internal Polish law in conformity with the content of international law. In regard to EU law see: Polish Constitutional Court, judgments

Other provisions of the Constitution refer directly to the position of treaties ratified by Poland. In line with articles 87 and 91 of the Polish Constitution, ratified international agreements are directly applicable sources of universally biding law and have precedence over statutes.[17] Article 87 states that ratified international agreements are sources of universally binding law of the Republic of Poland. According to Article 91, after publication in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute. An international agreement ratified with prior consent of the parliament through a statute has precedence over other statutes if such an agreement cannot be reconciled with the provisions of such other statutes. According to Article 91(3) of the Consitution if the Republic of Poland ratifies an agreement that establishes an international organisation, the laws adopted by this organisation are applied directly and have precedence over domestic law in the event of a conflict of laws, if the ratified agreement so provides.

Sources other than ratified international agreements (such as customary law, general principles of international law and non-ratified international treaties to which Poland is a party) are applied by Polish courts on the basis of the aforementioned general clause contained in article 9 of the Constitution.[18] Both judiciary and doctrine accepted that "article 9 expresses the principle of openness the Polish legal order in respect to the norms of

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of 21 April 2004, No. K 33/03 and of 11 May 2005, No. K 18/04. See also the Polish Supreme Administrative Court, judgment of 26 August 1999, No. V SA 708/99.

17 English translation of the Constitution of the Republic of Poland available at *www.sejm.gov.pl/prawo/konst/angielski/kon1.htm*. For more details about the relationship between international law and Polish law see A. Wyrozumska, 'Poland', in: D. Shelton (ed.), *International Law and Domestic Legal Orders, Incorporation, Transformation and Persuasion* (Oxford University Press, 2011), 468–516 and L. Garlicki, M. Marsternak-Kubiak and K. Wójtowicz, 'Poland', at 373 and 381.

18 P. Sarnecki, 'Commentary to Article 9', in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V (Warszawa: Wydawnictwo Sejmowe, 1999), 1–37, at 2 and 5; K. Działocha, 'Commentary to Article 87', in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. I (Warszawa: Wydawnictwo Sejmowe, 1999), 1–14, at 5; A. Wasilkowski, 'Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji RP)', in: K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne* (Warszawa: Wydawnictwo Sejmowe, 2006), 9–28, at 15; A. Wyrozumska, 'Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa', in: K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe…*, 18–45, at 36–37 and 39; M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczpospolitej Polskiej* (Warszawa: Zakamycze, 2003), at 259. [CZY NIE: KRAKÓW?]

international law and establishes a presumption of automatic, even if only indirect, incorporation of those norms into that order".[19]

Article 91 of the Constitution contains a so-called formal condition of direct application i.e. ratification and publication, as well as substantive condition which requires "the completeness of the treaty provision that enables its operation without any additional implementation".[20]

Ratified international agreements prevail over statutory law, but not over the Constitution, which, according to its Article 8, is the "supreme law of the Republic of Poland". However, as the Constitutional Court stated in the judgement of 11 May 2005, this provision "is accompanied by the requirement to respect and to be favourably inclined towards appropriately drafted regulations of international law binding upon the Republic of Poland". This means that also the Polish Constitution is regularly interpreted and applied in light of and in conformity with Poland's obligations under international law.[21]

2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

The Constitution is the main legal basis for application of international law in Polish legal system. However one may find also some specific provisions in this regard. As an example may serve Article 1111 of the Code Civil Procedure and Article 578 of the Code of Criminal procedure which refer to international agreements and customary law in the field of diplomatic immunity. Also the Polish Criminal Code provides that infringement of international law institutes constituent element of crimes against peace and war crimes punishable under Polish law. As an example of sectoral regulation

19 See R. Szafarz, 'Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym', in: M. Kruk (ed.), *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* (Warszawa: Wydawnictwo Sejmowe, 1997), 19–42, at 19.

20 See Polish Supreme Court, judgment of 21 November 2003, Ref. No. I CK 323/02.

21 In the same judgment (K 18/14) the Constitutional Court further explained that "the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorization or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution" (English translation after http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf). A few years later the Constitutional Court ruled that "the principle of favourable predisposition and respect of EU Treaties and international law obligations which bind the Republic of Poland expressed in article 9 of the Constitution, […] cannot undermine article 8 of the Constitution, which stipulates the primacy of the Constitution in the Polish legal order" (Polish Constitutional Court, judgment of 24 November 2010, K 32/09, English translation after http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf).

referring to international law may serve the Aviation Law of 2002 which contains referral to binding acts of international organisations constituted under ratified treaties, including the International Civil Aviation Organisation (ICAO).

II. Treaties

1. **How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?**

Polish courts are authorised to apply both the Vienna Convention's definition of treaty and definition of treaty provided for in Article 1 of the Law on International Treaties of 2000. The last is based on Vienna Convention, but contains some changes. According to this provision:

> […] "international treaty" means an agreement between the Republic of Poland and another subject or subjects of international law, governed by international law, whether embodied in single document or in more related instruments, regardless of its name and regardless of whether it is concluded on behalf of the State, the government or the minister in charge of a department of the government administration competent for matters regulated by the treaty in question[22].

In practice the Polish courts apply both definitions to establish the legal character of an international act, however in rather superficial way.[23] The Regional Administrative Court in Gorzów Wielkopolski recognised the decision of Mixed Commission EC/EFTA as international treaty in the meaning of Article 1 of the Law on International Treaties. The reasoning of the Court was as follows: although the Law does not expressly regulate situation when amendments to treaty attachments are done by the body established under such treaty, in that case the Mixed Commission, the broad definition of a treaty contained in that statute (Article 2 point 1 of the Law on International Treaties) and that the consent of the Republic of Poland to be bound by a treaty may be expressed: by signature, exchange of documents constituting a treaty or by any other means allowed by international

22 Translation after A. Wyrozumska, 'Poland', at 473.
23 See *ibid.*.

law (Article 13, paragraph 1 of the Law), so also by means provided for in Article 15 of the Common Transit Procedure Convention (by means of the decision adopted by the Commission), it is proper to assume that the principle on publication of international treaty, contained in Chapter 5 of the above cited Statute, apply equally to the amendment of the attachment to a treaty (Convention) forming its integral part and provided for by international law".

In the judgement of 8 of September 2011 the Regional Administrative Court in Warsaw applied both the Vienna Convention and the Law on International Treaties to determine whether Appendix No. 10 to the Chicago Convention on International Civil Aviation of 1944 is integral part of the Convention.[24]

Sometimes the courts do not apply neither international nor national law to establish legal nature of international act. An example may be the judgement of the Constitutional Court of 11 May 2005[25] in Accession Treaty case in which the court had to decide about legal nature of several acts. The Constitutional Court recognised its own jurisdiction to review constitutionality of the Accession Treaty under the competence provided for in in Article 188 of the Constitution as international agreement. According to the Court this finding may not be challenged by the fact that the Accession Treaty has been ratified upon prior consent granted in referendum. The power conferred on the Constitutional Court to rule in matters concerning "the compliance of statutes and international agreements with the constitution" does not differentiate the Court's authority with regard to treaties concluded under the procedure of granting the consent for ratification.

One of the questions the Constitutional Court had to resolved in the case was whether it may examine the legality of primary law other than the Accession Treaty, i.e. the Treaty establishing the European Community. It must be considered that according to Article 1 of the of the Accession Treaty, Poland become *the party to the founding Treaties and Article 2 of this Treaty confirms that from the date of accession Poland is bound by provisions of these Treaties* and therefore, these other acts of primary law, may also be examined by the Constitutional Court as the acts incorporated by the Accession Treaty.[26] Unfortunately the Court did not based its own jurisdiction on incorporation argument, but stated that subject of review in the case was "the Accession Treaty and acts forming its integral part". As a consequence, "however indirectly also other primary law acts of the Communities and

24 VI SA/Wa 666/11. See also the judgement of 18 April 2013 of the Regional administrative Court in Szczecin I SA/Sz 936/12.

25 Judgment of the Constitutional Court Ref. No 18/04.

26 A. Wyrozumska, 'Some Comments on the Judgements of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant', *Polish Yearbook of International Law* 2004–2005, p. 8.

European Union which are appendices to the Accession Treaty become subject of the review". The Constitutional Court did refer neither to international nor to Polish law to determine the content of the Accession Treaty and based its founding mainly on scholarly opinions.

In the same decision of 2005 the Constitutional Court rejected constitutional control of the Charter of Fundamental Rights of the European Union since it found that the form in which the Charter was proclaimed in 2000 maintained features more closely resembling a declaration than a legal act and that the provisions of the Charter did not have legally binding force. Also in that part the Court based used mainly scholarly opinion's argument. The Court had to establish the legal effect of the framework decision of the EU Council 2002/589 on European Arrest Warrant. The Court analysed the content of the framework decision and stated that it was not reviewable, given generality and solely directional nature of its disposition. According to the Court the framework decision "has features of simplified intergovernmental agreement – and as such does not require ratification". However few weeks earlier the Constitutional Court reviewed the constitutionality of provision of the Polish Criminal Court implementing the aforementioned framework decision[27].

2. Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?

Ratified treaties

Polish law distinguishes two main kinds of treaties: ratified and non-ratified treaties. There are four modes of ratification in Poland. Two of these modes are for treaties delegating the competence of organs of state authority to an international organisation or international institution in relation to certain matters. Under Article 90 of the Constitution ratification of such treaties by the President requires either prior consent given in national referendum or by the Parliament in a statute passed by qualified majority of both Chambers (Sejm and Senat).[28] The third mode is ratification by Pres-

27 See judgement of 27 April 2005, Ref. No. P 1/05.

28 Article 90 of the Constitution: "The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125. Any

ident with prior consent granted by the Parliament in a statute. The statute expressing the consent is passed by the same majority that is required for adopting statutes. Article 89 para 1 of the Constitution provides that this kind of ratification is required if international treaty concerns: peace, alliances, political or military treaties; freedoms, rights or obligations of citizens, as specified in the Constitution; the Republic of Poland's membership in an international organization; considerable financial responsibilities imposed on the State; matters regulated by statute or those in respect of which the Constitution requires the form of a statute. Other treaties, not covered by Article 90 and 89 of the Constitution are subject of so called "simple ratification" – by the President.

The Constitution distinguishes legal effect of ratified and non-ratified international agreements. Hierarchy of treaties is determined by the procedure of their conclusion. According to article 87 of the Constitution ratified international agreements are sources of universally binding law of the Republic of Poland. The position of a ratified treaty within the domestic legal order depends on the procedure of ratification. Treaties ratified on statutory authorization are directly applicable after their publication in the Official Journal and enjoy priority over domestic statutes. Article 91(2), provides that such a treaty *shall have precedence over statutes if it cannot be reconciled with the provisions of such statute*. As a consequence, the courts not only are authorised to apply directly the provisions of such treaties but also are obliged to grant them priority over a conflicting statutory norm, whether prior or subsequent to the treaty or not. According to the judgment of the Constitutional Court of 19 December 2006[29], ruling on collisions between ratified international agreements and statutory law lies in jurisdiction of ordinary law and thus it is not subject of obligatory reference to the Constitutional Court.

The Constitution does not distinguish legal position of treaties ratified under Article 90 of the Constitution and other ratified treaties. However in the *Lisbon Treaty* the Court held that international agreement, ratified in accordance with Article 90 of the Constitution enjoys a special presumption of constitutionality. It is result of the fact that enacting the statute granting consent to the ratification of that Treaty occurred after

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resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies".

29 Decision of the Constitutional Court of 19 December 2006 Ref. No P 37/05: "In the process of applying the law, judges shall completely be subject the Constitution and statutes (Article 178 paragraph 1 of the Constitution). This principle is connected with the 'conflicting norm', as expressed in Article 91 paragraph 2, imposing an obligation to refuse to apply statutes in the event of a conflict with an international agreement ratified by way of statute".

meeting the requirements which w re more stringent than those concerning amendments to the Constitution. The Sejm and the Senate acted under the conviction that the Treaty was consistent with the Constitution. The President of the Republic of Poland, who is responsible for ensuring observance of the Constitution, ratified the Treaty, without exercising his powers with regard to referring the application to the Constitutional Tribunal for it to determine the constitutionality of the Treaty prior to its ratification. As it follows from the previous jurisprudence of the Constitutional Tribunal, the President of the Republic of Poland is obliged to commence the procedure for preventive review with regard to the statute which he considers to be inconsistent with the Constitution (cf. the decision of 7 March 1995, Ref. No. K 3/95, OTK of 1995 r., Part 1, item 5). The President of the Republic of Poland acts within the scope of and in accordance with the law, and ensures observance of the Constitution, which obliges him to undertake all possible actions in this regard, due to the provisions of Article 7 and Article 126 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution.

Based on the above grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution. The Constitutional Tribunal may not overlook the context of the effects of its judgment, from the point of view of constitutional values and principles, as well as the consequences of the judgment for the sovereignty of the state and its constitutional identity.[30]

Non-ratified international agreements

The Council of Ministers may conclude international agreements[31] of an executive nature (it is also possible for particular minister to enter into such agreement, which is however subject to the Councils of Ministers approval). Those agreements do not require any involvement of the President or the Parliament in treaty-making process. They, are however outside the system of "the sources of universally binding law" established under Article 87 of the Constitution.

According to Polish Constitutional Court, "non-ratified treaties are not of universally binding nature, in consequence, according to Article 87 of the Constitution, they may not constitute sources of universally binding

30 Judgment of 24 November 2010, Ref. No. K 32/09, para III 1.1.2.

31 See Article 146 of the Constitution.

law".[32] As a consequence, non-ratified international agreements may not themselves create rights and obligations for individuals. They are legally binding only upon government and organs or organizational units subordinated to it and are not directly effective outside system of public administration.[33] Non-ratified agreements have to be implemented in Polish legal system by an act of legislative or executive. There is no doubts that implementing acts are subject of constitutional review, which in practice usually means indirect control of executive international agreements as to their consistency with the Constitution. Although obligation of observance of non-ratified treaties results from Article 9 of the Constitution, it is doubtful whether in case of omission individuals could request implementation. According to the Constitutional Court Article 9 of the Constitution does not create any rights or freedoms for individuals and could not be invoked by them in individual complaint aiming at control of the failure of state organs to implement non-ratified treaties.[34]

3. What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country? Is there any influence of EU law, including the decisions of European Court of Justice?

The concept of self-executing treaties is well established in Polish judicial practice long before the Constitution of 1997 entered into force. As it was already mentioned direct effect of ratified treaties is currently reflected in Article 91 of the Constitution. This provision contains so called formal condition of direct application i.e. ratification and publication as well as substantive condition which requires "the completes of the treaty provision that enables its operation without any additional implementation".[35] The Supreme Court recognised as self-executing *inter alia* Article 15 of the International Covenant on Civil and Political Rights[36], provisions of the Treaty on Func-

32 Judgment of 3 December 2009, Ref. No. Kp 8/09, para 6.2.: "umowy nieratyfikowane nie mają charakteru powszechnie obowiązującego, a zatem, zgodnie z art. 87 ust. 1 Konstytucji, nie mogą stanowić źródeł prawa powszechnie obowiązującego. Przy spełnieniu tego warunku ustalenia zawarte w umowach nieratyfikowanych mogą być przedmiotem legislacji rządowej, jeśli zachodzi taka potrzeba. Są to przeważnie zespoły norm technicznych mieszczące się w ramach tzw. prawa resortowego" (see A. Wasilkowski, 'Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji)', 13 and next).

33 A. Wyrozumska, 'Poland', at 478.

34 Decision of Constitutional Court of 14 January 2004, Ref. No. Ts 168/03 para. 3.

35 See the judgement of the Supreme Court: of 21 November 2003, Ref. No. I CK 323/02, judgment of the Supreme Court of 8 December 2009, Ref. No. I BU 6/09.

36 Decision of the Supreme Court of 30 April 2014 Ref. No. I KZP 6/14.

tioning of the European Union.[37] Also bilateral international agreements concerning e.g. recognition of employment periods for purposes of determination of social security benefits were recognised as self-executing.[38]

It must be noticed that although all Polish courts are authorised to apply ratified international treaties directly they do so mainly if the case is governed directly by the treaty. While an international agreement is implemented in domestic legal order, courts apply national law. International agreements of executive nature lay outside the system of universally biding sources of law determined in Article 87 of the Constitution. In consequence, although they are binding upon state organs, they do not create any rights for individuals.

The Constitutional Court delivered the most comprehensive statement of the position of non-ratified agreements in the *Bug River* case. Following the World War II, the external borders of Poland were changed. And so Poland lost a major part of its territory eastwards from the Bug river. Inhabitants of that territory, according to the so-called "Republican Agreements"[39] have been repatriated westwards. The agreements provided for an obligation of evacuated landlords to leave substantial – quantitatively and qualitatively – parts of their property in the abandoned territories. The thus lost property was to be compensated by the Republic of Poland. Whilst most of the repatriates were compensated, a number of claims remained unsatisfied. In 2002 the Polish Ombudsman challenged before the Constitutional Court provisions of domestic laws restricting largely and practically impeding the possibility to compensate these losses as foreseen by the treaties. The Constitutional Court[40] held that although the Polish Committee of National Liberation was not a constitutionally legitimate organ of a sovereign State, the agreements concluded by the Committee with the governments of the Soviet Republics – Lithuania, Belarus and Ukraine, which were not promulgated in the Official Journal, together with the intergovernmental agreement of 21st July 1952, created legal obligations of state authorities. Since the agreements were neither ratified nor published, they did not constitute a part of Polish legal order and therefore cannot per se constitute the legal basis for a substantive right of repatriates for compensation.[41] Nevertheless thay legitimate expectations of Polish nationals as regards the do-

37 Judgment of the Supreme Court of 8 December 2009, Ref. No. I BU 6/09, resolution of the Supreme Court of 23 July 2008, Ref. No. III CZP 52/08, in regard to Union law see also decision of the Constitutional Court of 28 February 2014 Ref. No. IV CSK 202/13.

38 See judgment of the Supreme Court of 24 June 2015, Ref. No. II UK 278/14.

39 Agreements of 1944 concluded by the Polish Committee for National Liberation [PKWN] and governments of three Soviet republic: Belarusian, Ukrainian and Lithuanian, as well as in two treaties of 1945 and 1957 concluded between the governments of Poland and USSR.

40 Judgment of the Constitutional Court of 19 December 2002 Ref. No. K 33/02.

41 Judgment of the Constitutional Court of 19 December 2002 Ref. No. K 33/02.

mestic legal regulation of compensation for the loss of property beyond the Bug River. The agreements allowed the Polish legislator unfettered discretion as to how to regulate the issue of compensation.[42]

The same position towards non-ratified international agreements has been taken by the Supreme Court. In the case concerning Agreement of 31 January 1990 between the governments of the Republic of Poland and the Federal Republic of Germany concerning the posting of workers within the framework of execution of contracts of commission for the performance of a specific work, the Supreme Court held that the claim based on Article 4 of the Agreement must be rejected since a non-ratified treaty is not a source of law in Poland.[43]

The question is whether reference can be recognized as incorporation. The Court also refuse to recognise incorporating effect of referral made in national legal act. It must be noticed, that jurisprudence of Polish courts in relation to referrals is inconsistent; however in general the courts are rather reluctant to accept incorporation as a result of reference. In the Judgment of 2000 the Supreme Court the Court held that general reference to international agreements in a statute cannot change the catalogue of sources of universally binding law set forth in Article 87 of the Constitution, and as a result cannot be recognised as incorporation. This position of the Supreme Court seems to be questionable, especially in regard to the circumstances of the present case. The key-point at stake are the legal consequences to be drawn from a reference to a non-ratified treaty included in a domestic source of law. The Supreme Court stated that such a reference implies the direct applicability of the non-ratified treaty. Meanwhile, incorporation by reference is a legal means by which one legal act (international agreement) is made a part of another (domestic legal act) simply by referring to it. The text of the referenced act, once incorporated by reference, becomes fully and legally a part of the act into which it is incorporated.

On the other hand, Article 9 of the Constitution of the Republic of Poland, which declares that the Republic of Poland respects international law binding upon it, irrespective of whether the law is of the nature of a ratified or non-ratified treaty, imposes an obligation on the courts to attempt to interpret internal Polish law in such a way which ensures the highest degree of consistency with international law.

However, the Supreme Court confirmed that non-ratified treaties can be applied indirectly. In the indirect application of a treaty the procedure pursuant to which a treaty was concluded does not matter, nor does the nature

42 English summary of the judgment http://trybunal.gov.pl/fileadmin/content/omowienia/K_33_02_GB.pdf.

43 Judgment of the Supreme Court of 29 November 2005, Ref. No. II PK 100/05.

of its provisions (self-executing or not). The application of international agreements for the purpose of interpretation of statutes and other universally binding sources of law is a well-established mechanism for ensuring the effectiveness of international law. The obligation of Polish national courts in this regard is based on *Article 9 of the Constitution*, which declares that the Republic of Poland respects international law binding upon it. In the case discussed the obligation of consistent interpretation applies equally to internal law.

Although publication of an act is a precondition of direct application of international treaty in the case concerning Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage Regional Administrative Court in Lublin decided to apply unpublished changes to the Attachment to the Convention adopted by the Mixed Commission.[44] The reasoning of the Courts was based on legally binding force of international agreement upon state authorities and *pacta sunt servanda* principle, as reflected in Article 26 of the Vienna Convention of 1969. International obligations are independent form the fact of publication of the Convention in the Polish Official Journal. That's why according to administrative courts individuals may invoke unpublished international acts against state organs.

4. Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?

Polish courts apply both international and national law to decide issues of treaty law. Especially administrative courts frequently refer to the Vienna Convention[45], however often in quite superficial manner.[46] Supreme Administrative Court and Regional Administrative Courts refer to rules on interpretation of treaties, however in some of them they apply national rules on interpretation.

In the judgment of 9 December 2010[47] the Supreme Administrative Court, determining the scope application of the Convention on the Contract for the International Carriage of Goods by Road of 1956 declared that because China is not state-party[48] to it, the Convention cannot be applied to

44 See judgment of the Regional Administrative Court in Lublin of 30 April 2013, Ref. No. III SA/Lu 16/13, judgement of the Supreme Administrative Court of 11 March 2010, Ref. No. I FSK 92/09, judgment of the Regional Administrative Court in Wrocław of 28 June 2016, Ref. No. III SA/Wr 570/04.

