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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT REPORT ON CASE-LAW REGARDING THE SUPREMACY OF INTERNATIONAL HUMAN RIGHTS TREATIES

on the basis of comments by

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(Member, France)

I. Introduction :

1. By letter dated 16 June 2004, the Head of the Constitutional Commission of the Turkish Grand National Assembly, Prof Dr Burhan Kuzu, asked the Commission to report on the case-law of countries which have adopted the supremacy of treaties on fundamental human rights and freedoms.

2. The Commission appointed Mr Dutheillet de Lamothe, member, as rapporteur. The present report, which was drawn up on the basis of his comments, was adopted by the Commission at its …Plenary Session (Venice, …).

II. Background:

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

4. This report is purely descriptive and, in accordance with Article 90 of the Turkish Constitution, deals only with case-law concerning the supremacy of international human rights treaties over national legislation, not constitutions.

III. Review of the relevant constitutional provisions:

5. Before looking at the case-law, it is necessary to look at the constitutional provisions on the status of international treaties, in general or regarding human rights in particular, where such provisions exist, in the domestic legal systems of different European countries.

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

7. However, a large number of European countries have constitutional provisions which expressly give priority to international treaties over conflicting national law. These countries include Albania (Article 122.2)[1], Armenia (Article 6), Azerbaijan (Article 151, although international treaties do not take precedence over conflicting constitutional provisions and acts accepted by way of referendum), Bulgaria (Article 5), Croatia (Article 134), Czech Republic (Article 10), Estonia (Article 123, although Estonia may not conclude international treaties which are in conflict with its constitution), France (Article 55), Georgia (Article 6, as long as the

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

international treaties do not contradict the constitution), Germany (Article 25), Greece (Article 28), the Netherlands (Article 94), Poland (Article 91), the Russian Federation (Article 15) and the Former Yugoslav Republic of Macedonia (Article 118).

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

9. The Constitution of Austria provides that the generally recognised rules of international law are regarded as integral parts of federal law (Article 9). The Constitution of Portugal states that the rules and principles of general or customary international law are an integral part of Portuguese law (Article 8). The Constitutions of Lithuania (Article 138) and Ukraine (Article 9) provide that international treaties which are ratified by the parliament are part of the legal system.

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

11. Some countries do not just accept the supremacy of international treaties, their constitutions give priority to the **"general rules" or "generally recognised rules" of international law** (Austria, Germany, Greece, Portugal and the Russian Federation). The German Constitution provides that the general rules of international law shall be **directly applicable**.

12. The situation in other European countries varies.

13. The constitutions of some countries provide that their national legislation shall comply with generally accepted principles of international law. This is the case in Georgia (Article 6), Hungary (Article 7), Italy (Article 10) and Slovenia (Article 8). The Constitution of the Swiss Confederation provides that the Confederation and the Cantons shall respect international law (Article 5), as must the Federal Supreme Court and other authorities applying the law (Article 190), and states that the mandatory provisions of international law may not be violated in a total or partial revision of the constitution (Articles 193 and 194). The Belgian Constitution provides that federal authorities may temporarily substitute themselves for councils and communities "in order to ensure respect of international and supranational obligations" (Article 169). The Latvian Constitution provides that the State shall "recognize and protect fundamental human rights in accordance with the constitution, laws and international agreements binding upon Latvia" (Article 89).

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

15. Ireland "accepts the generally recognised principles of international law as its rule of conduct in its relations with other states" (Article 29) but makes any obligation under international treaties subject to acceptance by the parliament. Finland also requires that any international obligation should be brought into force by an act of parliament or presidential

decree and states that "an international obligation shall not endanger the democratic foundations of the Constitution" (Section 94), although it also provides that the Constitutional Law Committee shall issue statements on the relation of legislative proposals and other matters to international human rights treaties (Section 74).

16. The remaining constitutions in Europe do not have provisions which specifically address the question of the position of international treaties in the domestic legal system.

IV. Review of the relevant case-law of courts with constitutional jurisdiction:

17. In accordance with the request from the Turkish authorities, emphasis is placed on the case-law of those countries which have adopted the supremacy of international human rights treaties.

18. The following extracts are from decision summaries taken from the Venice Commission's CODICES database. It should be made clear that the decisions which appear in the CODICES database represent a selection made by participating courts as being decisions of particular importance. CODICES is not, therefore, an exhaustive source of information. For this reason, additional information has been included where this is necessary to portray an accurate picture of the position existing in the different countries.

19. The decisions are listed by country. They are quoted according to their CODICES identification. The date of decision and the jurisdiction which delivered the decision are also indicated. The full summaries can be accessed through the CODICES database.

20. Only decisions which deal with the influence or position of human rights treaties within the domestic legal system have been included in this report. Decisions where courts refer to or straightforwardly implement provisions of human rights treaties have not been included.

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

Albania:

ALB-2002-3-007; decision delivered on 23.09.2002 by the Constitutional Court

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

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

24. On the trial of an individual by the International Criminal Court for acts for which he or she has previously been tried by a domestic court, the Court found that the Rome Statute did not run

counter to the principle of "non bis in idem", which is guaranteed by the