45 More than 700 judgements till 2014.

46 See A. Wyrozumska, 'Poland', 467.

47 Judgment of the Supreme Administrative Court of 9 December 2010, Ref. No. I GSK 493/09.

48 The Court used term "did not ratify".

goods in case of carriage of goods from China. Nevertheless the Court also checked whether packing letter is covered not only by Article 1 of the Convention but also by its specific provisions. The Court based its analysis solely on the wording of the convention without any referral to practice of its application.

5. **Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?**

   No case law concerning invalidity or termination of international treaties has been identified.

6. **Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)**

   Article 31 of the Vienna Convention on the Law of Treaties is quite frequently invoked, especially by administrative courts.[49] As an example may serve common approach of Polish administrative courts that the OECD Model Convention should be recognised as context of treaties on avoidance of double taxation concluded by the Republic of Poland in the light of Article 31 of the Vienna Convention. In result state organs, including courts, are obliged to consider the Model Convention in application of tax treaties.[50] On that ground the Polish administrative courts commonly interpret autonomous terms used in tax treaties in accordance with the Model Convention and Commentary to it.[51]

Human rights treaties and EU law

49 See currently: Judgement of the Supreme Administrative Court of 19 February 2016, Ref. No. I OSK 3111/14, Judgment of the Regional Administrative Court in Gliwice of 11 February 2016, Ref. No. I SA/Gl 933/15.

50 Judgment of the Regional Administrative Court in Gliwice of 11 February 2016, Ref. No. I SA/Gl 933/15, Judmnet of the Regional Administrative Court in Kraków of 19 February 2013, Ref. No. I SA/Kr 1698/12. See also detailed analysis in Z. Kukulski, *Konwencja Modelowa i Konwencja Modelowa ONZ w polskiej praktyce traktatowej* (Warszawa: Wolters Kluwer, 2015).

51 See in regard to "beneficial owner" judgment of the Regional Administrative Court in Waszawa of 22 June 2016, Ref. No. III SA/Wa 1609/15.

One can notice that judicial dialogue is used by Polish courts mainly in EU law and ECHR cases. The reason is mainly but not exclusively position of the ECHR and EU law in Polish legal order discussed in previous sections. there is a significant difference in purpose of judicial dialogue used in the judgments in which ECHR or EU law is applied and other judgments. The difference seems to the result of several circumstances.

According to the general constitutional provisions discussed, the ECHR, as a ratified international agreement, is directly applicable and has precedence over statute. In contrast to some other Constitutions of Eastern Europe, the Polish Constitution does not give international human rights treaties a special position in the Polish legal order. Nonetheless, it is clear from the *travaux preparatoires* of the 1997 Polish Constitution that this Constitution has been inspired by international human rights standards, especially by the ECHR and the ICPPR.[52] Both the ECHR and the ICCPR, as ratified international treaties, have been recognised also by the Supreme Court as part of Polish legal order.[53]

In addition, the Polish Constitutional Court has recognised the evolving standard of ECHR rights protection as established by the ECtHR as a substantive part of the constitutional standard of human rights' protection in Poland.[54] Consequently, constitutional provisions should be interpreted in the light of the ECHR and ECtHR jurisprudence.[55] The Polish Supreme Court has confirmed this. Shortly after Poland's accession to the ECHR, it declared that the "case law of the European Court of Human Rights in Strasbourg should be applied as an essential source of interpretation of the provisions of Polish domestic law".[56] This includes the interpretation and application of the Polish Constitution.

Given the strong position of the ECHR and the ECtHR's jurisprudence in Polish law, the Constitutional Court of Poland refers to the case law of the ECtHR in its application of human rights rather often. This is clear in particular from the fact that Polish courts refer to the ICCPR and output of the UN Human Rights Committee much less frequently. In the period between 1996–2104 the Constitutional Court resolved 2668 cases concerning human Rights protection. In 208 of that decisions of the Constitutional

52 See M. Jabłoński, 'Identyfikacja wolności i praw jednostki w pracach nad treścią Konstytucji RP z dnia 2 kwietnia 1997 roku', in: M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych praw jednostki w polskim porządku prawnym* (Wrocław: Uniwersytet Wrocławski, 2014), 15–28, at 17.

53 Resolution of the Supreme Court, of 12 July 2001, Ref. No III CZP 22/01.

54 In the judgment of 28 June 2008, Ref. No. K 51//07, the Polish Constitutional Court explicitly stated that it is necessary to refer to human rights treaties and practice of their application to establish the standard of constitutional protection.

55 Judgement of the Constitutional Court of 23 February 2010, Ref. No. P 20/09.

56 Decision of the Supreme Court of 11 January 1995, Ref. No. III ARN 75/94.

Court referred to ECtHR jurisprudence were found in the period between 1996–2014.

The number of references is determined mainly by grounds of action brought before the court (in cases of so called abstract control the ECHR may be invoked directly) and the subject matter of cases. If there is no doubt about the scope and content of the right in question, there is no need to invoke ECtHR practice. On the other hand case law is of ECtHR is invoked mainly in "problematic" cases. That's why most often invoked provision of ECHR (as interpreted by the ECtHR) is article 6 violation of which has been recognised by the European Court in many cases against Poland. Similarly article 1 of Protocol a to the ECHR.

It must be born in mind that also the scope of jurisdiction may influence number of references. The ECHR may be invoked directly before the Polish Constitutional Court in the so-called procedure of abstract norm control of constitutionality of national provisions.[57] However also in individual complaint procedure[58] the ECHR is used as interpretative tools by the Constitutional Court, which applies the Polish Constitution in light of international human rights law. International human rights treaties (including the ECHR) may also be applied directly to control whether laws and other acts conform to the Polish Constitution and international human rights treaties.

The Supreme Court of the Republic of Poland also frequently refers to the ECHR and ECtHR jurisprudence. In the period 2010–2015 it did so in almost 300 cases.[59] In the same period, Supreme Administrative Court made more than 700 references to the ECtHR.[60] Number of references made by this courts is determined by the number of cases decided in the period under consideration which is considerably higher than number of cases of the Constitutional Court.[61] Since ECHR is directly appli-

57 See the procedure provided for in article 188(1)-(3), of the Polish Constitution concerning review of conformity of statutes with the Constitutional and ratified international treaties.

58 In the judgement of 20 October 2009, SK 15/08 the Constitutional Court stated that: "According to Article 79 of the Constitution may only concern plea of exception of infringement of constitutional rights and freedoms or obligations of plaintiff granted by the Constitution of Poland and not rights provided for in international treaties. The Constitutional Court constantly stresses that international agreements on human rights protection may not be applied directly in this procedure". See judgments of 7 May, Ref. No. SK 20/00; of 14 December 2005, Ref. No. SK 61/03; and of 22 June 2010, Ref. No. SK 25/08. However they are frequently applied indirectly for interpretative purposes. See judgements discussed in next part of the Report.

59 Research based on the database of the Polish Supreme Court http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx.

60 Research based on the database of the Polish Supreme Administrative Court http://www.orzeczenia.nsa.gov.pl/.

61 According to available data basis In the period of 2010–2015 the Supreme Administrative Court issued more than 100 000 judicial decisions, the Constitutional Court issued 4240

cable in the Polish legal order parties quite often invoke the Convention before courts. Although the number of references to ECtHR jurisprudence in the three highest Polish courts has constantly increased over the years, lower courts are still rather reluctant in applying the ECHR and ECtHR jurisprudence when they decide cases in the field of human rights.[62]

In most cases in which the Polish Constitutional Court, the Supreme Court and the Supreme Administrative Court cite the ECHR/ECtHR jurisprudence, the ECHR was invoked by the parties to the proceedings, and the courts rely on the arguments brought forward by the parties to the case. This is obvious in particular from judgements in which these courts base their reasoning largely on the legal material concerning human rights presented by the parties to the proceedings.

Otherwise, the selection of ECtHR judgements that are cited is highly dependent on their accessibility in Polish. The courts mainly invoke ECtHR judgements discussed in Polish legal literature,[63] judgments that are available in Electronic System of Legal Information (LEX), or judgments that can be found on the website of the Ministry of Justice that publishes ECtHR judgments to which Poland was a party.[64] The last source is, however, used rarely. The problem of accessibility of ECtHR judgements in the respective national languages of judges also limits the number of references to these judgments in other Eastern European States.

The case law of the CJEU is mainly invoked before Polish courts for interpretation of EU law. The CJEU is invoked in application of both EU law and national law implementing EU law. It must be noticed that the Constitutional Court recognised the EU Charter of Fundamental Rights as part of

judicial decisions.

62 D.R. Swenson, K. Stasiak, A. Szarek, *Poland and The European Court of Human Rights. Selected Issues And Recommendations* (Lublin: The Rule of Law Institute Foundation, 2011), at 16–19.

63 The most popular source is the commentary to the ECHR and ECtHR jurisprudence by M.A. Nowicki, *Europejski Trybunał Praw Człowieka – orzecznictwo* (Kraków: Zakamycze, 2002). This commentary has been referred to in 36 cases of the Polish Supreme Court and in many decisions of lower courts (see e.g. Judgment of the Appellate Court of Warsaw of 21 November 2012, II AKa 335/12; and the decision of the Supreme Court of 9 December 2014, III SPP 231/14). However, courts also use other academic sources. For example, in the judgment of 13 April 2007, I CSK 31/07, the Supreme Court referred to the ECtHR judgment *A. Cordoba v. Italy* which was discussed in the journal *Przegląd Sejmowy* (Parliamentary Review) – *Przegląd Sejmowy* 61:2 (2004), at 200. The argumentation of the Constitutional Court in a judgment of 22 July 2011, Ref. No. P 12/09 which in part concerned questions of the ECHR, is almost fully based on a monograph by I.C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna* (Warszawa: Wolters Kluwer, 2010).

64 See the relevant website at: http://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/orzeczenia-w-sprawach-dotyczacych-polski/.

standard of human rights protection in cases covered by EU law. In judgment of 16 November 2011 the Polish Constitutional Court recognised own jurisdiction to review constitutionality of EU regulations however, it also broadly referred to the jurisprudence of the CJEU to determine exact content and scope of the right to fair trial under EU law and its equivalence to the right protected under Article 45 of the Polish Constitution.[65]

7. **Do the courts refer to the opinion of the Executive?**

   The Polish courts very rarely refer to the opinion of executive.

8. **Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?**

   There is no case-law concerning reservations in Poland.

III. Customary international law

1. **Is customary international law automatically incorporated into domestic law?**

   Application of international customary law is well recognised in Polish legal system. The main filed of application is law on diplomatic immunities and state immunity. What is significant, norms of general international law in this regard were applied by Polish courts even before the Constitution of 1997 entered into force. In the judgement of 15 May 1959[66] the Supreme Court held that "Polish courts generally may not adjudicate in the litigations against foreign states by authority of binding international custom which excludes to sue foreign State before domestic courts".[67]

   As it has been already mentioned, although the Constitution does not refer directly to customary international law there is the prevailing opinion of the doctrine and judiciary that it is automatically incorporated into the Polish legal order. Article 9 of the Constitution has been referred to as legal

65 Para 6.4 of the judgment of the Constitutional Court of 16 November 2011, Ref. No. SK 45/09.
66 Ref. No. CR 1272/57.
67 See also judgement of the Supreme Court of 26 March 1958 Ref. No. 2 CR 172/56, judgement of the Supreme Court od 18 May 1970, Ref. No ICR 58/70 and resolution of Supreme Court of 26 September 1990, Ref. No. III PZP 9/90.

basis for validity of international these norms of international law which have not been indicated in other constitutional provisions of the Constitution as sources of law in the Republic of Poland, especially international customary law.[68] Such interpretation of Article 9 of the Constitution is recognised as legal basis for application of customary international law in Poland.

2. Do the courts apply customary international law in practice? How do the courts prove existence of customary law? Do the national courts always take account of developments in the practice of States, as well as in case law and jurisprudence while determining the existence and content of customary international law?

Question of immunities rooted in international law is the most representative field of judicial dialogue concerning customary international law. In the 2010 *Natoniewski*[69] case the Polish Supreme Court has to decide whether the Federal Republic of Germany may invoke state immunity in cases concerning the damages caused during the World War II. W. Natoniewski, claimed damages as a compensation for the injuries[70] suffered during the pacification of Szczecyn village carried out by the German army in 1944. According to the plaintiff the case was not covered by state immunity since the State breached *jus cogens* norm. He claimed that at the current stage of development of international law there is a evident trend to indicate, that in case of conflict between State immunity and *jus cogens* norm, a peremptory norm prevails and deprives the rule of State immunity of all its legal effects.

The Court held that state immunity is the principle of customary international law which Poland was bound to abide by under Article 9 of the Polish Constitution and that the content of customary international law was to be determined according to Article 38 § 1(b) of the Statute of the International Court of Justice (practice and *opinio iuris*). The Supreme Court referred in

68 P. Sarnecki, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, commentary to Article 9, p. 2 and 5 *in fine*; K. Działocha, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. I, commentary to Article 87, p. 5; A. Wasilkowski, 'Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji RP)', p. 15; A. Wyrozumska, 'Prawo międzynarodowe oraz prawo Unii Europejskiej…', p. 36–37 and 3; *Polskie sądy*... [????], p. 41; A. Wyrozumska, *Stosowanie prawa*... [???], p. 23; M. Masternak-Kubiak, L. Garlicki, 'Władza sądownicza RP a stosowanie prawa międzynarodowego i prawa Unii Europejskiej', in: K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe*…, p. 169; M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego*..., p. 259; K. Wójtowicz, 'Prawo międzynarodowe w systemie źródeł prawa RP', in: M. Granat (ed.), *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej. Materiały konferencyjne (Nałęczów 1–3.VI.2000)* (Lublin: Wydawnictwo Naukowe KUL, 2000), p. 68.

69 Judgment of the Supreme Court of 29 October 2010, Ref. No. IV CSK 465/09).

70 As 6 years old child the plaintiff suffered from burn of his head, chest and hands.

its reasoning to number of international and national courts decisions as evidences of existence and content of customary law on state immunity.

First of all the Court noticed that the doctrine of absolute State immunity is no more relevant, and that the distinction between *de iure imperium* and *de iure gestionis* acts of states is well established rule of customary international law. Thus, assuming that the complainant's claims concern, in accordance with the view expressed in the *Lechouritou*[71] judgment, the defendant's actions was covered by its sphere of *imperium*, the latter would undoubtedly enjoy jurisdictional immunity. However, recent developments reveal a strong tendency to restrict further the jurisdictional immunity of states. Such limitations refer to depart from state immunity on cases concerning delicts committed in the territory of the state of the forum state (tort exception). As the evidence of such development of international law the Court indicated Article 11 of the Basel Convention[72] excluding invocation of the jurisdictional immunity by a defendant state sued for compensation of immaterial damages resulting from a bodily harm or of material damages where they result from events which occurred in the territory of the forum state and the perpetrator was present in the territory of the latter state at that time. Similar solution is provided for in Article 12 of the UN Convention. A similar proposal was included in Article 3F of the Montreal Draft Articles for a Convention on State Immunity adopted by International Law Association in 1982[73] and the resolution of the International Law Institute adopted during the conference in Basel in 1991. The Supreme Court also indicate that the case law of different jurisdictions confirms that the defendant state does not enjoy immunity in cases concerning torts committed in the territory of the forum state.[74]

The Court concluded that in the light of international legal documents, the state practice and the position of the academia, there exists no obligation in international law to grant immunity to a foreign state in cases concerning a tort where the action resulting therein occurred in the state of forum and the perpetrator was in the territory of the latter state. However

71 Judgment of the Court of Justice of the European Union of 15 February 2007, C-292/05 Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias.

72 European Convention on State Immunity, Article 11: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred".

73 *International Legal Materials* 1983, vol. 22, p. 287 and subsequent.

74 Judgment of the American Court of Appeal of 29 December 1989 in case *Helen Liu vs. Republic of China*, judgment of the Greek Supreme Court of 4 May 2000 in case *Prefectura Voiotia vs. Federal Republic of Germany*, (*Distomo case*) and judgment of the Italian Cassation Court of 11 March 2004 in case Ferrini vs. Federal Republic of Germany.

taking into consideration the circumstances of the case it was necessary to decide whether there norm of customary international law presently in force, which excludes cases against a state for torts committed in the territory of the forum state from the scope of application of jurisdictional immunity, can be applied to situations in which the tort in question was committed several decades earlier. The Court noticed that the rule accepted in international law, making the legal relevance of acts dependent upon the norms applicable at the time of their occurrence, seems to advocate the negative reply to such question. However, according to the Court this rule is of substantive nature: it applies to consequences of acts in the sphere of public international law whereas state immunity has an obviously procedural nature. According to intertemporal rule of procedural law proceedings commenced in accordance with the new law must be conducted with in accordance with this new law.

The next legal question in the case was whether the exclusion of jurisdictional state immunity extends to cases of events having occurred in the time of war. The Court held that, the specificity of military conflicts must be considered. Military conflict – with a number of victims, magnitude of devastation and anguish – cannot be treated in the categories of relations between the perpetrating state and an individual being a victim; it occurs above all between states. Consequently decision on material claims resulting from military events belongs to peace treaties, which aim at complex regulation of consequences of military conflicts, both on international and individual level. Jurisdictional state immunity guarantees in such cases the international legal framework for regulating claims resulting from military events.

There is no doubts that any state can resign from jurisdictional immunity, nevertheless, the reasoning of views which accept the implied resignation from immunity by state in the instances referred to in the judgments of national courts was rightly contested. Such resignation was supposed to be the effect of either the state's action incompatible with imperative norms or the accession to an international treaty guaranteeing fundamental rights. According to the Supreme Court the first concept is based on groundless assumption – it does not accept that resignation from immunity, just like any other expression of will, must be sufficiently clear, the second concept is hardly reconcilable with the requirements of the law of treaties regarding the accession to international treaties. The Court noticed that even in the judgment in the case *Ferrini vs. Federal Republic of Germany*[75] the argument of implied resignation from immunity by the defendant state was not accepted. A similar approach was taken by the American court of appeal

75 Judgement of the Italian Corte di Cassazione of 11 March 2004, *Ferrini v Germany* 5044/2004, judgement of the Italian Corte di Cassazione of 21 October 2008, *Civitella* 1072/08.

in case *Hugo Princz vs. Federal Republic of Germany*[76] related to the holocaust upheld in subsequent decisions of in case *Hirsz vs. Federal Republic of Germany and Israel*[77] and case *Smith vs. Libya*[78] regarding the crash of the aircraft in Lockerbie. According to the Supreme Court, the concept of forfeiture (*Verwirkung*) of state immunity, similar to the construct of the abuse of rights, which would result from a conduct manifestly incompatible with international law, also poses significant doubts. These doubts predominantly concern the possibility of substantiating this concept by invoking the general principles of law referred to in Article 38.1.c. of the Statute of the International Court of Justice. State immunity is regulated by customary international law, whereas invoking general principles of law as sources of international law is only possible in cases of lacunae in treaties or in rules of customary international law. Besides, within this concept state immunity would be excluded under the assessment based on equity, therefore the court's decision would amount to represalia, whereas it is highly doubtful whether the latter ought to be applied by courts considering their political nature. Even if so, then anyway, taking into account the circumstances of the case at hand and assessing them rationally, it is hardly imaginable that a Polish court would apply represalia against Federal Republic of Germany in relation to events which occurred some sixty years earlier. It is noteworthy in this respect that Poland also protected itself by state immunity in cases in which it was a defendant before foreign courts, concerning nationalisation or expropriation. The court indicated as an example the case decided by the New York in which Theo Garb and other claimants demanded compensation from Poland for illegal deprivation of property within a "planned anti-Semitic action".

According to the Supreme Court there is no sufficient basis for application of tort exception related to military conflicts and committed within the territory of the forum state if such torts were consequences of violations of human rights. Certain judicial decisions – in particular the decisions of the Greek Supreme Court in the *Distomo* case, Italian Cassation Court in the case *Ferrini vs. Federal Republic of Germany* and the views of the legal scholarship may be treated as indicating the beginning of the process of creation of the rule excluding state immunity in all cases concerning grave violations of human rights, nevertheless if one considers other judicial decisions – in particular the decisions of the Greek Special Supreme Court

76 Judgement of the United States DC Circuit Court of Appeals of 14 April 2003, *Hugo Princz v. Federal Republic of Germany*.

77 Judgement of the United States District Court (New York) of 8 April 1997, *Hirsch v. State of Israel and State of Germany.*

78 Judgement of the United States Court of Appeals, 2nd Circuit of 26 November 1996, *Bruce Smith v. Socialist People's Libyan Arab Jamahiriya*.

in case *Margellos vs. Federal Republic of Germany*[79], House of Lords in case *Jones and others vs. Saudi Arabia*[80], European Court of Human Rights in case *Al-Adsani vs. United Kingdom* and the views of the legal scholarship one cannot accept that such rule has already evolved. Even though it would be desirable from the viewpoint of axiology of human rights, it cannot be considered to be already existing. Possible uncertainties in this respect will be solved by the International Court of Justice before which there is a pending case of *Federal Republic of Germany vs. Italian Republic*, where Germany claimed that Italy violated international obligations by denial of recognition of jurisdictional immunity of Federal Republic of Germany in the *Ferrini vs. Federal Republic of Germany*[81] case and other authorities in similar cases. Although the Supreme Court confirmed the great significance of the contemporary concept of human rights, it stressed that one must not forget about the importance of state immunity. The latter, based on equality of states and assuming non-subjection of sovereign states to their respective jurisdictions, it contributes to the maintenance of amicable relations between states. While eliminating the influence of national courts on the legal position of third states, it prevents from tensions between states as for the respect for their sovereignty. State immunity does not exclude solving problems covered thereby with the employment of methods appropriate for international law. It is common ground that pecuniary claims deriving from war events are traditionally settled in peace treaties aimed at complex solution to the consequences of military conflicts. Such solution seems the most accurate due to the peculiarity of military conflicts. Thus, although the pacification of Szczecyn by German armed troops constituted a flagrant violation of *ius in bello* and humanitarian law and – viewed from contemporary perspective – amounted to self-evident breach of human rights, the claims derived from it against Federal Republic of Germany cannot, in the light of presently valid norm of customary public international law, be treated as exempted from jurisdictional immunity of state.

The decision of the Supreme Court was noticed and referred by the ICJ in its decision in Jurisdictional Immunities of the State[82], also concerning the responsibility of Germany for damages caused during World War II. Also the European Court of Human Rights in Jones and Others v the United Kingdom[83] invoked the decision of the Supreme Court.

79 Judgement of the Greek Special Supreme Court of 17 September 2002.

80 Judgement of the House of Lords of 14 June 2006, *Jones v. Saudi Arabia*.

81 Judgement of the ECtHR of 21 November, Application No 35763/97.

82 Judgment of the ICJ of 3 February 2012 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.

83 Judgement of the ECtHR of 4 January 2014 *Jones and Others v the United Kingdom*, Application No 34356/06 and 40528/06.

3. **Do the courts refer to the opinion of the Executive?**

The *Nationiewski* case demonstrates example of broad express referrals to the material presented by the Executive. In that case the Court used possibility granted by Article 1116 of the Polish Code of Civil Procedure and requested from the Ministry of Justice information concerning existing customary international law on jurisdictional immunity of State. The material presented by the Ministry of Justice was broadly used by the Court – most of cases invoked by the Court in the statement of reasons were quoted after the Ministry. However it is not common practice of Polish Courts.

In the procedure before the Constitutional Court a competent minister responsible for foreign affairs, participates in cases concerning the conformity to the Constitution of other ratified international agreements. The Minister for Foreign affairs is interviewed by the Court and may present own written opinion in the case. The position of the Executive is considered by the Constitutional Court and indicated in the judgment however the Court usually does not refer to it as to legal material.

4. **What are the primary subject areas or contexts in which customary international law has been invoked or applied?**

As it was already mentioned, customary international law is mainly applied in the field of immunities.

IV. Hierarchy

1. **How are treaties and customary international law ranked in the hierarchy of domestic legal system?**

Article 9 of the Polish Constitution sets out the general rule on the position of international law in Polish law: "The Republic of Poland shall respect international law binding upon it". This provision is understood as a universal one, referring not only to treaties but also to other sources of international law (customary law, general principles of law and legally binding decisions of international organisations).[84] The Polish Constitutional Court has described article 9 of the Constitution not only as "a grandiose decla-

84 See L. Garlicki, M. Masternak-Kubiak and K. Wójtowicz, 'Poland', *op. cit*, at 376.

ration addressed to the international community, but also an obligation of state authorities, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland".[85] The provision is also the basis of state organs' obligation to interpret and apply national law in conformity with international law,[86] an obligation that also addresses Polish courts.

Other provisions of the Constitution refer directly to the position of treaties ratified by Poland. In line with articles 87 and 91 of the Polish Constitution, ratified international agreements are directly applicable sources of universally biding law and have precedence over statutes.[87] Sources other than ratified international agreements (such as customary law, general principles of international law and non-ratified international treaties to which Poland is a party) are applied by Polish courts on the basis of the aforementioned general clause contained in article 9 of the Constitution.[88] Both judiciary

85 See Polish Constitutional Court, judgment of 27 April 2005, Ref. No. P 1/05 available in English at http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf.

86 See *inter alia*, judgment f the Supreme Court of 29 November 2005, Ref. No. II PK 100/05 in which the Court stated that from the article 9 of the Constitution of the Republic of Poland which declares preservation of international law binding upon the Republic of Poland streaming an obligation on courts to favour an interpretation that is sympathetic to international law. This means courts should interpret internal Polish law in conformity with the content of international law. In regard to EU law see: judgments of the Constitutional Court, of 21 April 2004, Ref. No. K 33/03 and of 11 May 2005, Ref. No. K 18/04 and judgement of the Supreme Administrative Court, of 26 August 1999, No. V SA 708/99..

87 Article 87 states that ratified international agreements are sources of universally binding law of the Republic of Poland. According to Article 91, after publication in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute. An international agreement ratified with prior consent of the parliament through a statute has precedence over other statutes if such an agreement cannot be reconciled with the provisions of such other statutes. The same provision provides that if the Republic of Poland ratifies an agreement that establishes an international organisation, the laws adopted by this organisation are applied directly and have precedence over domestic law in the event of a conflict of laws, if the ratified agreement so provides. (English translation of the Constitution of the Republic of Poland available at *www.sejm.gov.pl/prawo/konst/angielski/kon1.htm*). Article 91 of the Constitution contains a so-called formal condition of direct application i.e. ratification and publication, as well as substantive condition which requires "the completeness of the treaty provision that enables its operation without any additional implementation'"(see judgment of the Supreme Court of 21 November 2003, Ref. No. I CK 323/02). For more details about the relationship between international law and Polish law see A. Wyrozumska, 'Poland', D. Shelton (ed.), *International Law and Domestic Legal Orders, Incorporation, Transformation and Persuasion*, (Oxford University Press, 2011) 468–516 and L. Garlicki, M. Marsternak-Kubiak and K. Wójtowicz, '*Poland*', op. cit., p. 373 and 381.

88 P. Sarnecki, 'Commentary to Article 9', in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, 1–37, at 2 and 5; K. Działocha, 'Commentary to Article 87', in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. I, 1–14, at 5; A. Wasilkowski, 'Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji RP)', 9–28, at 15; A. Wyrozumska,

and doctrine accepted that "article 9 expresses the principle of openness the Polish legal order in respect to the norms of international law and establishes a presumption of automatic, even if only indirect, incorporation of those norms into that order".[89]

Ratified international agreements prevail over statutory law, but not over the Constitution, which, according to its Article 8, is the "supreme law of the Republic of Poland". However, as the Constitutional Court stated in the judgement of 11 May 2005, this provision "is accompanied by the requirement to respect and to be favourably inclined towards appropriately drafted regulations of international law binding upon the Republic of Poland". This means that also the Polish Constitution is regularly interpreted and applied in light of and in conformity with Poland's obligations under international law, including international human rights treaties.[90]

The Constitutional Court determined position of directly applicable treaties in Polish legal order in the judgment of 21 September 201, Ref. No. SK 6/10 concerning the the Extradition Treaty between the United States of America and the Republic of Poland of 1996. The Court held that:

> […], in the case where extradition relations between Poland and a third state are regulated by an extradition treaty, it is in the content of the treaty that one should look for grounds for extradition, and only when such issues are not regulated, one should look at national regulations (likewise, on the basis of the formerly binding legal system, the Court of Appeal in Warsaw in its decision of 7 March 1997 (Ref. No. akt II AKz 76/97, Krakowskie Zeszyty Sądowe Issue No. 11-12/1997, item 107). What also requires approval is the thesis stated further on in the decision of the Court of Appeal in Katowice that, in the case where parties specified, in an international agreement, a catalogue of situations in which extradition is inadmissible, thus they concluded that

'Prawo międzynarodowe oraz prawo Unii Europejskiej…', 18–45, at 36–37 and 39; M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego…*, at 259.

89 See R. Szafarz, 'Międzynarodowy porządek prawny i jego odbicie…', 19–42, at 19.

90 Polish Constitutional Court, judgment of 11 May 2005, Ref. No. K 18/04. The Constitutional Court further explained that "the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorization or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution" (English translation after http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf). A few years later the Constitutional Court ruled "that the principle of favourable predisposition and respect of EU Treaties and international law obligations which bind the Republic of Poland expressed in article 9 of the Constitution, […] cannot undermine article 8 of the Constitution, which stipulates the primacy of the Constitution in the Polish legal order" (Polish Constitutional Court, judgment of 24 November 2010, K 32/09, English translation after http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf.

other situations, which had not been mentioned in the said catalogue, might not constitute the basis of refusal of extradition. The said states, when signing the agreement, made a pledge that, in the cases set out in the agreement, they might refuse to extradite a person sought for extradition.

As the Supreme Court stated in its decision of 29 August 2007 (Ref. No. II KK 134/07, SNwSK No. 1/2007, item 1887): "Article 615(2) of the Code of Criminal Procedure stipulates that the provisions of Chapter XIII of the said Code do not apply if an international agreement to which Poland is a party stipulates otherwise. This is linked to the constitutional principle of primacy of an international agreement ratified by Poland over a statute, where the latter may not be reconciled with the said agreement"

2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice? What is the role of the international law doctrine, decisions of international or foreign courts?

Polish courts have not had opportunity to adjudicate on *jus cogens* norms of international law. Such norms were invoked only in Skrzypek and Naroniewski cases. In Nationievski case the Supreme Court elaborated on the relation between *jus cogens* and state immunity, and it discussed the argument that breaching a *jus cogens* norm impliedly waives immunity (including for war crimes and torture) and the hierarchy between *jus cogens* and state immunity as described above.

3. Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

The is no practice of application of Article 103 of the UN Charter. Human rights treaties possess equal position to other international treaties (Polish courts do not apply human rights as customary law or general principles of law, but always base their judgements on international treaty law). However it must be noticed, that the Polish Constitutional Court found that the ECHR plays an essential role in determining a standard catalogue of fundamental rights and freedoms in a democratic state.[91] According to the Court:

> […] special role of the European Convention stems from the fact that states-parties to the Convention not only obliged themselves to observe a catalogue of rights and fundamental freedoms included in the Convention but also to comply with the judgments of the European Court of Human Rights which adjudicates on the basis of the Convention and the Protocols that supplement it. The Court's judicial decisions determine

91 See *inter alia* Polish Constitutional Court Judgments and of 9 June 2010 Ref. No SK 52/08, para. III 7.3.2.

> the normative contents of rights and fundamental freedoms that are formulated in a compact way, which is understandable, in the Convention and the Protocols. The judicial decisions of the European Court determine common normative contents of rights and fundamental freedoms the regulation of which (also by constitutions) sometimes significantly differs in various states.[92]

This means that the Polish Constitution recognizes significance of the ECHR not only as an international treaty but also as an emanation of common European standards (at least at a minimal level) of human rights protection.
The interesting example in disused field is the judgment of the Constitutional Court in case concerning lessons of religion at public schools[93] in which the Court, quite surpassingly, declared that since the Constitution in Article 25 (4) indicates that "the relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute", the Agreement between the Holly See and Poland is not only part of Polish legal order of higher rank than statutory law (like any international treaty) but also is incorporated into constitutional regulation. Although the Court explained that the position of the Roman Church is equal to other churches and religious organizations, it is not clear what would be the result of constitutional nature of such agreement in case of conflict with other international act binding upon the Republic of Poland in the light of the principle of primacy of the Constitution as reflected in its Article 8.

V. Jurisdiction

1. Do the courts exercise universal jurisdiction over international crimes?

92 See also: judgment of the Constitutional Court of 22 September 2015 Ref. No. SK 32/14 in which the Court resolved question of constitutionality of provisions of Polish Code of Civil Procedure precluding possibility of reopening of the case in consequence of the ECtHR's decision on infringement of Art. 6 of the ECHR. The Court held that according to the Art. 91 (1) of the Polish Constitution the ECHR possesses special legal status. It is part of the Polish legal order and is directly applicable. It is an act of higher legal value than statutes. The content of the Convention is determined by its text as interpreted by the ECtHR. Constitutional status of the Convention covers not only provisions concerning rights and freedoms but also other provisions of the Convention including Art. 6 which obliges state-parties to respect final decision of the ECtHR in any case to which they are parties. This obligation includes prohibition of challenging the infringement of subjective rights decided by the ECtHR and duty of any positive action in order to implement the judgment.

93 See judgment of the Constitutional Court of 2 December 2009, Ref. No. U 10/07.

Polish criminal courts exercise universal jurisdiction over international crimes pursuant to Article 113 of the Penal Code: Irrespective of the provisions applicable in the *locus criminis* the Polish penal code shall be applicable to a Polish citizen or a foreigner whose was not extradited where he committed abroad a crime which the Republic of Poland is obliged to prosecute on grounds of international treaties or a crime defined in the Rome Statute of the International Criminal Code. An as example of application of this provision may serve the Resolution of 7 judges of the Supreme Court of 21st May 2004, I KZP 42/03, concerning the interpretation of Article 43 of the Law of 24th April 1997 on the prevention of drug addiction, penalising the introduction to the market of psychotropic substances contrary to the provisions of the statute. The legal question concerned was whether the "statute" referred to in the provision can be a foreign law and – consequently – whether there is universal jurisdiction of Polish courts over such acts committed in a foreign territory. The accused in the main proceedings, a Turkish citizen, allegedly committed the act in question in the territory of Turkey, acting together with certain Polish nationals. The Supreme Court ruled that the *locus criminis* can also be a foreign territory however in such case the "statute" referred to in the quoted provision is the law applicable in the *locus criminis*. The Supreme Court found that Poland is obliged to prosecute the illegal introduction of drugs to the market on grounds of different international instruments binding upon Poland and Article 113 of the Penal Code provides for the jurisdiction of Polish courts over such crimes.[94]

2. Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?

Pursuant to the provisions of the Polish Code of Civil Procedure (Article 1103), Polish civil courts exercise jurisdiction over civil actions where the defendant is a resident of Poland, irrespective of the place where the violation of law giving rise to the action took place.

94 [art. 43 p.n. jest wyrazem realizacji zobowiązań wynikających z ratyfikowanych przez Rzeczpospolitą Polską konwencji międzynarodowych w zakresie niedopuszczenia do nielegalnego obrotu środkami odurzającymi, substancjami psychotropowymi, mleczkiem makowym lub słomą makową (Jednolita konwencja o środkach odurzających, sporządzona w Nowym Jorku dnia 30 marca 1961 r. – ratyfikowana przez Polskę 21 grudnia 1965 r., Dz.U. z 1966 r. Nr 45, poz. 277 ze zm.; Konwencja o substancjach psychotropowych, sporządzona w Wiedniu dnia 21 lutego 1971 r. – ratyfikowana przez Polskę 14 listopada 1974 roku, Dz.U. z 1976 r., Nr 31, poz. 180; Konwencja Narodów Zjednoczonych o zwalczaniu nielegalnego obrotu środkami odurzającymi i substancjami psychotropowymi, sporządzona w Wiedniu dnia 20 grudnia 1988 r. – ratyfikowana przez Polskę 30 kwietnia 1994 r., Dz.U. z 1996 r., Nr 16, poz. 69)].

3. **Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?**

There is one example of decision of the Supreme Court explicitly referring to the problem of "forum shopping" – the judgment of 16th February 2011 (II CSK 326/10) in which the Supreme Court ruled *inter alia* that:

> Among many authorities based on the theory of *mind of management* one may quote for example the order of the London *High Court of Justice* (order of the *High Court of Justice Chancery Division* of 4th July 2002, 62 IN 190/2, 10th December 2002) delivered in case *Enron Directo S.A.* The said company had a registered seat, assets, clients and employees in Spain; however, it was managed centrally from England (through a company specifically dedicated to this end). The jurisdiction of the English court (in particular – elimination of the presumption related to the registered seat) was justified by the court by referring to the fact that basic functions of the company, such as management, personal decisions and accounting, were performed in London. The theory of the *mind of management* influenced significantly the establishment of domestic jurisdiction in bankruptcy proceedings concerning international capital groups composed of numerous legally independent, although commercially interrelated companies. This theory allows for the conclusion that the centre of principal interests of subsidiary company is situated in the Member State in which the managerial and supervisory functions are exercised by the parent company. Interpretation based on the theory of *mind of management* is not correct. Neither the Regulation nor the recitals contained in its preamble offer any grounds for applying a subjective interpretation of the term of the *centre of principal interests*. On the contrary, recital 13 *in fine* of the preamble to the Regulation expressly determines the necessity to create the opportunity for creditors to verify the actual circumstances justifying the domestic jurisdiction of the courts of a given state. Moreover, the application of this model can allow in practice that the debtors may manipulate the premises of national jurisdiction by transferring the management centre of a company (even before the bankruptcy) to countries whose legal system is more convenient for them and thus less favourable to the creditors. Such a possibility would constitute a denial of the rationale of the Regulation, which is primarily to prevent the phenomena (negative to the economy) of the so-called *forum shopping*.

VI. Interpretation of domestic law

1. Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?

International law is indirectly applicable. According to well established case law of Polish Courts art. 9 of the Constitution obliges state organs to interpret domestic law, as far as possible, in conformity with international law.[95] According to the Supreme Administrative Court national courts are first of all obliged to interpret national law in conformity with international law, and just if it is impossible, they apply international law directly.[96] Such approach is shared by other courts.

The limits of friendly interpretation was established by the Constitutional Court in the Judgment on Accession Treaty. The Court held that

> […] the principle of interpreting domestic law in a manner "sympathetic to European law", as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.

Although the statement concerns EU law, it is equally relevant in regard to international law.

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

The Polish Constitutional Court has recognised the evolving standard of ECHR rights protection as established by the ECtHR as a substantive part of the constitutional standard of human rights protection in Poland.[97] Consequently, constitutional provisions should be interpreted in the light of the ECHR and ECtHR jurisprudence.[98] The Polish Supreme Court has confirmed this. Shortly after Poland's accession to the ECHR, it declared that the "case law of the European Court of Human Rights in Strasbourg should be applied as an essential source of interpretation of the provisions of Polish

95 See *inter alia* judgment of the Supreme Administrative Court of 2000, Ref. No. V SA 708/99.
96 Judgment of 22 December 2010, Ref. No. II OSK 231/10.
97 In the judgment of 28 June 2008, Ref. No. K 51//07, the Polish Constitutional Court explicitly stated that it is necessary to refer to human rights treaties and practice of their application to establish the standard of constitutional protection.
98 Judgment of the Constitutional Court of 23 February 2010, Ref. No P 20/09.

domestic law".[99] This includes the interpretation and application of the Polish Constitution.

One prominent example of dialogue that resulted in bringing Polish law in line with the ECHR is a case concerning the reorganisation of intelligence services.[100] In this case, the Constitutional Court held that although it was unnecessary to refer to article 6 of the ECHR since the right of fair trial was enshrined in article 45 of the Polish Constitution, it was necessary to refer to human rights treaties and the judicial practice of the ECtHR and other international human rights bodies to establish the (evolving) standard of constitutional protection.

Sometimes judicial dialogue is used to prove that international standard is irrelevant for the case. An example is the judgment of the Polish Constitutional Court concerning the insult of the President of the Republic of Poland.[101] In this case, the Constitutional Court had to answer the question of the conformity of penal provisions on public insult of the President of Republic of Poland (article 135(2) of the Polish Penal Code) with both article 54 (right to freedom of expression) of the Polish Constitution and article 10 of the ECHR. The Polish Constitutional Court analysed the jurisprudence of the ECtHR with the clear intention to prove the conformity of article 135 (2) of the Polish Penal Code with article 10 of ECHR. To achieve this, the Court based its main argument on (an artificial) distinction between an "insult" and a "defamation". It found that most ECtHR judgments concerned the question of defamation, whereas the case before the Polish Constitutional Court concerned a question of insult. In consequence, it held that ECtHR jurisprudence was of low relevance for the solution of the case before the Polish Constitutional Court, including the ECtHR's judgment issued in a very similar

99 Decision of the Supreme Court of 11 January 1995, Ref. No III ARN 75/94.

100 Judgment of the Polish Constitutional Court of 27 June 2008, K. 51/07, para III. 4.2.

101 Judgment of the Constitutional Court of 6 July 2011, Ref. No. P 12/09. The proceeding before the Constitutional Court was initiated by a question posed by the Regional Court in Gdansk concerning the conformity of article 135 (2) of the Penal Code with article 54(1) in conjunction with article 31(3) of the Constitution of the Republic of Poland and article 10 of the ECHR. The question arose in the context of a complaint about the decision of the Regional Prosecutor's Office in Warsaw to discontinue the investigation of the alleged insult of the President of the Republic of Poland Lech Kaczyński by a former President of the Republic of Poland, Lech Wałęsa. The latter had called the former a "fool" during a TV programme. The Public Prosecutor decided to discontinue the proceedings against Lech Wałęsa because the statement should be interpreted in the context in which it was made, as an inherent part of the substance of the articulated criticism. The Prosecutor found that the choice of words might seem controversial; however, they could not be the basis for the declaration of an offence of insulting the President. The Prosecutor's decision was challenged by the Representative of the President of the Republic of Poland Lech Kaczyński.

case of defamation of the King of Spain, *Otegi Mondragon v. Spain*.[102] It stated that

> […] numerous interesting views were presented by the ECtHR with regard to the infringement of Article 10 of the Convention in cases related to actions aimed against the head of state. However, in the context of the present case, the significance of that jurisprudence is limited, due to the fact that, to a large extent, it concerns defamation, and not an insult to the head of state.[103]

The Polish Constitutional Court further observed that only the ECtHR's judgment *Pakdemirli v. Turkey* of 2005[104] – in which the President of Turkey was referred to *inter alia* as "a liar", "a slanderer", "a political invalid", "a narrow-minded person" and "a person who corrupts clean consciences" – may be regarded as an example of an *insult* of the head of state. However, after the Polish Constitutional Court had heard the opinion of the expert on the question, it nonetheless concluded that also the judgment *Pakdemirli v. Turkey* was irrelevant for the case before it. The reason for this was that *Pakdemirli v. Turkey* concerned the question of civil law compensatory sanctions (financial compensation) for undermining good reputation. The case before the Polish Constitutional Court, by contrast, concerned a criminal sanction.

The Court concluded its analysis of ECtHR jurisprudence with a statement that revealed the purpose of its dialogue with the ECtHR in this case: to uphold the particular Polish law on the criminalisation of the insult of the president of the Poland. It observed that one should not

> […] overlook the fact that the ECtHR, by its nature, resolves whether a ruling issued by a domestic court with regard to specific circumstances of a given case (the result of the application of a provision in a particular situation) complies with a standard of the Convention, and does not adjudicate on the conformity of a provision of the national law to the Convention. Therefore, views formulated by the ECtHR directly refer only to the circumstances of a particular case and the ruling related thereto which has been issued by a domestic court.[105]

This statement of a full bench of the Polish Constitutional Court seems to question the idea of judicial dialogue between the ECtHR and national courts as the main tool of creation of common European standard of

102 *Otegi Mondragon v. Spain* (Appl.No 11662/85) Judgment (Chamber) 15 March 2011. The Polish Public Prosecutor General had relied on this judgment in its submissions to the Polish Constitutional Court.

103 Judgment of 6 July 2011, para.3.4.

104 *Pakdemirli v. Turkey* (Appl. No. 5839/97) Judgment (Chamber), 22 February 2005.

105 Judgment of 6 July 2011, para.3.4.

protection. However, as judge Stanisław Biernat pointed out in the separate opinion the statement may not be absolutised[106] In this context it is necessary to remember that constitutional courts, including the Polish one, are first of all guardians of the constitution. In a judgment adopted by the Polish Constitutional Court of 13 October 2009,[107] the Court reiterated the supremacy of the Polish Constitution in the Polish legal order based on article 8 of the Polish Constitution, and thus indicated some of the limits of the dialogue in which it is ready to enter with the ECtHR. The Constitutional Court observed that although the normative content of rights granted by the ECHR is determined in the jurisprudence of the ECtHR, which should be taken into account when the fundamental rights in the Polish Constitution are interpreted, the Polish Constitutional Court nonetheless enters into a dialogue with the ECtHR within the limits of its own jurisdiction. In the jurisdiction of the Polish Constitutional Court, the Polish Constitution is the supreme law.[108] The statement of the Polish Constitutional Court above can be understood as a reservation to taking on the jurisprudence of the ECtHR: this jurisprudence will only be given effect if it does not undermine a higher standard of protection granted by the Polish Constitution and in the established jurisprudence of the Polish Constitutional Court.

3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

A prominent purpose and effect that Polish courts allegedly wish to attain with their engagement in judicial dialogue is very much related to the purpose just discussed: the purpose of ensuring that domestic law is interpreted and applied effectively in line with European and international human rights law.

106 As judge Stanislaw Biernat pointed out in the disserting opinion, "[o]ne may only partially agree with that statement. In its more recent jurisprudence, the ECHR requires the states, being the High Contracting Parties to the Convention, to take action in order to adjust the domestic law and the practice of the application thereof to the requirements of the Convention. This is the notion of 'positive obligations of the state' […]. I do not think that the said kind of obligation could apply to Poland in the context of Article 135(2) of the Penal Code, taking into account the present practice of applying the provision. My point is that the above-cited statement about the case-specific character of the ECHR rulings, voiced by the Constitutional Tribunal (full bench) in this particular context, would not be absolutised".

107 Judgment of the Constitutional Court of 13 October 2013, Ref. No. P 4/08, para 3.2.

108 In its judgment of 11 May 2005, Ref. No. K 18/04, the Polish Constitutional Court noticed that norms of the Constitution within the field of individual rights protection of rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the principle of interpreting domestic law in a manner "sympathetic to European law". The latter principle is also formulated in the Constitutional Court's jurisprudence.

There is no doubt that human rights granted in the ECHR reflect a common standard agreed between the state parties to the Convention. As is clear from the ECtHR's concept of the Convention as "living instrument", the content of ECHR rights evolves over time. This fact makes judicial dialogue an important tool for the development of the evolving European consensus on the scope of human rights. According to the ECtHR, "human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions".[109]

Consistent interpretation is a well-established method used by national courts to avoid conflicts between domestic constitutional law and international and regional human rights law. Polish courts' use judicial dialogue, especially with the ECtHR to achieve this purpose. As mentioned before, already shortly after accession of Poland to the EC HR, the Polish Supreme Court recognised an obligation of all Polish courts to take the jurisprudence of the ECtHR into consideration, and to interpret and apply Polish law in light of this jurisprudence.[110] One prominent example of dialogue that resulted in bringing Polish law in line with the ECHR is the case K 51/07 which concerned the reorganisation of intelligence services. In this case, the Constitutional Court held that although it was unnecessary to refer to article 6 of the ECHR since the right of fair trial was enshrined in article 45 of the Polish Constitution, it was necessary to refer to human rights treaties and the judicial practice of the ECtHR and other international human rights bodies to establish the (evolving) standard of constitutional protection.

When judicial dialogue is relied on to achieve consistent interpretation of domestic and international human rights law in Polish courts, the foreign or international courts' judgments do not usually form part of the legal reasoning in the determination of the content and scope of the applicable norm. Rather, international and foreign material is used to support or supplement the Polish court's argument that is primarily based on Polish law.[111] In this regard, the judgement of the Polish Constitutional Court on the retirement age of men and women seems to be a good example. The Constitutional Court clearly stated that the case was concerned exclusively with establishing whether national provisions that set a different retirement age for men and women were in conformity with article 32 (non-discrimination) and article 33 (equality of men and women) of the Polish Constitution. It nonetheless dedicated two separate parts in the judgement to a discussion

109 See *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para 71.

110 Judgment of the Polish Constitutional Court of 18 October 2004, Ref. No. P 8/04.

111 M. Wendel, 'Comparative Reasoning and the Making of a Common Constitutional Law – The Europe-Decisions of National Constitutional Courts in a Transnational Perspective', *Jean Monnet Working Paper* 25/13, p. 9; J. Krzemińska, 'Courts as Comparatists References to Foreign Law in the case-law of the Polish Constitutional Court', *Jean Monnet Working Paper* 5/12, at 49–50, available at: www.jeanmonnetprogram.org.

of relevant EU and international standard of protection, including the case law of the ECtHR. In addition, the Constitutional Court noted explicitly, albeit in an *obiter dictum*, that the relevant provisions of domestic law were consistent with these European and international standards.[112]

The European standard of protection of human rights that brings domestic law into line with this standard may also be constructed by Polish courts in dialogue with the CJEU, especially in cases concerning measures implementing EU law in Polish legal system.[113] However, the practice of Polish Constitutional Court is inconsistent in that regard. On the one hand, in a case concerning ritual slaughter strictly connected to the implementation of EU Regulation, the Constitutional Court did not refer to relevant jurisprudence of the CJEU.[114] On the other hand, the Constitutional Court sometimes refers to CJEU case law in cases not covered by EU law. It does so with the purpose of highlighting the existence of a "European standard" of protection to interpret domestic law in conformity with this "European standard".

An example, is the case that came before the Polish Constitutional Court, challenging the constitutionality of the obligation to fasten seat belts in cars under the Polish Road Traffic Act. The applicant had been stopped by the police and had been fined for not fastening his seat belts. The applicant refused to pay the fine on the ground that the obligation in question was contrary to the right of privacy and violated his dignity. The Polish Constitutional Court referred to several cases of the ECtHR[115] as well as of national courts[116] to strengthen its argumentation concerning the acceptable scope of limitations to the protection of the right to privacy.

112 See point III.3 and III. 4 under the heading "International law provisions concerning equal retirement age of men and women".

113 Judgement of the Constitutional Court of 2 June 2007, Ref. No. K 41/05 and judgment of 30 July 2014, Ref. No. K 23/11.

114 Judgment of the Constitutional Court of 10 December 2014, Ref. No. K 52/13.

115 Among them to *X v. Belgium*, judgment of 13 December 1979, application No. 8707/79; *Schmautzer v. Austria*, of 10 May 1993, application No. 15523/89; *Viel v. France* of 14 December 1999 application No. 41781/98; *X v. United Kingdom* of 12 July 1978 application No.7992/77.

116 For example, Federal Constitutional Court of Germany: judgment of 26 January 1982 Ref. No. 1 BvR 1925/80; judgment of 24 July 1986 Ref. No. 1 BvR 331/85; and judgment of 9 March 1992 r., Ref. No. 1 BvR 74/92; Austrian Constitutional Court: judgment of 27 February 1989 in the case Schmautzer Ref. No. B 821/88; Judgments of the US Supreme Courts: Illinois of 1 October 1986, *Society v. Kohrig*, Ref. No. 62719-24, 498 N.E. 2d 1158; Illinois 1986, Iowa of 17 May 1989, *State v. Hartog*, Ref. No. 88-383, 440 N.W. 2d 852; Washington of 14 October 2004, *State v. Eckblad* Ref. No. 74109-3, 152 Wn.2d 515, 98 3d 1184.

VII. Other international sources

1. **Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?**

   It seldom happens that Polish courts invoke any general principles of law in accordance with Article 38 § 1 of the Statute of the International Court of Justice. In the judgment of the Regional Administrative Court in Warsaw of 23rd February 2012 (case No. VI SA/Wa 2128/12) the court referred to the principle of reciprocity.[117] In another judgment (of 27th December 2012, case No. III SA/Lu 341/12) the Regional Administrative Court in Lublin referred to the principle of *pacta sunt servanda* treating it as a "fundamental principle of international law"[118] and concluding that due to that principle the annexes to the convention, although neither ratified nor promulgated must be treated as a binding source of law in the internal regime. In the judgment of 8th August 2008 (case No. II OSK 189/07) the Supreme Administrative Court referred to the "principle of sovereignty" in the context of the case concerning the alleged "right to citizenship".[119]

2. **Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?**

   Whereas the binding nature of EU secondary law acts remains normally undoubted in the perception of Polish courts, ambiguity concerns other resolutions of international organisations. For examples, Resolution 1401/2002 of the UN Security Council was applied in the judgment of the Regional Administrative Court in Warsaw of 10th October 2008 (case II SA/Wa 896/08)

117 The court held that "administrative bodies, both in their decisions and the rebuttal to the application, invoked the principle of reciprocity based in international law".

118 The court held that "the obligation to observe binding international law is incumbent upon the government, the parliament and the courts. It must also be stressed that the VCLT contains a fundamental provision of Article 26 pursuant to which every treaty in force is binding upon the parties to it and must be performed by them in good (*pacta sunt servanda*). This fundamental principle of international law requires that states are to undertake every action necessary in order to perform international obligations, including actions undertaken in the field of domestic law. The party must not invoke its domestic law to justify the failure to perform the treaty, in particular it must not justify itself by the lack of domestic law necessary for the implementation of the treaty".

119 The court held that "the domestic competence of a state to regulate issues related to citizenship results from the principle of sovereignty and it is not put into question either on grounds of international law or domestic law".

in order to establish the (political and not military) nature of the UN Assistance Mission in Afghanistan and consequently, to define the legal position and benefits of a soldier who had been participating in UNAMA.[120] Although binding, the Resolution was not applied directly though (it was employed in order to interpret the domestic law on the status of soldiers).

Resolutions of UN bodies are rarely invoked by the Supreme Court or the Supreme Administrative Court. The former invoked the UNICITRAL (adopted as the resolution of the General Assembly No. 31/98 of 15th December 1976) while analysing the competence of arbitration tribunal to deliver interim and partial decisions.[121] In another decision, the Supreme Court invoked Resolution of 48/96 of the UN General Assembly (on handicapped persons) in order to strengthen the argumentation aimed at proving the effect of certain domestic provisions concerning the decision to find a person as a disabled one.[122]

3. To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?

Polish courts rarely refer to non-binding declarative texts. A few examples can be quoted though:

Judgment of the Regional Court in Warsaw of 6th September 2011, case XIII U 5025/10 (concerning the reduction of pensions for retired officials of the communist secret service):

> There is no incompatibility of the provisions in question with the Resolution of the Parliamentary Assembly of the Council of Europe No 1096 of 27th June 1996 or the guidelines related to this document aimed at assuring the compatibility of the lustration laws and similar administrative measures with the rule of law […]. As § 14 of the said Resolution provides that "In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level.[123]

120 The court held that "as it appears from the content of the Resolution of the UNSC of 2nd March 2002 the mission is of political and not military nature".

121 Judgment of the Supreme Court of 9 March 2012, Ref. No. I CSK 312/11.

122 Resolution of 3 judges of the Supreme Court of 12 December 2011, Ref. No. I UZP 4/11.

123 In Polish: "Nie zachodzi też sprzeczność kwestionowanych przepisów ustawy z rezolucją Zgromadzenia Parlamentarnego Rady Europy nr 1096 z dnia 27 czerwca 1996 r. oraz ze związanymi z tym dokumentem wytycznymi mającymi zapewnić zgodność ustaw lustracyjnych i podobnych środków administracyjnych z wymogami państwa opartego na rządach prawa. […] jak stanowi pkt. 14 rezolucji 1096 'w wyjątkowych przypadkach, gdy rządzące elity dawnego reżimu przyznały sobie wyższe emerytury niż pozostałej części społeczeństwa, emerytury te powinny być ograniczonego do zwykłego poziomu'".

Judgment of the Court of Appeal in Katowice of 5th March 2010, case I ACa 790/09 (concerning the lawsuit of Ms. A.T. v the Silesian Archdioceses of Katowice and Mr. M.G. for defamation in the catholic weekly):

> In the Resolution of the Parliamentary Assembly of the Council of Europe of 1st July 1993 on the ethics of journalists it is stated, among others, that news broadcasting should be based on truthfulness, ensured by the appropriate means of verification and proof, and impartiality in presentation, description and narration […] and that the media have a moral obligation to defend democratic values: respect for human dignity, solving problems by peaceful, tolerant means, and consequently to oppose violence and the language of hatred and confrontation and to reject all discrimination based on culture, sex or religion.[124]

In yet another decision the Supreme Court referred (as a supplementary source of inspiration while interpreting the domestic provisions on contractual penalties in civil law) to the Council of Europe's Committee resolution.[125]

Administrative courts frequently refer to the OECD Model Convention with respect to taxes on income and on capital. For example the Regional Administrative Court in Kraków in the judgment of 19 February 2013, case I SA/Kr 1698/12 held that:

> While interpreting the provisions of the convention on the avoiding of double taxation one can in principle employ the OECD Model Convention […] and the commentaries thereto, however guidelines resulting from these documents must not lead to correcting

124 In Polish: "W Rezolucji […] Zgromadzenia Parlamentarnego Rady Europy z dnia 1 lipca 1993 r. w sprawie etyki dziennikarskiej (Zeszyty Prasoznawcze, Kraków 1994, R. XXXVI, nr 3–4, 140) stwierdzono, między innymi, że przekazywanie informacji powinno być oparte na popartej weryfikacją i udokumentowaniem zebranych materiałów prawdzie i cechować je winna bezstronność przekazu zarówno w prezentacji, opisie, jak i narracji (pkt 4, str. 155), a ponadto że media mają moralny obowiązek bronić demokratycznych wartości, a wśród nich: poszanowania ludzkiej godności, tolerancji, konsekwentnego sprzeciwiania się językowi nienawiści i konfrontacji, odrzucać wszystkie rodzaje dyskryminacji wynikającej z odmienności, między innymi religijnej".

125 Resolution of 7 judges of the Supreme Court of 6th November 2003, III CZP 61/03: "Article 1 of the Annex to the Resolution of the Committee of the Council of Europe of 20th January 1978 reads that a penal clause is, for the purposes of this resolution, any clause in a contract which provides that if the promisor fails to perform the principal obligation he shall be bound to pay sum of money by way of penalty or compensation. The Explanatory Memorandum to this Resolution clarifies that the said Article assumes that the penal clause may have as its subject to determine the possible compensation and/or to define the contractual penalty independent from the loss incurred and thus in most states the penal clause may have a hybrid goal: to facilitate the assessment of compensation and to persuade the debtor to perform the obligation".

or extensive interpretation of norms of the ratified treaties, in particular if it is likely to impact the formulation of public law obligations on the part of the addressee of a norm.[126]

4. Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?

Decisions of international courts (mainly the CJEU and ECHR) are normally treated as binding. Rare exceptions can be traced resulting from poor qualifications of judges (see e.g. decisions of the Regional Court in Elbląg and the Appellate Court in Gdańsk rejeting to observe of binding force of the ECHR of 29th July 2008 in case *Choumakov v. Poland*, application No. 33868/05, described in the judgment in the *Choumakov .v Poland [no 2]* case 1st February 2011, application No. 55777/08).

Polish courts, when requested to apply or enforce decisions of international courts, have different legal grounds to do so. Administrative courts would base their decision on the reopening of the case on Article 272 § 3 of the Law on the Procedure before Administrative Courts, reading that "one may request the reopening of the procedure also where a need to do so resulted from a decision of international body acting under international treaty ratified by the Republic of Poland"[127].

Criminal courts would base the revision on Article 540 § 3 of the Code of Criminal Procedure, reading that "the proceedings shall be reopened to the benefit of the accused where a need to do so resulted from a decision of international body acting under international treaty ratified by the Republic of Poland".[128]

Civil courts encountered recently certain significant turbulences in recognizing the binding force of ECHR decisions. The Supreme Court initially accepted such possibility (see: order of the Supreme Court of 17th April 2007, case I PZ 5/07[129]), however "in the end of the day" it outlawed such

126 In Polish: "Dokonując wykładni postanowień umów o unikaniu podwójnego opodatkowania, można co do zasady posługiwać się Konwencją Modelową OECD w sprawie podatków od dochodu i majątku i komentarzem do niej, to jednak wynikające z nich wytyczne nie mogą prowadzić do korygowania, a także rozszerzającej wykładni norm zawartych w samych ratyfikowanych umowach, w szczególności jeżeli ma to wpływ na kształtowanie obowiązków publicznoprawnych adresata takiej normy".

127 In Polish: "Można żądać wznowienia postępowania również w przypadku, gdy potrzeba taka wynika z rozstrzygnięcia organu międzynarodowego działającego na podstawie umowy międzynarodowej ratyfikowanej przez Rzeczpospolitą Polską".

128 In Polish: "Postępowanie wznawia się na korzyść oskarżonego, gdy potrzeba taka wynika z rozstrzygnięcia organu międzynarodowego działającego na mocy umowy międzynarodowej ratyfikowanej przez Rzeczpospolitą Polską".

129 The Supreme Court held that "the judgment of the ECtHR finding the violation of the right of the applicant to fair trial guaranteed by Article 6.1. of the ECHR may constitute a circumstance

possibility, deciding (in the composition of 7 judges of the SC on 30th November 2010, case III CZP 16/10) that final decision of the ECHR finding the violation of Article 6 § 1 of the Convention does not constitute the grounds of reopening the civil proceedings.[130]

5. **Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?**

   There are no judgments of Polish courts in which one would trace an effective invitation to apply (as a legally binding document) the decisions or recommendations of non-judicial treaty bodies. A sole exception could be the judgment of the Regional Administrative Court in Warsaw of 23rd February 2012 (case No. VI SA/Wa 2128/11) in which the Court referred to the outcome of talks within the Mixed Commission acting under the Polish-Russian transport agreement and stated that these talks (their outcome) must not be treated as a legally binding source of law in the Republic of Poland unless they are reflected in the text of the treaty.[131]

VIII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed**

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justifying the re-opening of proceedings due to the invalidity of proceedings (Article 401 § 2 of the Code of Civil Procedure) also where the proceedings were concluded by delivering a procedural order instead of a judgement". This decision was commented in: T. Zembrzuski, 'Wpływ wyroku ETPCz na dopuszczalność wznowienia postępowania cywilnego', *EPS*, Feb. 2009, pp. 12–19.

130 The Supreme Court held that: "the final judgment of the ECtHR finding the violation of the right of the applicant to fair trial guaranteed by Article 6.1. of the ECHR shall not constitute a circumstance justifying the re-opening of proceedings". This resolution was commented in: M. Ziółkowski, 'Wyrok ETPCz jako podstawa wznowienia postępowania cywilnego', *EPS*, Sep. 2011, pp. 4–11; A. Paprocka, 'Glosa do uchwały 7 sędziów SN z 30 listopada 2010, *PiP* 7–8/2011, pp. 153–159.

131 In Polish: "Wyniki rozmów Komisji Mieszanej oraz rozmów międzyrządowych, o ile nie znajdą swojego odzwierciedlenia w ratyfikowanej umowie międzynarodowej, nie są źródłami prawa powszechnie obowiązującego w Polsce".

by international tribunals? May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?

National civil courts may request the Minister of Justice for opinions on the questions of substantive or procedural immunities – pursuant to Article 1116 of the Polish Code of Civil Procedure.[132] Formally speaking the opinion is not binding upon the requesting court.[133] The courts employ this opportunity relatively seldom. They do not tend to research on the current state of customary international law themselves. The *Natoniewski* judgment serves an example that using the opportunity created by Article 1116 of the CCP may have positive influence on the quality of the court's reasoning.

The Law on the Constitutional Tribunal reads that representatives of the President of the Republic of Poland and the Minister for Foreign Affairs participate in the proceedings before the Constitutional Court when their subject concerns the constitutionality of international agreements ratified by the President of the Republic (Article 27 § 6 and 7 of the Law on the CT). Participants are obliged to make statements before the CT on the case at hand and to produce all evidence necessary to resolve the case (Article 34 § 1 of the Law on the CT). Pursuant to § 29 of the Rules of Procedure of the Constitutional Tribunal, the President of the CT or the adjudicating panel may refer to other bodies or organisations (then participants of the proceedings) for their views on issues likely to have relevance for the resolution of the case.

In the court administrative procedure the administrative body whose act is challenged before the court is obliged to submit to the court its reply to the application of the party (Article 54 § 2 of the Law on the Procedure before Administrative Courts). Obviously, it is not binding upon the court, however the court must refer to it.

There are no rules concerning the topical issue on grounds of criminal procedure.

2. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

132 Article 1116 of the Code of Civil Procedure: "In case of doubts as for the existence of jurisdictional immunity and/or immunity from enforcement the court may refer to the Minister of Justice for information" (in Polish: „W razie wątpliwości co do istnienia immunitetu sądowego lub egzekucyjnego sąd może zwrócić się do Ministra Sprawiedliwości o informację").

133 See: A. Hrycaj, 'Komentarz do art. 1116 Kodeksu postępowania cywilnego', Lex/el., *WKP* 2012, item no. 2 regarding Article 1116 of the Code of Civil Procedure. Also, M.P. Wójcik, 'Komentarz do art. 1116 Kodeksu postępowania cywilnego', Lex/el., *WKP* 2012, item no. 1 regarding Article 1116 of the Code of Civil Procedure.

International agreements concluded by the government are subject to the review of their compatibility with the higher-ranked norms. No "political question" doctrine is present in the Polish legal system. As a rule any executive acts (also in the field of international relations) are subject to judicial review.

3. **In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?**

4. **Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?**

   As for the "export" of certain value-laden concepts to other jurisdictions the problem is rather technical.

5. **Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?**

   Poland's accession to the EU opened the path for broader application of international law in Poland. As the Constitutional Tribunal held in the judgment on the Accession Treaty (K 18/04), the legal consequence of Article 9 of the Constitution (reading that Poland observes international obligations binding upon it) is the constitutional assumption that the arrangements created outside of the Polish system of legislative organs are in force in the territory of the Republic of Poland alongside the provisions enacted by the Polish legislative power. The Constitutional legislator consciously assumed that the legal system binding in the territory of the Republic of Poland shall be of multicentric nature. There are acts which are applied stemming from international law which exist alongside those enacted by domestic bodies. Also, in the case concerning the European Arrest Warrant (P 1/05) the Constitutional Tribunal held that Article 9 of the Constitution constitutes a source of obligation binding upon the organs of the state, including the government, the parliament and the judiciary, to observe international law binding upon Poland. Fulfilling this duty may consist of taking certain actions by different state powers (including the judiciary) within their respective fields of competence.

IX. Judicial dialogue on international law in Eastern Europe

1. **Do the courts refer to decisions of international and/or foreign courts?**

   It is common to refer to decisions of the CJEU or ECHR. Other authorities (ICJ, DSB, ICC) are more rarely invoked. Although invoking decisions of ECHR in their judgments national courts they do it indirectly referring actually either to the translations published by the Ministry of Justice or certain commentaries. Moreover they do not really discuss the decisions of ECHR (also critically) neither they really follow the developments in the ECHR evolving jurisprudence. References are limited to short quotations without justification of reference to specific case (the choice of ECHR decisions is not explained and seems to be random). In some cases (e.g. concerning the legal assistance) there seem to be "sets" of judgments of ECHR quoted repetitively. As for the CJEU is somewhat different. One of the reasons may be that since the judgments are officially published in Polish it is easier for courts to invoked them. Another reason can be the special position of EU law and its autonomous nature. As for the decisions of foreign courts they are invoked mainly by the Constitutional Tribunal or the Supreme Court. In the latter case this can be explained by the fact that certain institutions of Polish law are rooted (or sometimes even largely copied from) in other legal systems, mainly German and French.

2. **For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?**

   The most common reason for employing the references to "external" judicial practice is the need to strengthen argumentation, increase authority and be more persuasive. Therefore one may have the impression that the use of foreign decisions is sometimes rather decorative. Courts do not normally begin the explanations of reasons for their decisions with referring to "external" practice (in order to analyse the content of norms) but rather they first present their views (construed independently from "external" practice) and only later they add argumentation related to invoking decisions of foreign or international courts. The practice of courts in "hard cases" (especially

in the Constitutional Court who obviously has more to do with politicised cases) shows that the courts sometimes support their findings on the normative contents by referring to practice in jurisdictions sharing similar legal (political) problems.

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?

Concerning the extent of Polish courts' engagement with the decisions of international and foreign courts, some general observations about the level of detail of these references shall be made in this last sub-section.

The level of detail in the analysis of international and foreign domestic jurisprudence in Polish courts' judgments vary from simple mention of a particular concept or statement of other courts to more detailed analysis of their case law. A non-specific reference is made by simple invocation of the case law of an international or foreign court (without reference to particular cases) like "according to the case law of the European Court of Human Rights…" or "similar interpretation can be found in the case law of the courts of…".[134] This kind of reference is used mainly in order to confirm view already adopted by the citing court, and it is hard to determine to what extent the foreign or international case influenced the final decision of the Polish courts. Such references are limited to the indication that there is (or ought to be) a certain similarity between the case before the court and the foreign or international courts' decision referred to. However, in these decisions, Polish courts neither describe nor contextualize nor evaluate the decision referred to in more detail. In other words, the classic comparative reference to foreign jurisprudence seems to be limited to the statement that there is an external authority following a similar approach.[135]

When making more specific references to a foreign or international judgment, Polish courts explicitly mention a specific judgment of an international or foreign court, they include excerpts of such rulings or they engage in an in-depth analysis of foreign or international case law. Such more specific references are mainly found in the jurisprudence of the Polish Constitutional Court, in particular in cases that concern questions on limitations of fundamental rights, and the Supreme Court. When balancing conflicting rights, the Constitutional Court looks for inspiration abroad to

134 See *inter alia* judgement of the Supreme Court of 6 December 2013, Ref. No. I CSK 146/13, judgment of the Supreme Court of 23 November, Ref. No. I CSK 292/12, judgement of the Appellate Court in Rzeszów, of 27 June 2013, Ref. No I ACa 181/13, judgement of Appellate Court in Katowice of 8 February 2013 Ref. No. I ACa 971/12 and judgment of the Appellate Court in Warsaw, judgment of 17 October 2012, Ref. No I ACa 367/12.

135 Compare M. Wendel, 'Comparative Reasoning...', at 24.

find out about the common, democratic European standard.[136] Even if to a lesser extent than the Constitutional Court, in some cases involving human rights questions, the Polish Supreme Court also looks very carefully at international and foreign practice. In many cases, especially in cases of lower courts, a single passage or concept from the foreign or international judgement is quoted, without the citing Polish court giving any explanation concerning the similarity of circumstances of the foreign or international case with the case before the Polish court.[137] Generally, lower Polish courts (both administrative courts and courts of general jurisdiction) focus on the interpretation and application of domestic law and standards. In many cases, their references can therefore be described as "decorative", i.e. they do not have real influence on the final decision.[138] This may be caused by the limited accessibility of international and foreign case law in Polish that was discussed in section 2.2 above. Sometimes, the choice of judgements to which Polish courts refer seems to be random, especially in cases in which Polish courts do not explain why they referred to a particular judgement. However, this is a typical problem of the comparative approach which is sometimes described as subjectivist or arbitrary.[139] Engagement in dialogue of Polish courts may also have a specific purpose, and can thus be an instrumental and result-oriented mechanism. This also explains why Polish courts will not always disclose the reasons for why they refer to a particular international or foreign judgment in their own decision.

4. What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason of non-referral?

The frequency of referring to foreign authorities is not excessive. The Polish legal system was traditionally a dualistic one. In the era of socialism in Poland the legal system was essentially closed for international law. Therefore

136 See J. Krzemińska, 'Courts as Comparatists…', 62, at 34.

137 See e.g. many cases concerning questions on access to justice and legal assistance in different administrative courts quoted. In many of these cases, the administrative courts quote a passage from the ECtHR case *Związek Nauczycielstwa Polskiego v. Poland* (Appl. No. 42049/98) Judgement (Chamber) 21 September 2004: "the right of access to a court is not, however, absolute. It may be subject to legitimate restrictions, for example, statutory time-limits or prescription periods, security for costs orders, regulations concerning minors and persons of unsound mind, etc.". See also Regional Administrative Court of Wrocław, decision of 15 May 2015, Ref. No. IV SAB/Wr 101/13; and judgement of Supreme Court of 3 June 2007 r., Ref. No. I UK 40/07.

138 See M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013), *supra*, n. 60, at 227–228.

139 *Ibid.*, at 240–244 and literature referred to by Bobek.

by certain inertia the judges educated in the past times (and the judges educated by them) still are not used to refer to decisions of "external" courts. Also, the formation of judges (starting from universities and including postgraduate professional training and vocational training of practising judges) does not place sufficient emphasis on the judicial dialogue. There are also practical reasons of declining the referral related to linguistic obstacles. Comparing to Western European states Poland has a relatively short experience of membership in the EU/ECHR systems, the latter providing impulse for national courts to follow the development of jurisprudence of international courts. However, Polish judges faced with the challenge of Poland's participation in international organisations, present growing eagerness to engage in judicial dialogue: one can trace a significant progress in invoking the interpretative standard of the ECHR – from simple noticing the fact that the Convention exists through simple quotation of the ECtHR judgments to still more often extensive and critical references in certain decisions.

5. **Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?**

Practically all obstacles mentioned in this question are present as hindering the judicial dialogue. Foreign judgments are rarely translated (with the exception of the CJEU and the translations of judgments of ECtHR where Poland is the defendant). Judges are not formally required to speak foreign languages.

6. **Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?**

Historically Polish legal system was composed of different elements taken from Austrian, French, German and Russian systems. In the XIX century Poland's territory was divided between the neighbouring empires. Complete regulations in different branches of Polish law, while being re-established after Poland gained independence in 1918, where highly inspired by the provisions of Austria, Germany and Russia. As for the French inspirations they can be explained both by the existence of the Napoleonic Warsaw Principality in the XIX century and by the fact that the well educated Poles, including legal scholars, spoke French as the main foreign language: thus the influence was self-evident. Polish courts seem to invoke mainly European courts' decisions, especially British, French, German, Italian, but

not only those. The common problems rooted in the historical experience related to communism and the transformation process result in similar approach to certain issues determined in the same legal environment and references to the decisions of e.g. Czech, Hungarian or German courts.

Polish courts' engagement with the case law of foreign domestic courts. First of all, it has to be noted that the number of references to foreign national courts in Polish courts differs considerably from references to jurisprudence of the ECtHR and the CJEU. Except from cases that involve private international law and mutual recognition, as well as cases that concern other compulsory considerations of foreign law,[140] decisions of foreign courts do not constitute binding legal sources in Polish law. As a consequence, Polish courts use decisions of foreign domestic courts mainly as sources of inspiration in the process of interpretation and application of Polish law.[141] References to foreign courts' judgments are made mainly by the Polish Constitutional Court.[142] Most frequent references in the field of human rights protection are made by the Polish Constitutional Court to the Federal Constitutional Court of Germany (47) then to French courts, US courts (10)especially the Constitutional Council but also the Council of State (8), the Austrian Constitutional Court (8). The choice of a referred court seems to be determined by several factors. Firstly by availability of case law including both language skills of judges but also Polish reports and scientific literature discussing foreign case law. In regard to Federal Constitutional Courts one must remember, that because of neighbourhood and common history for many years German was most popular "western" language in Poland, and comparative researches in many fields have been conducted in regard to Poland and Germany. Also for historical reasons many institutions of Polish law, especially in the field of criminal law is based on German law. The same arguments may be used to explain references to French case-law.

There are also references to foreign jurisprudence in the practice of the Supreme Court[143] and the Supreme Administrative Court.[144] In lower courts, references to foreign domestic courts' decisions seem rather incidental. The main reason for this is the limited accessibility of foreign judgments to lower courts. The Polish Constitutional Court and Supreme Court are in

140 *Ibid.*, at 21–23.

141 See *ibid.*, at 28.

142 For a broad analysis of the practice of the Polish Constitutional Court see J. Krzemińska, 'Courts as Comparatists…'.

143 See *inter alia* decision of the Supreme Court of 29 October 2010, Ref. No. IV CSK 465/09, Resolution of the Supreme Court of 17 April 2015, Ref. No. II CZP 11/15, Resolution of the Supreme Court of 3 March 2009, Ref. No. I KZP 30/08, Judgement of the Supreme Court of 16 February 2011, Ref. No. II CSK 326/10.

144 See *inter alia* judgment of the Supreme Administrative Court of 16 May 2014, Ref. No. II FSK 1395/12, the judgment of the Regional Administrative Court in Warsaw of 27 May 2015, Ref. No. VI SA/Wa 3730/14.

a better position when it comes to the access to foreign jurisprudence. Judges from both courts cooperate with their counterparts in other countries through various fora, which gives then the opportunity to exchange information with judges from abroad concerning similar legal questions they are faced with.[145]

7. Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).

Another purpose of Polish courts' engagement in dialogue with foreign domestic and international courts is to strengthen their argumentation in cases involving difficult questions about which there is no consensus in Polish society. In these cases, Polish courts regularly try to formulate a convincing legal answer to difficult social questions which is in conformity with standards of international human rights protection through a proper balancing of conflicting interests.

An example revealing this purpose of dialogue is the judgment of the Polish Constitutional Court on the constitutionality of a domestic law that provided for the possibility of shooting down a passenger aircraft. Shooting down was permitted by the law if the aircraft constituted a threat to the state's security, and where an organ of the air defence command had found that the aircraft in question was used for unlawful acts, in particular as a means for carrying out a terrorist attack. The objective of the proposed regulation was to facilitate an efficient response to any potential aerial terrorist attack, and to allow the air forces of NATO member states to operate in Polish airspace.

In its judgment, the Polish Constitutional Court rejected the arguments that fundamental human rights have to be reinterpreted in order to maintain public security at a time when the threat of terrorist attacks was high, and declared the respective Polish law unconstitutional (or parts of it?). To strengthen this conclusion, the Polish Constitutional Court referred to the case law of the UK House of Lords,[146] the German Federal Constitutional Court,[147] the Israeli Supreme Court[148] and the US Supreme Court.[149]

145 For more on this cooperation, see below, section 3.

146 Judgments – *A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71; House of Lords, judgments – *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 65.

147 German Constitutional Court (Bundesverfassungsgericht), 1 BvR 357/05.

148 *Public Committee Against Torture on Israel v. The State of Israel et al*., Case HCJ 5100/94; Israeli Supreme Court, *The Center for the Defence of the Individual v. The Commander of IDF Forces in the West Bank*, Case HCJ 3278/02; Israeli Supreme Court, *Marab v. The Commander of IDF Forces in the West 14 Bank*, Case HCJ 3239/02;

149 *Rasul v. Bush*, Case No. 03-334, 542 US 466 (2004) 321 F. 3d 1134.

The Polish Constitutional Court only explicitly relied on the German Federal Constitutional Court's judgment – in which the German Aerial Security Law had been challenged – to underline the highly controversial nature of the authorisation to shoot down a passenger aircraft, if such an action constituted the only means to prevent a direct threat to the life of persons not on the aircraft. However, the Polish Constitutional Court also adopted some of the German Constitutional Court's arguments (without explicit reference) to determine the standard of protection, involving the question of defining the appropriate limitations to the rights to life. The Court noted that there are two specific requirements that need to be complied with if the right to life was limited. First, the necessity of a limitation to the right to life must be interpreted particularly restrictively. As developed in the jurisprudence of the ECtHR on article 2 ECHR, the appropriate standard was that of "absolute necessity". Secondly, the Polish Constitutional Court observed that due to the fundamental nature of the right to life in the Polish constitutional axiology, only the presence of other fundamental interests could justify solutions that interfere with the right to life of a certain group of people (i.e. the passengers of the aircraft). Limitation of the right to legal protection of life is conditional upon the existence of a situation in which the right cannot be reconciled with analogous rights of other persons. According to the Polish Constitutional Court, this prerequisite may generally be defined as the requirement of "a symmetry of values": the sacrificed value and the saved value need to be of equal importance.

In the *Aerial Law* case, the Polish Constitutional Court used international and foreign case law in the process of balancing competing interests: the need to uphold public security by fighting terrorism on the one hand and the need to protect human rights on the other. References performed two functions here – they were a source of inspiration for the Polish Constitutional Court's arguments, but also helped to legitimise the decision of the Court by reference to similar solutions that had been accepted in other jurisdiction concerning this difficult and controversial question. The Court referred to the "European standards" as established by the EtCHR, and as implemented in other countries. It thus relied on a combination of international and foreign decisions to determine the existence of common standards, and used these standards as an external authority reinforcing its conclusion.[150]

Another example of the determination of a common standard through judicial dialogue, and the use of these standards to decide cases that involve difficult questions of balancing of interests, is case concerning

150 See J. Krzemińska, 'Courts as Comparatists References…', at 56.

the prohibition to publicly display totalitarian symbols.[151] The first in sequence of cases involving various national constitutional courts and the ECtHR came up before Hungarian Constitutional Court. It concerned the prohibition under the Hungarian Criminal Code to use and wear totalitarian symbols, including the "five-point red star". The relevant provision of the Criminal Code was challenged before the Hungarian Constitutional Court in 2000 by Mr Vajnai who had been sanctioned for wearing a five-point red star in public. However, the Hungarian Constitutional Court did not find that the prohibition was unconstitutional. Subsequently, Mr Vajnai challenged this decision before the ECtHR.[152] In its judgment *Vajnai v. Hungary*, the ECtHR concluded that the applicant's criminal conviction for simply having worn a red star had to be considered unnecessary, as it did not respond to a "pressing social need". Furthermore, the sanction against the applicant, although relatively light, came under criminal law, entailing serious consequences for the applicant. The sanction had therefore not been proportionate to the legitimate aim pursued. Accordingly, there had been a violation of article 10 ECHR.

After the ECtHR had issued its judgment in *Vajnai* case, a similar case concerning the public use of "totalitarian symbols" came up before the Polish Constitutional Court. The Constitutional Court referred to the jurisprudence of the Hungarian Constitutional Court as well as the ECtHR's *Vajnai* judgment. In addition, it considered the case law of the German Federal Constitutional Court, which appeared to be main persuasive source for the finding of the Polish Constitutional Court when it balanced the competing interests involved: the individual right to freedom of expression with the need to maintain public safety.[153]

151 Constitutional complaint on §269/B para. (1) variant "five-point red star" of the Act IV of 1978 on Criminal Code, Decision No. 4/2013 (II. 21.) AB, Hearing 19 February 2013, Case No. IV/02478/2012 Decision 14/2000 (V. 12).

152 *Vajnai v. Hungary*, judgment of 8 July 2008, Application No. 33629/06.

153 See Judgment of the Constitutional Court judgment of 19 July 201, Ref. No. K 11/10, para III. 3 with the heading "The standards and jurisprudence of other states and of the European Court of Human Rights".

International Law through the National Prism:
the Impact of Judicial Dialogue

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Country Report – Russian Federation

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I. Legal basis for application of international law in domestic legal system

1. **What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?**

The principles and rules of international law are applied in the Russian Federation in accordance with the Constitution, federal constitutional laws and federal laws.

Pursuant to Article 15.4 of the Russian Constitution "the generally recognised principles and rules of international law and the international treaties of the Russian Federation shall form an integral part of its legal system. If an international treaty of the Russian Federation sets out the rules other than those provided for by law, the rules of the international treaty shall apply". This provision of the Russian Constitution is reflected in a number of federal laws, in particular, in the Federal Law "On International Treaties of the Russian Federation" and the Federal Law "On Combating Terrorism".

As set out in the Constitution, the international treaties of the Russian Federation shall prevail over the provisions of law, not over the Constitution. In accordance with Article 125.6 of the Constitution "the international treaties of the Russian Federation that are inconsistent with the Russian Constitution shall not be enacted and applied".

The Constitution does not define the concept of generally recognised principles and rules of international law. It is left to the discretion of courts to decide on this issue taking into account international legal doctrine.

2. **Are there any legislative provisions or regulations that call for the application of international law within the national legal system?**

The judicial power in the Russian Federation is exercised through constitutional, civil, administrative and criminal court proceedings.

The Russian judicial system comprises federal courts, constitutional (statutory) courts and justices of peace of the constituent entities of the Russian Federation.

The federal courts include:

- The Constitutional Court of the Russian Federation;
- The Supreme Court of the Russian Federation, supreme courts of the republics, regional and territorial courts, courts of federal cities, courts of

autonomous regions and territories, district courts, military and specialised courts which form the system of federal courts of general jurisdiction;
- The Supreme Commercial Court of the Russian Federation, federal commercial courts of the districts (commercial courts of cassation), commercial courts of appeal, commercial courts of the constituent entities of the Russian Federation and specialised commercial courts which form the system of federal commercial courts;
- Judicial Disciplinary Tribunal.

The courts of the constituent entities of the Russian Federation include: constitutional (statutory) courts of the constituent entities of the Russian Federation, justices of peace being the justices of the general jurisdiction in the constituent entities of the Russian Federation.

The general courts consider civil, criminal and administrative cases. The general courts are governed by Federal Constitutional Law of the Russian Federation N 1-FKZ "On General Courts in the Russian Federation" dated 7 February 2011.

The commercial courts consider economic disputes. These courts operate in accordance with Federal Constitutional Law of the Russian Federation N 1-FKZ "On Commercial Courts in the Russian Federation" dated 28 April 1995.

In practice the Russian Constitutional Court is not directly involved in the application of the rules of international law. Pursuant to Article 125 of the Constitution, the Constitutional Court considers only those international treaties of the Russian Federation for consistency with the Constitution of the Russian Federation that have not yet become effective.

In practice, there have been not many cases in which the Russian Constitutional Court considered the constitutionality of international treaties. The Court has considered whether the Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine of 1997 is consistent with the Russian Constitution. However, no decision on the merits was issued. Upon the preliminary examination of the request filed with the Court, the treaty was ratified by both the parties and became effective. As the Court is not competent to assess the effective international treaties for consistency with the Constitution, it had to dismiss the request without examining its merits. In 2012, the Russian Constitutional Court considered whether the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organisation is consistent with the Russian Constitution. By Ruling No. 17-П dated 9 July 2012, the Protocol, which constitutes an international treaty of the Russian Federation, was recognised consistent with the Russian Constitution.

At the same time, it should be noted that in supporting its decisions the Constitutional Court commonly refers to the rules of international law and the judgments of the European Court of Human Rights, including the judgments in cases not involving Russia.

When considering civil, administrative and, to certain extent, criminal cases the courts of the Russian Federation of all levels directly apply the rules of international law. The respective provisions are reflected in judicial and procedural laws.

Pursuant to Article 3 of Federal Constitutional Law No. 1-FKZ "On the Judicial System of the Russian Federation" dated 31 December 1996, the integrity of the judicial system of the Russian Federation is ensured through the application by all courts of the generally recognised principles and rules of international law and the international treaties of the Russian Federation.

As set out in Article 11.4 of the Russian Code of Civil Procedure, where an international treaty of the Russian Federation provides for the rules other than those provided for by law, the court in considering a civil case shall apply the rules of the international treaty. A similar provision is contained in the Civil Code.

In criminal law, the rules of international treaties that require states to consider certain acts as criminal ones shall not be applied directly. In Russia, the crimes and the punishment for criminal acts are determined solely by the Criminal Code of the Russian Federation (Russian Criminal Code). New components of crime shall be included in the Russian Criminal Code based on the international treaties. Certain articles of the Russian Criminal Code contain references to the international treaties. For instance, Article 356 of the Russian Criminal Code establishes criminal liability for using the prohibited means and methods of warfare. The concept of the "prohibited means and methods of warfare" is defined in the Geneva Conventions.

Pursuant to Article 1.3 of the Russian Code of Criminal Procedure "the generally recognised principles and rules of international law and the international treaties of the Russian Federation shall form an integral part of the criminal procedure laws and regulations of the Russian Federation. If an international treaty of the Russian Federation sets out the rules other than those provided for by this Code, the rules of the international treaty shall apply".

Finally, as set out in Article 1.1(2) of the Russian Code of Administrative Offences, the Code is based on the generally recognised principles and rules of international law, and sets out the prevailing nature of the rules of international treaties over the provisions of law on administrative offences.

3. For Russia as federal state: do the constitutions of the republics refer to international law, are there constitutional or statutory provisions at

the federal level addressing federal authority over matters concerning international law?

Russia is a federal state. The Russian Federation consists of 83 constituent entities, including 21 republics, 9 territories, 46 regions, 2 cities of federal significance, 1 autonomous region, and 4 autonomous districts. Pursuant to Article 71 of the Constitution of the Russian Federation, the foreign policy and international relations of the Russian Federation, international treaties of the Russian Federation, and the war and peace issues, come under the jurisdiction of the Russian Federation. Under Article 72 of the Russian Constitution, Russia and its constituent entities have joint jurisdiction over the coordination of international and foreign economic relations of the constituent entities of the Russian Federation and the fulfilment of international treaties of the Russian Federation. The constitutions and charters of the constituent entities of the Russian Federation shall be consistent with the Russian Constitution. Accordingly, all authorities of the constituent entities of the Russian Federation shall apply the generally recognised principles and rules of international law and the international treaties of the Russian Federation in accordance with Article 15.4 of the Russian Constitution. The constitutions and charters of the constituent entities of the Russian Federation contain references to the generally recognised principles and rules of international law.

Nearly all constitutions of the republics and a number of charters of other constituent entities of the Russian Federation (Krasnoyarsk territory, Perm territory, Sakhalin region, etc.) provide for that the human rights and freedoms shall be recognised and guaranteed in accordance with the generally recognised principles and rules of international law.

It is interesting to note that the Constitution of the Republic of Adygea contains a reference to the Universal Declaration of Human Rights. The Constitution of the Republic of Adygea guarantees the exercise of all rights and freedoms of an individual and citizen set out in the Constitution of the Russian Federation and the Constitution of the Republic of Adygea, the Universal Declaration of Human Rights and other international laws and regulations.

The Constitution of the Republic of Dagestan, being one of the most multinational republics in Russia, sets forth the rights of nations. As set out in Article 6, the Republic of Dagestan guarantees the protection of rights of all nations and national minorities living in the Republic of Dagestan in accordance with the Constitution of the Russian Federation, federal laws and the generally recognised principles and rules of international law and the international treaties.

Pursuant to Article 6.6 of the Constitution of the Chechen Republic, the state authorities of the Chechen Republic, local authorities, enterprises,

institutions, organisations, officials, citizens and any associations thereof shall comply with the generally recognised principles and rules of international law.

Therefore, it may be concluded that in accordance with Russian law the generally recognised principles and rules of international law and the international treaties of the Russian Federation, relating to both substantive and procedural law, shall be directly applied by the courts of all levels. In criminal law, the rules of international treaties may be applied directly by the courts in instances set out in the Russian Criminal Code.

II. Treaties

1. **How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?**

The concepts and types of international treaties of the Russian Federation are defined in Federal Law No. 101-FZ "On International Treaties of the Russian Federation" dated 15 July 1995. An international treaty of the Russian Federation means an international treaty between the Russian Federation and a foreign state (or foreign states), international organisation or any other institutions having the right to enter into international treaties, made in writing and governed by international law, executed as one document or several interrelated documents, whatever its particular title is.

2. **Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?**

Article 3 of Federal Law "On International Treaties of the Russian Federation" specifies international treaties of the Russian Federation (interstate agreements), intergovernmental and interagency agreements. Article 15 sets out international treaties of the Russian Federation that shall be ratified by federal law. These include mainly the treaties which entail amendments to the effective or the adoption of new federal laws, and set out the rules other than those contemplated by law.

All international treaties of the Russian Federation are subject to mandatory registration and filing with the Ministry of Foreign Affairs of

the Russian Federation in accordance with the Rules of State Registration and State Filing of the International Treaties of the Russian Federation, approved by Order N 12828 of the Russian Ministry of Foreign Affairs dated 27 July 2007. All international treaties shall be officially published in accordance with Article 30 of Federal Law "On International Treaties of the Russian Federation". Accordingly, the courts are always able to obtain the official information on the international treaties legally binding upon the Russian Federation.

In accordance with Article 5.3 of Federal Law "On International Treaties of the Russian Federation", the provisions of the officially published international treaties of the Russian Federation applicable without enactment of relevant domestic legislation shall have direct effect in the Russian Federation. The courts shall determine whether a rule has direct effect or not on a case-by-case basis. In doing so the courts shall take into account that a treaty may contain both the rules of direct and indirect effect.

The prevalence of the rules of international treaties of the Russian Federation over the rules of domestic law

In determining whether the rules of international treaties prevail over the provisions of law, the Russian Supreme Court found that the rules of international treaties ratified by the Russian Federation shall prevail. As stated in clause 5 of Order of the Plenum of the Russian Supreme Court No. 8 dated 31 October 1995 "The court shall not apply the governing law in determining the case where an international treaty of the Russian Federation which has consented to be bound by the treaty by adopting the federal law and for which the treaty is in force sets out the rules other than those provided for by law. In these cases, the rules of the international treaty of the Russian Federation shall apply".

A similar position was articulated in clause 8 of Order of the Plenum of the Russian Supreme Court No. 5 dated 10 October 2003. The Plenum stated that the rules of an international treaty of the Russian Federation which has consented to be bound by the treaty by adopting the federal law shall prevail over the laws of the Russian Federation.

In doing so the Plenum noted that the rules of the effective international treaty of the Russian Federation which has consented to be bound by the treaty other than by way of adopting federal law shall prevail over the subordinate legislation and regulations issued by the state authority, making the treaty.

However, the prevailing nature of the international treaties of the Russian Federation does not mean that the provisions of national law contravening the rules of the international treaty shall not be applicable at all. This means that in a particular situation where a rule of the treaty contradicts a provision of law, the rule of the treaty shall prevail.

3. **What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country? Is there any influence of EU law, including the decisions of European Court of Justice?**

   In accordance with Constitution of the RF treaties of the RF may be invoked also between private persons. Russia is not a member of the EU. There is no influence of EU law and legel doctrine.

4. **Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?**

5. **Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?**

   The courts of the Russian Federation may apply only those treaties that are effective for the Russian Federation. This issue was reflected in Order of the Plenum of the Russian Supreme Court No. 5 dated 10 October 2003. When deciding on the applicability of the rules of an international treaty, the court shall find:
   - whether the international treaty is effective;
   - whether it is effective for the Russian Federation;
   - whether it has been officially published in the Russian Federation in accordance with the requirements of Federal Law "On International Treaties of the Russian Federation".

   The court may apply the rules of the international treaty only if all three criteria are met. Similar requirements apply to certain treaties of the USSR that remain effective for Russia as the successor state to the USSR.

   The courts independently determine whether a treaty is effective for the Russian Federation and whether it is applicable in the case under review on a case-by-case basis. When determining the validity of a treaty the courts rely upon the rules of the Vienna Convention on the Law of Treaties of 1969. The validity of the treaties has been regularly emphasised by the courts in cases regarding criminal extradition.

Case of D.G. Khakiroev

The Supreme Court of the Russian Federation has considered the complaint lodged by a national of the Republic of Tajikistan, D.G. Khakiroev, against the ruling of the Tyumen Regional Court dated 3 September 2012 to dismiss the complaint filed by D.G. Khakiroev against the order of the deputy General Prosecutor of the Russian Federation dated 1 August 2012 to extradite D.G. Khakiroev to the law enforcement authorities of the Republic of Tajikistan. In Cassation Ruling N 89-O12-42 of 4 December 2012, the Russian Supreme Court emphasised that the Convention of the CIS Member States "On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases" dated 22 January 1993 constitutes an effective treaty ratified by both Russia and Tajikistan.

In its Order No. 5 dated 10 October 2003 (clause 10) the Plenum of the Russian Supreme Court explains to the courts that an international treaty shall be construed in accordance with the Vienna Convention on the Law of Treaties dated 23 May 1969 (section 3; articles 31–33).

Pursuant to Section 3, Article 31.3 (b) of the Vienna Convention, when interpreting an international treaty, there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

The analysis of Russian court practice shows that the most common challenge for the Russian courts lies in the application and interpretation of the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 1 of Federal Law No. 54-FZ "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto" dated 30 March 1998 sets out that the Russian Federation, as a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognises as compulsory the jurisdiction of the European Court of Human Rights over the interpretation and application of the Convention and the Protocols thereto in the event of an alleged breach thereof by the Russian Federation provided that the alleged breach occurred after the Convention and the Protocols thereto became effective for the Russian Federation. When applying the European Convention the courts rely upon the practice of the European Court of Human Rights to avoid any violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Order of the Constitutional Court of the Russian Federation No. 2-П dated 5 February 2007 in the case regarding the constitutionality of the provisions of articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Russian Code of Civil Procedure originated in an application of the Cabinet of Ministers of the Republic of Tatarstan, complaints

of open joint stock companies Nizhnekamskneftekhim and Khakasenergo, and complaints of a number of citizens, is of essential importance for the application in Russia of the judgments of the European Court of Human Rights when interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms. In clause 2.1. of the Order, the Russian Constitutional Court stated that the judgments of the European Court of Human Rights which, based on the generally recognised principles and rules of international law, interpret the rights and freedoms set forth in the Convention, including the right to access to court and a fair trial, form an integral part of the Russian legal system, and therefore shall be taken into account by the federal legislative authorities when regulating the public relations and by the law-enforcement authorities when applying the respective legal provisions.

It is quite common for the courts to refer in their decisions to the judgments and legal positions of the European Court of Human Rights.

T. case

Ruling of the Russian Supreme Court in case N 18-B08-55 can be used as an example. The court of original jurisdiction, which decision was upheld by the court of cassation, found illegal the criminal prosecution of plaintiff T. (by the effective decision of the district court, T. was found non-guilty for the lack of elements of crime in her actions) and the recognisance not to leave imposed on her as preventive measures. The court satisfied her claim to recover from the Russian Ministry of Finance a monetary compensation for moral damage payable out of the budget of the Russian Federation.

The presidium of the territorial court (in a supervisory review based on a prosecutor's application) dismissed the decisions of the court of original jurisdiction and the court of cassation, and remanded the case to the same court for a new trial.

In substantiating its ruling, the presidium of the territorial court stated that the decisions delivered by the courts are to be dismissed for lack of evidence supporting the court's conclusion on the existence of a causation between illegal actions of the investigating authorities and bodily suffering of the plaintiff and that the court determined the amount of compensation for moral damage without regard to the requirements of reasonableness and justice, and therefore the amount has been overstated.

The Judicial Chamber for Civil Cases of the Russian Supreme Court overruled the presidium of the territorial court recognising its order illegal, and upheld the decisions of the court of original jurisdiction and the court of cassation.

In its ruling, the Judicial Chamber for Civil Cases of the Russian Supreme Court stated that the Russian Federation as a party to the Convention

for the Protection of Human Rights and Fundamental Freedoms recognises as compulsory the jurisdiction of the European Court of Human Rights over the interpretation and application of the Convention and the Protocols thereto in the event of an alleged breach thereof by the Russian Federation provided that the alleged breach occurred after the Convention and the Protocols thereto became effective for the Russian Federation. When applying the European Convention the courts shall rely upon the practice of the European Court of Human Rights to avoid any breach of the Convention for the Protection of Human Rights and Fundamental Freedoms. In substantiating its decision the Judicial Chamber for Civil Cases referred to the judgment of the European Court of Human Rights in the case of Ryabykh v. Russia dated 24 July 2003,in which the European Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.

The legal position of the European Court of Human Rights regarding the supervisory review of court orders was reflected in Order of the Plenum of the Russian Supreme Court N 2 dated 12 February 2008 "On Applying the Provisions of the Civil Procedure Laws in a Supervisory Court in Connection with the Adoption and Enactment of Federal Law N 330-FZ dated 4 December 2007 'On Amending the Russian Code of Civil Procedure'". In accordance with clause 6 of the Order, no court order shall be dismissed or amended by way of supervisory review proceedings unless such a review is required to eliminate the judicial error that was made in the previous proceedings and affected the outcome of the case, in order to restore and protect the materially violated rights, freedoms, and legitimate interests, as well as public interests protected by law.

6. Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign courts?)

In certain cases, the provisions of international treaties are interpreted taking into account the national interests and cultural traditions of the Russian Federation.

Case re Kostroma Region Law

Ruling of the Russian Supreme Court No. 87-АПГ 12-2 dated 7 November 2012 in the case originated in an application lodged by M.V. Bakumova seeking recognition of Kostroma Region Law N 193-5-ЗКО dated 15.03.2012 "On Amending the Kostroma Region Law 'On Guarantees of the Rights of the Child in the Kostroma Region' and the Kostroma Region Code of Administrative Offence" ineffective. M.V. Bakumova applied to the Kostroma Regional Court to contest Articles 1 and 2 of the said Law that prohibit and impose administrative liability for the propaganda of homosexual (gay and lesbian), bisexual relations and transgender among minors. In doing so she appealed that the contested provisions contradict the provisions of Article 8.1, Article 10.1, 1 Article 11.1, Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, articles 13, 29 of the Convention on the Rights of the Child, Recommendations of the Committee of Ministers of the Council of Europe, violate the rights and freedoms of the applicant guaranteed by federal law. The Kostroma Regional Court dismissed the claims by its decision of 6 July 2012.

The Judicial Chamber for Administrative Cases of the Russian Supreme Court reviewed the provisions of Kostroma Region Law, federal law on the protection of children, family and marriage and the rules of the international treaties and international regulations referred to in the application.

In considering whether the contested rules conform to the provisions of federal and international laws, the court proceeded from the fact that the content of the regional law does not imply the general prohibition, dispraise of homosexuality, lesbianism, bisexuality, transgender and its negative assessment in the general regulatory system, but the prohibition of the public actions aimed at the propaganda of the above among minors.

In considering the case, the Judicial Chamber noted that Federal Law N 436-FZ "On the Protection of Children from Information Harmful to their Health and/or Development" was adopted on 29 December 2010 to accomplish the goals of the protection of minors in the Russian Federation, defining the types of information harmful to the health and/or development of children, such information to include the information that negates the family values (Article 5.4).

In accordance with the provisions of Article 7.2 of the Constitution of the Russian Federation and Article 1 of the Family Code of the Russian Federation, the family values in the Russian Federation include family, motherhood, fatherhood and childhood being under protection of the state.

Given the above provisions and the national tradition to regard a family as a biological union based on the marriage between a man and a woman, the Russian Family Code sets out that the family relations shall be regulated, among other things, in accordance with the concepts of a voluntary union

between a man and a woman, priority of family education of the children, care about the welfare and development of the children (Article 1).

Pursuant to federal law, in accordance with the national traditions and subject to the international rules, the family values do not include homosexual relations, bisexuality, and transgender.

The Judicial Chamber for Administrative Cases of the Russian Supreme Court found that the provisions of the federal law are systematically interrelated with the rules of international treaties that require the state and the society to protect the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities for caring about dependent children and their education (Article 16.3 of the Universal Declaration of Human Rights, Article 10.1 of the International Covenant on Economic, Social and Cultural Rights, preamble to the UN Convention on the Rights of the Child dated 20 November 1989, and more).

Therefore, by adopting the disputed provisions the representative body of the Kostroma region did not impose any additional unreasonable restrictions of rights but acted within the scope of its competence as the disputed law prohibits the propaganda of homosexuality, bisexuality, transgender as relations negating the family values and imposes administrative liability for the propaganda thereof within the constituent entity of the Russian Federation, which is in compliance with the applicable federal laws.

7. Do the courts refer to the opinion of the Executive?

As recommended in Order of the Plenum of the Russian Supreme Court No. 5 dated 10 October 2003, if any difficulties arise in interpreting the generally recognised principles and rules of international law and the international treaties of the Russian Federation, the judges shall rely upon the acts and decisions of international organisations, including the UN bodies and specialised agencies, and apply to the Legal Department of the Ministry of Foreign Affairs of the Russian Federation and the Ministry of Justice of the Russian Federation.

8. Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?

No one case found.

III. Customary international law

1. Is customary international law automatically incorporated into domestic law?

Article 15.4 of the Constitution of the Russian Federation contains a general rule providing for the application of the rules of international law in Russia. The position of the higher courts was essential for the development of court practice in applying the rules of international law that have direct effect.
It was necessary to determine which of the principles and rules of international law are generally recognised and form the legal system of the Russian Federation.

The concept of the generally recognised principles and rules of international law

The Supreme Court of the Russian Federation developed its position in a number of orders of its Plenum.
Clause 5 of Order of the Plenum No. 8 dated 31 October 1995 "On Certain Issues Regarding the Application by Courts of the Constitution of the Russian Federation in the Exercise of Justice" states

> […] when administering justice, courts should proceed from the fact that in accordance with Article 15.4 of the Constitution of the Russian Federation, the generally recognised principles and rules of international law set out in international covenants, conventions and other documents (in particular, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights), and the international treaties of the Russian Federation constitute an integral part of its legal system.

Order of the Plenum No. 5 dated 10 October 2003 "On the Application by the Courts of General Jurisdiction of the Generally Recognised Principles and Rules of International Law and the International Treaties of the Russian Federation" defines the general principles and rules of international law. Pursuant to the definition, the generally recognised principles of international law shall mean the fundamental peremptory norms of international law accepted and recognised by the international community of States as a whole, from which no derogation is permitted. The generally recognised principles of international law include, but are not limited to, the principle of universal respect for human rights and fulfilment in good faith of obligations under international law. A generally recognised rule of international

law shall mean the rule of conduct accepted and recognised as legally binding by the international community of States as a whole. These principles and rules of international law may be found, in particular, in documents of the United Nations and its specialised agencies.

It should be noted that the orders of the Plenum of the Russian Supreme Court provide no specific list of the generally recognised principles and rules of international law which could be used by courts.

Thus, it may be concluded that in Russian court practice the generally recognised principles and rules of international law are the principles and rules that have been set out in the international regulations and have become customary rules of international law. Even though permitted by law, the courts do not apply the customary rules of international law not provided for in writing by the international regulations. The reason for that rests with the complexity of understanding and applying the customary rules that have not been set out in writing.

2. Do the courts apply customary international law in practice? How do the courts prove existence of customary law? Do the national courts always take account of developments in the practice of States, as well as in case law and jurisprudence while determining the existence and content of customary international law?

Russian courts apply international customary law not very often. Most of the cases relate to criminal proceedings. When determining a case, Russian courts of cassation consider whether the disputed judicial acts conform to the generally recognised principles and rules of international law.

G. case

The Moscow City Court dismissed the supervisory complaint filed by a lawyer, E.I. Mityushin, regarding the term of imprisonment of the accused Mr G. The court stated that the lower court's decision was issued in compliance with the criminal procedure law and without violating the rights of the accused and the generally recognised principles of international law (Order of the Moscow City Court N 4y/7-9100/12 dated 7 December 2012). The Moscow City Court considered possible violations of the generally recognised principles of international law in other supervisory complaints in the criminal cases to change the preventive measures (Orders N 4y/7-9919/12 dated 3 December 2012, N 4y/7-9100/12 dated 7 December 2012, N 4y/7-1944/12 dated 20 March 2012, N 4y/8-878 dated 28 February 2012, 2012 N 4y/8-878 dated 28 February). For all these cases the Moscow City Court found no violations and dismissed the supervisory complaints.

Recognising and enforcing foreign courts' decisions in commercial cases

Based on the generally recognised principles of international law, Russian courts have developed the practice of recognising and enforcing foreign courts' decisions reciprocally, where no bilateral treaty is in place.

Thus, by the order of 29 November 2012 in case N A40-88300/11-141-741 the Federal Commercial Court of the Moscow District upheld the ruling of the Commercial Court of the City of Moscow dated 31 August 2012 in case N A40-88300/11-141-741 on the recognition and enforcement of the judgment of the High Court of Justice of England and Wales given in default of appearance in case N HQ09X05584 dated 24.11.2010. In substantiating its decision the Federal Commercial Court of the Moscow District referred to the rules of international treaties. In addition, the court noted that foreign judgments may be recognised and enforced based on the principles of reciprocity and international comity that constitute the generally recognised principles of international law forming an integral part of the legal system of the Russian Federation pursuant to Article 15 of the Constitution of the Russian Federation.

3. Do the courts refer to the opinion of the Executive?

See II.7.

4. What are the primary subject areas or contexts in which customary international law has been invoked or applied?

The primary subject areas in which customary international law has been applied are protection of Human Rights, criminal proceedings, commercial law.

5. What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?

Case in the claim of S.N. Ryabov

Russian courts considered cases concerning the immunities of international organisations. The courts delivered the decisions based on the in-depth analysis of the international treaties on the establishment of international organisations and the charters.

We find interesting the Ruling of the Judicial Chamber for Civil Cases of the Russian Supreme Court dated 9 July 2010 in case No. 5-B10-49,

originated in a claim of S.N. Ryabov against the Eurasian Development Bank seeking the recovery of salary and compensation for moral damage.[1]

The court of original jurisdiction terminated the proceedings in case citing that the Eurasian Development Bank may not be involved in this case as defendant due to the fact that it has the immunity "from any court proceedings" and "from any form of judicial intervention" in the Russian Federation. The court of cassation upheld this finding.

The Judicial Chamber for Civil Cases of the Russian Supreme Court analysed the Charter of the Eurasian Development Bank and the Agreement between the Government of the Russian Federation and the Eurasian Development Bank establishing the terms and conditions of its presence in the Russian Federation.

Based on the results of the analysis, the Judicial Chamber for Civil Cases of the Russian Supreme Court found that the Bank has a limited (functional) immunity which extends to those activities of the Bank that involve the performance of its functions and accomplishment of the goals set out in the Agreement and the Bank's Charter.

The employment relations between R. and the Eurasian Development Bank do not result from the performance by the Banks of its core functions as the employment itself is for the purposes of the Bank's activities and therefore shall not be covered by the immunity.

Accordingly, the court's finding that the Eurasian Development Bank enjoys the absolute immunity from any legal proceedings and any form of judicial intervention constitutes a material violation of law and is based on wrong application and interpretation of the rules of substantive law.

In its statement against the supervisory complaint the defence argued that the employment dispute between the plaintiff and the respondent shall not be referred to the courts of the Russian Federation as pursuant to the employment agreement the dispute shall be resolved in accordance with the internal regulations of the Bank, which argument was found vicious by the Judicial Chamber for Civil Cases of the Russian Supreme Court.

In accordance with Article 46.1 of the Constitution of the Russian Federation each person shall be guaranteed judicial protection of his/her rights and freedoms. Pursuant to Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, and the internal regulations of the Bank do not contain any efficient remedies available to the plaintiff to protect his employment rights.

1 Overview of the legislation and court practice of the Russian Supreme Court for the 3d quarter of 2010.

The Judicial Chamber for Civil Cases of the Russian Supreme Court overruled the court orders in the case and remanded the case to the court of original jurisdiction for a new trial.

IV. Hierarchy

1. **How are treaties and customary international law ranked in the hierarchy of domestic legal system?**

   Treaties and customary international law are two equivalent source of law.

2. **Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice? What is the role of the international law doctrine, decisions of international or foreign courts?**

   In Russian international legal doctrine the concept of Jus cogens, and first of all the concept of the general principles of international law, is recognised as the framework rules of international law that prevail over other international laws and regulations.

   According to the doctrine, the generally recognised principles include, in the first place, the general principles of international law set out in the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, adopted by the UN General Assembly on 24 October 1970, and the Final Act of the Conference on Security and Cooperation in Europe dated 1 August 1975. In addition, the generally recognised principles include a number of industrial principles.

   The Constitution of the Russian Federation is silent about which of the rules of international treaties or the customary rules of international law shall prevail. These two main sources of international law are considered to be equal.

3. **Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?**

   Pursuant to Russian international legal doctrine and court practice, the rules of one branch of international law shall not prevail over the rules of other branches.

V. Jurisdiction

1. **Do the courts exercise universal jurisdiction over international crimes?**

Russian criminal law recognises the principle of universal criminal jurisdiction over international crimes in accordance with the international treaties of the Russian Federation. In accordance with Article 12.3 of the Criminal Code of the Russian Federation (Russian Criminal Code) foreign citizens and stateless persons not permanently residing in the Russian Federation, shall be held criminally liable under the Russian Criminal Code as provided for by the international treaty of the Russian Federation. There is a mandatory rule that if a citizen of this category has already been convicted of the crime in a foreign state, no criminal liability may be imposed on him/her in the Russian Federation. The treaties of the Russian Federation contemplating the universal jurisdiction include the 1958 UN Convention on the High Seas, the 1982 UN Convention on the Law of the Sea and certain other international treaties.

VI. Interpretation of domestic law

1. **Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?**

The generally recognised principles and rules of international law and the international treaties of the Russian Federation shall form an integral part of the legal system of the Russian Federation. In certain cases the rules of international law are relied upon by Russian courts for the purpose of interpretation of Russian law, and firstly its provisions on the protection of human rights.

N.I. Shakourov case
(Decision of the Vyborg District Court of St. Petersburg No. 2-3341/12 dated 29 June 2012)

N.I. Shakourov sought to have the court dismiss the decision of Interregional Department No. 122 of the Federal Medical and Biological Agency declaring

the applicant as undesirable foreigner in Russia. As stated in the decision, the applicant, a non-Russian national, has a disease included on the "List of Infectious Diseases that are Dangerous to the Public Health and Constitute Grounds for Refusing to Issue to Foreigners or Stateless Persons Temporary Residence Permit, Permanent Residence Permit or Work Permit in Russia", and therefore his stay (residence) in Russia is undesirable in accordance with Article 9.13 of the Federal Law "On Legal Status of Foreigners in the Russian Federation".

However, N. I. Shakourov is in marriage with a Russian national, and moreover, is a father of a Russian national and, if the applicant is deported from Russia, his family will not be able to live their normal life.

In interpreting Article 9.13 of the Federal Law the court relied upon the UN Convention on the Rights of the Child, the Convention for the Protection of Human Rights and Fundamental Freedoms, and a number of judgments of the European Court of Human Rights.

The Convention on the Rights of the Child require that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (Article 9.1); in accordance with this obligation, applications by a child or his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt with by states parties in a positive, humane and expeditious manner; states parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family (Article 10.1); nevertheless, the Convention does not prohibit the separation of a child from his or her parents where such separation results from any action initiated by a state party, such as the exile or deportation (Article 9.4).

As set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to respect for his private and family life, and there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus, as follows from these two international treaties, this was exactly the case with the application considered by the Vyborg District Court of St. Petersburg – on the one hand, the right of a husband and a parent to live together with his family without interference by the state with his private and family life, and on the other hand, his possible exile in order to protect the public interest, i.e. the protection of health, rights and freedoms of

others. In delivering its decision the Vyborg District Court of St. Petersburg relied upon the practice and referred to three cases of the European Court of Human Rights.

Based on the European Court's judgment in the case of D v. the United Kingdom, the district court concludes that each specific case requires an individual approach, with the healthcare system and the stage of a disease to be taken into account.

The district court also refers to the judgment in the case of Moustaquim v. Belgium in which the European Court noted that the Convention does not guarantee the right of an alien to enter any country and reside in any country; however, the exile of an alien from the country where he/she has a family may constitute an infringement of the right to respect for family life guaranteed by Article 8 § 1 of the Convention.

In its judgment in the case of Jakupovic v. Austria the European Court of Human Rights held that given the fact that the decisions of contracting states to deport aliens may interfere with a right protected under paragraph 1 of Article 8, this measure must be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

Taking into account the above judgments of the European Court of Human Rights, the Vyborg District Court of St. Petersburg concludes that the disputed decision shall be dismissed for infringing the applicant's right to respect for his private and family life without any pressing need to do so.

Case in the claim of G.A.V.

The Pskov Regional Court considered case N 33-871 originated in an appeal filed by the Administration of the Federal Migration Service of Russia for the Pskov Region against the decision of the Pskov City Court of the Pskov Region dated 16 March 2012. The Administration appealed the decision obliging the Administration to rectify the violation of the rights of G.A.V. in full and issue to G.A.V., originally from Tajikistan, a new passport of the Russian Federation in accordance with applicable law of the Russian Federation. Earlier the Administration confiscated from G.A.V. his passport of the Russian Federation and a transcript to his birth certificate as these documents were issued in breach of the established procedure. The Admistration could not find his application for Russian citizenship and information about registration of his applicaton.

By its ruling dated 5 June 2012 the Pskov Regional Court dismissed the appeal of the Administration of the FMS. In substantiating its position the court referred to Article 18 of the European Convention on Nationality dated 06.11.1997, stating that in matters of nationality in cases of State succession, each State Party concerned shall respect the principles of the rule

of law, the rules concerning human rights in order to avoid statelessness. In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account, in particular, of the genuine and effective link of the person concerned with the State; the habitual residence of the person concerned; the will of the person concerned; the territorial origin of the person concerned. The confiscation of the passport practically means that G.A.V. has been deprived of his nationality in the Russian Federation, and given that his link with Tajikistan had been lost when he was a minor, and given that due to his previous conviction it would not be possible for him to obtain the residence permit as proposed by the Administration, he would become a stateless person, which is inadmissible pursuant to the provisions of the European Convention on Nationality.

As stated in the ruling of the Tomsk Regional Court in the appellate proceedings in case N 33-2310/2012 dated 11 September 2012, in interpreting the provisions of the Russian pension legislation the court relied upon the Agreement of the CIS Member States "On Guaranteeing the Rights of the CIS Nationals to the Pension Benefits" dated 13.03.1992. Having reviewed the rules of the Agreement the court ordered the State Enterprise – Administration of the Pension Fund of the Russian Federation in the Kozhevnikov District of the Tomsk Region to recalculate and pay the pension benefits to Mr B. in accordance with the procedure established by the court.

We note a steady trend towards Russian courts, and first of all the Russian Supreme Court, applying the rules of international law aimed at the protection of human rights and fundamental freedoms in criminal proceedings when interpreting the provisions of the Russian criminal procedure law and laws concerning investigative activities. This trend can be supported by the following examples.

Case of A.V. Mayorov and A.M. Bocharov

By its ruling N 50-Д12-108 dated 20 December 2012 the Russian Supreme Court satisfied the supervisory complaints of convicted A.V. Mayorov and A.M. Bocharov and amended the verdict of the Kuibyshev District Court of Omsk dated 14 November 2007, cassation ruling of the judicial bench for criminal cases of the Omsk Regional Court dated 20 December 2007, order of the presidium of the Omsk Regional Court dated 6 June 2011 and order of the presidium of the Omsk Regional Court dated 18 July 2011.

The Kuibyshev District Court of Omsk found guilty A.V. Mayorov and A.M. Bocharov and convicted them of the attempted illegal sale of a narcotic drug by the group of persons by previous concert in a large amount. The crimes were committed under the circumstances described in the verdict.

In their supervisory complaints convicted A.V. Mayorov and A.M. Bocharov contested the legality and validity of the judgments and stated that

there were acts of provocation by the representatives of the law enforcement authorities, who having detected the fact of the illegal sale of the narcotic drug on 22 August 2007 did not terminate the criminal activities but continued to carry out single-type investigative work. The convicted applied to the Russian Supreme Court to have the verdict amended, the conviction of crimes committed on 23, 24 and 27 August 2007 excluded, and the punishment mitigated. The test purchasing of the narcotic drugs from the convicted took place on 22 August 2007 based on the information available to the officers of the Administration of the Federal Drug Control Service that A.V. Mayorov together with A.M. Bocharov have been engaged during a long period of time in the sale of narcotic drug – heroin, and based on the reasoned order. The subsequent test purchases were unnecessary for identification of the drug channels, places of storage, other individuals involved in the illegal sale of drugs.

Having detected that the convicted persons engage in the sale of the narcotic drug, the officers of the Administration of the Federal Drug Control Service did not terminate the criminal activities of A.V. Mayorov and A.M. Bocharov, but engaged a person who acted to incite the convicted persons to further sell the drug.

In its Ruling to satisfy the supervisory complaint of A.V. Mayorov and A.M. Bocharov, the Russian Supreme Court stated that as follows from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the public interest in combating drug trafficking cannot justify the use of evidence obtained as a result of police incitement.

Case of A.V. Vorontsov

A similar opinion can be found in Ruling of the Russian Supreme Court N 50-Д12-114 dated 25 December 2012 in a supervisory complaint of convicted A.V. Vorontsov against the verdict of the Omsk District Court of the Omsk Region dated 20 January 2010 and the follow-up decisions. The verdict was based on the results of the operational investigations (test purchases) by the officers of the Federal Drug Control Service in order to obtain evidence that Vorontsov has been involved in drug trafficking. The officers of the Administration of the Federal Drug Control Service engaged B. to participate in the investigative measures. As follows from the testimony given by witness B. in the course of the criminal investigation and accepted by the court as reliable, she would not have contacted Vorontsov but the request of the Administration of the Federal Drug Control Service. Moreover, her testimony statement did not contain any information that Vorontsov have been previously engaged in drug trafficking or had any narcotic drug in his possession and intended to engage in drug trafficking. This fact was also confirmed by the witness during the court hearing.

Pursuant to Article 6.1.4 of Federal Law N 144-FZ "On Operational Investigative Activities" dated 12 August 1995 (as amended) a "test purchase" is one of the types of operational investigative measures conducted in the course of the operational investigative activities. In accordance with Article 5.8 of the Law, it is prohibited for the authorities (officers) involved in the operational investigative activities to directly or indirectly incite, incline, induce anyone to do anything illegal (provocation).

In its ruling the Russian Supreme Court referred to Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, stating that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As follows from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the public interest in combating drug trafficking cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset.

The Supreme Court overruled the verdict of the Omsk District Court of the Omsk Region dated 20 January 2010, the cassation ruling of the judicial bench for criminal cases of the Omsk Regional Court dated 18 March 2010, the order of the presidium of the Omsk Regional Court dated 9 August 2010 against A.V. Vorontsov and dismissed the case based on Article 24.1.2. of the Russian Code of Criminal Procedure for the lack of elements of crime in his actions.

A similar opinion can be found in Ruling of the Russian Supreme Court N 13-Д12-42 dated 27 December 2012 to satisfy the supervisory complaint of convicted A.A. Andreev and Ruling of the Russian Supreme Court N 48-Д12-25 dated 27 December 2012 to satisfy the supervisory complaint of convicted A.M. Aksenova.

It is notable that in interpreting the rules of Russian law references are made to judgments of the European Court of Human Rights.

Case of A.S. Svinarenko

Quite illustrative is the Decision of the Russian Supreme Court of 20 September 2012 in case N AKPI12-1219 originated in an application of A.S. Svinarenko seeking compensation for the violation of his right to trial within a reasonable time. By the verdict of the Magadan Regional Court of 30 May 2011 on the basis of the verdict of the jury on 3 May 2011, A.S. Svinarenko was convicted of crimes under Article 210.2, Article 163.3(a), Article 163.3(a), of the Russian Criminal Code and was sentenced to imprisonment for a term of 8 years 5 months, payment of fine in the amount of

RUB 200,000, with serving the first four years of his sentence in prison, and the remaining term in a strict regime colony. By the cassation ruling of the Judicial Chamber for Criminal Cases of the Russian Supreme Court dated 23 March 2012, the verdict of the Magadan Regional Court of 30 May 2011 was partially amended to exclude the imprisonment of A.S. Svinarenko, the remaining part of the court verdict was upheld.

A.S. Svinarenko addressed the Russian Supreme Court with an application seeking compensation for the violation of his right to trial within a reasonable time in accordance with Federal Law N 68-FZ "On Compensation for Violation of the Right to Trial within a Reasonable Time and the Right to have the Judgment Enforced within a Reasonable Time" dated 30 April 2010.

The case of A.S. Svinarenko was not escalated to the European Court of Human Rights, and the claim for compensation was considered based on the rules of Russian law. However, a representative of the Russian Ministry of Finance representing the defendant – the Russian Federation, addressed the court with a request to take into account the practice of the European Court of Human Rights considering similar cases involving the citizens of the Russian Federation. The Supreme Court of the Russian Federation dismissed the application of A.S. Svinarenko and in substantiating its decision referred to both the rules of Russian law and the criteria established in the case-law of the European Court of Human Rights.

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

The analysis of court practice reveals that in interpreting the rules of Russian law Russian courts apply the rules of international law, first of all for the protection of human rights and fundamental freedoms. This is primarily the case for the courts of appellate jurisdiction.

3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

In interpreting the rules the courts refer to the provisions of the international treaties in force for the Russian Federation. In Russian court practice the courts, as a rule, make no references to international treaties, to which Russia is not a party.

VII. Other international sources

1. **Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?**

   No one case was found.

2. **Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?**

   Implementation of resolutions of the United Nations Security Council

   Russia is a permanent member of the United Nations Security Council and implements the binding resolutions adopted by the UN Security Council based on Chapter VII of the Charter of the United Nations. Resolutions of the United Nations Security Council imposing sanctions on states are implemented by executive orders of the President of the Russian Federation. These orders determine the procedure for the application of sanctions in accordance with the rules of Russian law. Two examples are Executive Order of the President of the Russian Federation No. 1092 dated 5 May 2008 concerning Iran, and Executive Order of the President of the Russian Federation dated 12 August 2011 concerning Libya.

3. **To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?**

   The Constitutional Court of the Russian Federation regularly refers to the international regulations that are not legally binding. Over the period between 1992 and 2012 the resolutions of the UN General Assembly were cited in 49 decisions of the Constitutional Court of the Russian Federation.

   Case of A.T. Fedin

   In its Order No. 27-П/2011 dated 06.12.2011 in the case regarding the constitutionality of Article 107 of the Russian Code of Criminal Procedure (home arrest) originated in a complaint filed by an Estonian national, A.T. Fedin, the Russian Constitutional Court in considering the application of home arrest as an alternative to detention referred to the United Nations

Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) adopted on 14 December 1990 by Resolution 45/110 of the UN General Assembly. This reference was one of the arguments used in substantiating the Court's decision. The Constitutional Court recognised the provisions of Article 107 of the Russian Code of Criminal Procedure as inconsistent with the Constitution of the Russian Federation, its Articles 19.1, 19.2, 22.1, 46.1, 46.2, 49 and 55.3 to the extent to which they fail to specify the term for which a detainee may be placed under home arrest, set out the grounds and procedure for the term extension and limit the maximum term for which a detainee may be placed under home arrest, taking into account the term of detention used as a preventive measure. The Constitutional Court also ordered that the law-enforcement decisions against an Estonian citizen, Alexander T. Fedin, delivered based on the provisions of Article 107 of the Russian Code of Criminal Procedure and recognised inconsistent with the Constitution of the Russian Federation shall be duly reconsidered, if no other restrictions apply.

K.I. Guziev and E.Kh. Karmova case

The Russian Constitutional Court issued order No. 8-П dated 28 June 2007 in a complaint lodged by K.I. Guziev and E.Kh. Karmova about the infringement of their constitutional rights and freedoms by Article 14.1 of the Federal Law "On Burial and Funeral Service" and The Provision on Burial of Terrorists who had Died as a Result of the Suppression of their Terrorist Actions (approved by Decree N 164 of the Government of the Russian Federation dated 20 March 2003)

Pursuant to Article 14.1 of the Federal Law "On Burial and Funeral Service" dated 12 January 1996, bodies of terrorists killed in the suppression of their terrorist activities shall not be released for burial and the place of burial shall not be made public.

K.I. Guziev and E.Kh. Karmova applied to the Russian Constitutional Court with a complaint that Article 14.1 of the Federal Law "On Burial and Funeral Service" and the Provision on Burial of Terrorists who had Died as a Result of the Suppression of their Terrorist Actions, deprive the applicants of the right to observe the religious and ritual ceremonies in accordance with the national traditions, disparage the killed persons and their relatives, permit conviction of a crime without a trial and therefor violate the rights and freedoms of a person and citizen guaranteed by the Russian Constitution, including by articles 21, 28, 45, 46, 49 and 55 thereof.

In its decision the Russian Constitutional Court stated that the United Nations Global Counter-Terrorism Strategy adopted by Resolution of the UN General Assembly 60/288 on 8 September 2006, encourages member states to endeavour to adopt such measures as may be necessary and

appropriate and in accordance with their obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct.

The court also noted that the provisions of Article 14.1 of the Federal Law "On Burial and Funeral Service" are logically connected with the content of clause 4 of the 1687 (2004) Recommendation of the Parliamentary Assembly of the Council of Europe "Combating Terrorism through Culture", underlining that extremist interpretation of elements of a particular culture or religion, such as heroic martyrdom, sacrifice, apocalypse or holy war, as well as secular ideologies (nationalist and revolutionary), can also be invoked to justify terrorist acts.

The court held that given the particular conditions existing in Russia due to a series of terrorist acts that had caused numerous human losses, the release of the bodies to the relatives for burial may create a threat to public order, rouse hatred, and that the place where the terrorists were buried may become a place of cult for certain extremists, and will be used by them for propaganda of terrorist ideology and involvement of others in terrorist activities.

Thus, the Russian Constitutional Court held that the rules of Article 14.1 of the Federal Law "On Burial and Funeral Service" dated 12 January 1996 and the Provision on Burial of Terrorists who had Died as a Result of the Suppression of their Terrorist Actions are consistent with the Russian Constitution.

Case of A.I. Vladimirtsev

In its Ruling No. 378-O/2006 dated 12.07.2006 in the complaint of Alexander. I. Vladimirtsev against violation of his constitutional rights by paragraphs six and eight of Article 82 of the Russian Code of Criminal Procedure, the Constitutional Court reviewed the contested provisions for consistency with the Standard Minimum Rules for the Treatment of Prisoners approved by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955. Based on the results of this review the Constitutional Court dismissed the complaint for lack of grounds.

Enforcement of judgments of the European Court of Human Rights

The Russian Federation is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The Convention and protocols thereto have been ratified by Federal Law No. 54-FZ dated 30 March 1998. Citizens of the Russian Federation have the right to

apply to the European Court of Human Rights, which decisions are binding upon the Russian Federation.

Procedural law of the Russian Federation contains the rules designed to enforce the judgments of the European Court of Human Rights.

Pursuant to Article 413 of the Russian Code of Criminal Procedure, a legally effective court verdict, ruling and order can be dismissed and the criminal proceedings can be reopened upon discovery of new facts, which include the fact of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed in considering a criminal case by Russian court, due to: a) the application of federal law inconsistent with the Convention for the Protection of Human Rights and Fundamental Freedoms; b) other violations of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 415.5 of the Russian Code of Criminal Procedure, a court verdict, ruling and order to be reconsidered upon discovery of new facts, shall be reviewed by the Presidium of the Russian Supreme Court based on a submission from the Chairman of the Russian Supreme Court within one month of the submission. Once the submission has been reviewed, the Presidium of the Russian Supreme Court shall either dismiss or amend the judgments in the criminal case in accordance with the order of the European Court of Human Rights. Copies of the order of the Presidium of the Russian Supreme Court shall be sent to the adjudicated person, the prosecutor and Russia's Commissioner for Human Rights (Ombudsman) of the European Court of Human Rights within 3 days.

The Russian Code of Commercial Procedure contains the provisions on reopening of cases based on the judgments of the European Court of Human Rights. In accordance with Article 311.2.4 of the Russian Code of Commercial Procedure, new facts include the fact of a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms found by the European Court of Human Rights in arbitration proceedings on the case escalated to the European Court of Human Rights.

The rule of reopening of cases based on the judgments of the European Court of Human Rights was absent from the Russian Code of Civil Procedure for a long time. Federal Law No. 353-FZ dated 09.12.2010 supplemented Article 392 of the Russian Code of Civil Procedure with a rule similar to that contained in the Russian Code of Commercial Procedure.
The Presidium of the Russian Supreme Court regularly reviews the submissions based on the judgments of the European Court of Human Rights.

Case of S.M. Kolpak

The Presidium of the Russian Supreme Court issued Order N 266-П12 dated 5 December 2012 to reopen the proceedings in K's application alleging

bodily injuries inflicted on him by the police officers and seeking dismissal of the order of the Oktyabrsky Federal Court of the Admiralty District of St. Petersburg dated 20 January 2004 and the cassation ruling of the judicial chamber for criminal cases of the St. Petersburg City Court dated 31 March 2004.

Believing that his rights were violated, K. filed a complaint with the European Court of Human Rights citing that the investigation into his allegations had been ineffective and inconsistent with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In its Order dated 13 March 2012, the European Court of Human Rights found that there has been a violation against K. of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, on account of the lack of an adequate and effective investigation into the applicant's allegations of ill-treatment by the police.

As follows from the case files, during the internal inquiry the prosecutor's office interviewed the police officers against whom K. had made his allegations, the reliability of evidence was not verified, neither K. nor the paramedic or the doctor examining him were interviewed, the results of the medical examination were not studied and were lost.

The European Court of Human Rights found that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed by the Russian court in considering the criminal case under Article 413.4.2(b) of the Russian Code of Criminal Procedure, which constitutes the ground for reopening the proceedings in the criminal case in accordance with Chapter 49 of the Russian Code of Criminal Procedure.

Case of I.S. Fedorenko

By its Order N 110-П12 dated 4 July 2012, the Presidium of the Russian Supreme Court dismissed a number of court orders and reopened the proceedings in the criminal case against I.S. Fedorenko based on the judgment of the European Court of Human Rights that there had been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed by the Russian court in the course of considering the criminal case.

Having considered the case originated in an application by I.S. Fedorenko, in its judgment of 20 September 2011 the European Court of Human Rights held that there has been a violation of Article 5.1(c), Article 5.3 and Article 6.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms committed in considering the criminal case against Mr Fedorenko.

The European Court of Human Rights found that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed by the Russian court in considering the criminal case under Article 413.4.2(b) of the Russian Code of Criminal Procedure, which

constitutes the ground for reopening the proceedings in the criminal case in accordance with Chapter 49 of the Russian Code of Criminal Procedure.

In particular, the European Court of Human Rights stated that in its decision of 28 April 2005 the Golovinskiy District Court of Moscow authorised the applicant's placement in custody, with reference to Articles 100 and 108 of the Russian Code of Criminal Procedure. At the same time, the District Court remained silent as to how long the applicant should remain in detention.

The absence of any specific time-limit for the applicant's placement in custody in the court's decision amounts to a "gross and obvious irregularity" capable of rendering the applicant's detention pursuant to that order arbitrary and therefore "unlawful". Therefore there has been a violation of Article 5 § 1 (c) of the Convention.

The domestic courts authorised the extension of the applicant's detention pending trial on 10 occasions, relying solely on the seriousness of the charges against him and his potential to abscond, influence the witnesses, obstruct the course of the investigation, or reoffend, if at large.

In addition, as stated in the judgment, the European Court of Human Rights is not convinced that the domestic courts' decisions were based on an analysis of all the relevant facts.

The decision of 28 April 2005 complained of by the applicant was taken a day after he was arrested by the police. Although at that time no formal charges were brought against him, his arrest and detention formed part of the investigation and made him a person "charged with a criminal offence" within the meaning of Article 6 § 2 of the Convention.

In the said decision the district court stated that the applicant should have been placed in pre-trial detention because he "had committed a serious criminal offence punishable under the criminal law with a term of imprisonment of more than two years", i.e. in the opinion of the European Court of Human Rights, "The statement was not limited to describing a 'state of suspicion' against the applicant; as it stood, it was represented as an established fact, without any qualification or reservation, that the applicant was involved in the commission of a serious crime".

The European Court of Human Rights did not accept the Government's argument to the effect that "it was a technical error", that the appellate court made no attempt to alter the relevant wording of the district court's decision, thus failing to rectify the defect complained of.

In the light of the foregoing, the European Court of Human Rights found that the wording of the district court's decision of 28 April 2005 and, namely, its statement that the applicant "had committed a serious criminal offence" amounted to a declaration of the applicant's guilt, in the absence of a final conviction, and breached his right to be presumed innocent.

Accordingly, there has been a violation of Article 6 § 2 of the Convention.

The decisions of Russian courts imposing a preventive measure in the course of investigation are recognised as unlawful in the judgment of the European Court of Human Rights. As follows from this judgment, the decision against Fedorenko finding him guilty of a criminal offence was also unlawful.

Having dismissed the courts' decisions to impose the preventive measures on Fedorenko, the Russian Supreme Court found no grounds for dismissing the conviction against Fedorenko and ruled to reopen the proceedings in this criminal case.

In 2012, the Presidium of the Russian Supreme Court ordered to dismiss the court decisions and reopen the proceedings in criminal cases based on the judgments of the European Court of Human Rights in the case of P.A. Sevastianov (Order N 41-П12 dated 16 May 2012), in the case of V.A. Shumkov (Order N 235-П12 dated 21 November 2012), in the case of T.S.-M Idalov (Order N 183-П12 dated 26 December 2012).

In the case of V.A. Shumkov the European Court of Human Rights in the Judgment of 14 February 2012 held that there has been a violation of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the authorities' failure to protect the life of Mr Shumkov and that the authorities failed to carry out an effective criminal investigation into the circumstances surrounding the suicide of Mr Shumkov, in breach of the said article in its procedural aspect.

A review by the Russian Supreme Court of a criminal case may have the following results: 1) a ruling that the proceedings in the case be terminated for the lack of elements of crime directly by order of the Presidium of the Russian Supreme Court (in implementing the judgment of the European Court on violation of Article 10 of the Convention); 2) a ruling that the decisions be dismissed and the case be remanded to the court which committed the violation for a new trial, with the applicant provided with all necessary rights and guarantees of a fair trial (in implementing the judgment of the European Court on violation of Article 6 of the Convention); and, finally; 3) consequences other than the dismissal of an order, cassation or supervisory ruling and, accordingly, not resulting in another outcome of the proceedings or a changed qualification of the criminal acts, but implementing the fundamental principle laid down in the Convention – the rule of law.

In each of the above cases, the most essential fact impacting the Russian judicial system is that the review involves the direct application by the highest judicial body of the state of the European Court's legal positions.

The analysis of the orders of the Presidium of the Russian Supreme Court on dismissing the decisions and reopening the proceedings in criminal cases based on the judgments of the European Court of Human Rights shows that the court decisions are dismissed mainly for violations of Article 5 (right to liberty and security of person) and Article 6 (right to fair trial) of

the European Convention for the Protection of Human Rights and Fundamental Freedoms. The widespread violations of Article 6 of the Convention include a violation of the right to defend; examine witnesses; public hearing; tribunal established by law.

5. **Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?**

   Decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty are not sources of law.

VIII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?**

   Pursuant to Article 120 of the Russian Constitution the courts shall be independent. This provision means that the courts act independently in determining and interpreting the rules of law applicable under certain case. The general provision on the application and interpretation by courts of the rules of law shall also apply to the generally recognised principles and rules of international law and provisions of the international treaties of the Russian Federation as they form part of the legal system of the Russian Federation.

2. **May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?**

   As recommended in Order of the Plenum of the Russian Supreme Court No. 5 dated 10 October 2003, if any difficulties arise in interpreting the generally recognised principles and rules of international law, and the international treaties of the Russian Federation, the judges shall apply to the Legal Department of the Ministry of Foreign Affairs of the Russian Federation

and the Ministry of Justice of the Russian Federation. At the same time, pursuant to Article 120 of the Russian Constitution, the courts are not bound by the position of the executive authorities.

In their decisions Russian courts rely upon the provisions of the 1969 Vienna Convention on the Law of Treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

No one case was found.

4. **Do the national courts decline to give effect to foreign public acts that violate international law?**

No one case was found.

5. **In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?**

The courts often refer to the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms in their decisions on criminal cases.

Case of A.P. Mikhalchenko and I.N. Bazhenov

By its Ruling N 60-Д12-2 dated 10 October 2012, the Russian Supreme Court dismissed the order of the Milkovsk District Court of the Kamchatka Region dated 27 March 2008, the cassation ruling of the judicial chamber for criminal cases of the Kamchatka Regional Court dated 29 April 2008 and the order of the presidium of the Kamchatka Territorial Court dated 26 August 2009 against A.P. Mikhalchenko and I.N. Bazhenov. Having examined the files of the criminal case and arguments in the supervisory complaint, the Judicial Chamber for Criminal Cases of the Russian Supreme Court found that the supervisory court failed to ensure legal assistance for Mr Mikhalchenko and thus violated his right to defend and that there were a number of procedural irregularities. In substantiating its decision the Supreme Court referred to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides for the right to a fair trial. The Court also noted that in accordance with

Article 15.4 of the Russian Constitution the Convention forms an integral part of the Russian legal system.

6. **Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?**

   Recognition and protection of human rights in the Russian Federation are based on the generally recognised principles and rules of international law.

7. **Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?**

   Russia is not a member of the European Union and accordingly the rules of EU law cannot be applied for regulating the relations within the Russian Federation. However, EU laws and regulations are relied upon by Russian lawmakers when drafting laws and influence the development of Russian law to certain extent.

IX. Judicial dialogue on international law in Eastern Europe

1. **Do the courts refer to decisions of international and/or foreign courts?**

   The Constitutional Court of the Russian Federation quite often refers to the rules of international law and the judgments of the European Court of Human Rights, including the judgments in cases not directly involving the Russian Federation.

   For instance, in its Order No. 27-П/2011 dated 06.12.2011 in the case regarding the constitutionality of Article 107 of the Russian Code of Criminal Procedure (home arrest) originated in a complaint filed by an Estonian national, A.T. Fedin, the Russian Constitutional Court referred to the judgments of the European Court of Human Rights dated 26 June 1991 in the case of Letellier v. France, 6 April 2000 in the case of Labita v. Italy, 29 January 2008 in the case of Saadi v. the United Kingdom, 28 March 2000 in the case of Baranowski v. Ploand.

References to the judgments of the European Court of Human Rights are also widely used in the decisions of Russian courts of original jurisdiction.

Case in the complaint of A.A. Navalny

By its appellate ruling of 10 October 2012 in case N 11-22489, the Moscow City Court dismissed the appeal of the representative of the defendant, A.A. Navalny, against the decision of the Lyublino District Court of Moscow dated 04 June 2012 in the claim to defend honour, dignity and compensation for moral damage. One of the matters considered by the court related to the interpretation of Article 10 § 1 and § 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In determining its position the Moscow City Court relied upon the position of the European Court of Human Rights pursuant to which the difference between a value judgment and a statement of fact finally lies in the degree of factual proof which has to be established and therefore a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10 (see the judgment of the European Court of Human Rights in the case of Scharsach and News Verlagsgesellschaft v. Austria), complaint N 39394/98, § 40, ECHR 2003-XI). Taking into account the active social position of the defendant, his popularity among the general public, the court considered that the criticism by the defendant of the political parties and politicians must be based to some extent on the statement of fact and there must be evidence that he acted in good faith as noted by the European Court of Human Rights in its judgments (case of Marer v. France, complaint N 12697/03, Judgment of 07.11.2006, Case of Schwabe v. Austria, complaint N 13704/88, Judgment of 28.08.1992).

2. **For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?**

References to the judgments of the European Court of Human Rights are used by Russian courts in interpreting the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Case in the claim of T.B. Borisova

We find interesting Ruling of the Russian Supreme Court N 78-Впр12-5 dated 18 May 2012 in the claim of T.B. Borisova against State Enterprise

– Administration of the Pension Fund of the Russian Federation in the Vyborg District of St. Petersburg to restore the payment of retirement benefits, originated based on the submission from deputy general prosecutor of the Russian Federation, S.G. Kekhlerov, to dismiss the order of the presidium of the St. Petersburg City Court of 26 September 2007.

T.B. Borisova applied to the court with a claim against State Enterprise – Administration of the Pension Fund of the Russian Federation in the Vyborg District of St. Petersburg to restore the payment of retirement benefits starting from 15 June 1998. In supporting her claims the applicant stated that she had been receiving the retirement benefits since 1982 in accordance with the then effective legislation of the USSR. In September 1990 she left Leningrad for Israel for permanent residence and for that reason, starting from 1 March 1991, she received no retirement benefits. In August 2000 and May 2004 she addressed the respondent with an application for the restoration of the payments. However, by decisions of the Pension Committee of the State Enterprise – Administration of the Pension Fund of the Russian Federation in the Vyborg District of St. Petersburg N 697 dated 5 September 2000 and N 04-25/7873-14 dated 19 July 2004, her application was denied as before the departure to Israel she was not entitled to the pension under the Law of the Russian Federation and there are no legal grounds for restoring the payments. By decision of the Vyborg District Court of St. Petersburg the claims of T.B. Borisova were satisfied in part. The court ordered the defendant to restore the retirement benefits for T.B. Borisova starting from 21 June 2004. The remainder of the claims was dismissed.

The case was not reviewed in a cassation procedure.

The presidium of the St. Petersburg City Court of 26 September 2007 quashed the above decision, a new decision in the case to dismiss the claim of T.B. Borisova against State Enterprise – Administration of the Pension Fund of the Russian Federation in the Vyborg District of St. Petersburg for the restoration of the retirement benefits was issued.

In considering the case, the Russian Supreme Court referred to the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Russian Federation, as a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognises as compulsory the jurisdiction of the European Court of Human Rights over the interpretation and application of the Convention and the Protocols thereto in the event of an alleged breach thereof by the Russian Federation provided that the alleged breach occurred after the Convention and the Protocols thereto became effective for the Russian Federation (Article 1 of Federal Law No. 54-FZ "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto" dated 30 March 1998). Therefore, when applying the European Convention the courts shall rely upon the practice of the European Court of

Human Rights to avoid any breach of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The judicial chamber decided that having had recourse to the supervisory review of the court's decision the presidium of the St. Petersburg City Court violated the principle of legal certainty arising from the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 6 § 1 of the Convention, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As set out in Article 1 of Protocol N 1 to the Convention, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

As noted by the European Court of Human Rights in the case of Ryabykh v. Russia of 24 July 2003, the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question. Legal certainty presupposes respect for the principle of res judicata, which is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.

The European Court of Human Rights also noted that a judgment debt may be regarded as a "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention. Quashing such a judgment after it has become final and unappealable will constitute an interference with the judgment beneficiary's right to the peaceful enjoyment of that possession.

The Russian Supreme Court recognised the order of the presidium of the St. Petersburg City Court illegal, delivered with a material violation of procedural law affecting the outcome of the case that must be eliminated in order to restore and protect the violated rights of the applicant. Therefore,

the order of the presidium of the St. Petersburg City Court of 26 September 2007 was dismissed, and the decision of the Vyborg District Court of St. Petersburg of 2 March 2006 was upheld.

The review of court practice shows that references to the judgments of the European Court of Human Rights are most commonly used in the decisions of the Russian Supreme Court. As fairly noted by Russian experts, the courts of the original jurisdiction and the courts of cassation not always understand and rely upon the judgments of the European Court of Human Rights.[2]

However, there are examples of successful application of the rules of the European Convention and references to the practice of the European Court of Human Rights by the courts of original jurisdiction.

S.T. Maryin case

In its decision of 24 March 2010, the Oktayabrsky District Court of Saransk, the Republic of Mordovia, found that the head of Correction Facility No. 18 of the Administration of the Federal Service for Corrections of the Russian Federation in the Republic of Mordovia (hereinafter, CF No. 18) acted unlawfully by not allowing to a member of the public human rights organisation, S.T. Maryin, to visit the detainees. The court found that S.T. Maryin sought visitations solely to obtain powers of attorney for the application to the European Court of Human Rights. In doing so the court applied Article 34 of the Convention relying upon the practice of the European Court of Human Rights. In particular, the court referred to the position in the judgment of the European Court of Human Rights of 8 November 2007 in the case of Knyazev v. Russia: "Contracting Parties undertake not to hinder in any way the effective exercise of this right". The European Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the European Court without being subjected to any form of pressure from the authorities to withdraw or modify their (applicants') complaints. In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. Relying upon Article 34 of the Convention, rule 36 of the Rules of the European Court of Human Rights, clause 22 of the Explanatory Note for Persons Considering Lodging an Application with the European Court of Human Rights, the court found that "according to the international rules, at the stage of

2 T.V. Solov'eva, 'Legislation and judicial practice as practice influencing realization of decrees of the European Court of Human Rights', p. 2, www.consultant.ru.

lodging a complaint, the applicant has the right to be represented before the European Court of Human Rights by anyone, even by a person who is not an attorney or who has no specialisation in law. Therefore, the judge concluded, the head of the correction facility using his authorities and powers hindered the right to apply to the European Court of Human Rights by not allowing the applicant to visit the detainees.

The Commercial courts also refer to the judgments of the European Court of Human Rights when substantiating their decisions. These references are made mainly in the decisions in complaints about violation of the right to have a judicial decision enforced within a reasonable time. Examples are the decision of the Federal Commercial Court of the Volga Region dated 13 December 2012 in an application of municipal unitary enterprise Raizhilkombytgasstory, and decision N A19-13743/09 of the Federal Commercial Court of the East Siberian Region dated 31 August 2011 in an application of law firm Veritas.

Thus, by its decision dated 13 December 2012 in case N АФ06-4/2012(A12-14976/2010) the Federal Commercial Court of the Volga Region partially satisfied the claim of municipal unitary enterprise Raizhilkombytgasstroj for imposing a court fine on the municipal entity – Alekseevsky municipal district of the Volgograd region represented by the administration of the Alekseevsky municipal entity. In its decision the court referred to the judgment of the European Court of Human Rights dated 26.06.2008 in the case of Krasev v. Russia, pursuant to which where a judgment is against the State, it is the State, not the creditor, who must take the initiative of enforcing it. In addition, the court stated that as explained in the Judgment of the European Court of Human Rights dated 15.01.2009 in the case of Burdov v. Russia (N 2), the complexity of the domestic enforcement procedure or of the State budgetary system cannot relieve the State of its obligation under the Convention to guarantee to everyone the right to have a binding and enforceable judicial decision enforced within a reasonable time. Nor is it open to a State authority to cite the lack of funds or other resources as an excuse for not honouring a judgment debt.

Another category of complaints where references to the judgments of the European Court of Human Rights are used include the complaints to revive an expired limitation period for contesting the decisions of tax authorities. To support their decisions the commercial courts refer to the European Convention that prohibits the denial of justice and to the practice of the European Court of Human Rights not to admit unreasonable barriers to judicial protection (Order of the Federal Commercial Court of the East Siberian Region dated 6 February 2007 in case No. A19-18593/06-33-Ф02-223/07-C1, Federal Commercial Court of the Ural Region dated 27 February 2008 No. Ф09-854/08-C2, Order of the Federal Commercial Court of the Northwest Region dated 29 August 2008 in case No. A42-7020/2007).

EU member states are the most important trade partners of Russia. Russian courts refer to the EU customs and tax legislation, as well as to the standards and rules applied within the EU technical regulation system. According to a survey by P.A. Kalinichenko, there are over one hundred cases which have been determined by Russian courts of different levels and jurisdictions, including the higher courts of the Russian judicial system, in reliance upon EU law.[3]

In certain cases, the courts resolving double tax disputes between taxpayers and the tax authorities refer to the decisions of the European Court of Justice and foreign courts in cases involving the interpretation and application of the conventions on avoiding double taxation.

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?

As a rule, the courts make general references to the judgments of the European Court of Human Rights. They specify the date of the judgment, the case in which the judgment was delivered, and give a summary of the judgment. It is quite rare that Russian courts analyse the reasoning behind the judgments of the European Court of Human Rights.

5. Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?

Russian courts refer in their decisions to the decisions of the European Court of Human Rights. It is notable that the references to the rules of international treaties and to the decisions of the European Court of Human Rights are made mainly in the higher courts' decisions. It is not so common for the courts of original jurisdiction to refer to the rules of international treaties. Russian courts usually do not refer to decisions of foreign courts. It is not necessary in accordance with Russian law. Russia is not a member of the European Union and EU law is not a common legal base for the dialogue with courts of other European countries. The lack of translations of foreign decisions also creates a problem.

Conclusion

Based on the results of the analysis, the following key findings can be highlighted.

3 P.A. Kalinichenko, 'Legal regulation of the relations between Russia and the European Union'. Author's summary of the thesis for the degree of doctor of law. M.: 2011, p. 42, http://*eulaw.ru/files/.../autoreferat_kalinichenko.doc.*

Pursuant to the Constitution of the Russian Federation, the generally recognised principles and rules of international law and the international treaties of the Russian Federation form an integral part of its legal system. This provision of the Constitution has further evolved in the Russian legislation and court practice.

Pursuant to Russian legal doctrine reflected in the orders of the Plenum of the Russian Supreme Court and the Russian Constitutional Court, the rules of international treaties ratified by the Russian Federation shall prevail over the provisions of law. In the event of conflict, the rules of the international treaty shall apply. Interagency agreements shall prevail over the regulations of the relevant agency. Thus, there is a sufficient legal base in Russia for direct application of the rules of international law and regulation of the domestic relations.

The Russian courts directly apply the rules of international treaties effective for the Russian Federation. If any difficulties arise in determining the validity of a treaty, the courts may consult with the executive authorities; however the courts shall be independent and not bound by the position of the executive authorities when delivering the decisions. The courts shall independently determine whether a treaty or its certain rules have direct effect or not.

The Courts are independent in interpreting the generally recognised principles and rules of international law and international treaties. When interpreting international treaties, the courts shall be governed by the Vienna Convention on the Law of Treaties of 1969. In doing so, the courts shall also rely upon resolutions of international organisations. When interpreting the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Russian courts rely upon the practice of the European Court of Human Rights, including the cases not directly involving the Russian Federation, and the legal positions of the European Court of Human Rights.

Russian courts refer in their decisions to the rules of international treaties. These references are made where the rules of a treaty are applied directly, when interpreting the rules of Russian law and when substantiating the judgments. It is notable that the references to the rules of international treaties are made mainly in the higher courts' decisions. It is not common for the courts of original jurisdiction to refer to and take into account the rules of international treaties.

The decisions with references to the rules of international law comprise primarily the decisions in cases for the protection of human rights and fundamental freedoms. The Russian courts quite often apply the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. In accordance with Russian procedural law, judgments of the European Court of Human Rights in cases v. Russia are recognised

as new circumstances and may constitute the ground for a case review. The Russian courts make no references to the international treaties which are not effective for Russia.

Russia is not a member of the European Union. Accordingly, the judgments of the European Court have no material effect on the Russian court practice. However, Russian courts refer to the European Court's judgments, primarily in the decisions on tax and customs disputes. This is also the case for courts of other European countries. For the EU member states, foreign judgments can be taken into account when interpreting and applying the rules of EU law and the rules of domestic law adopted in accordance with EU law. References to foreign judgments can be found primarily in the decisions on double taxation disputes.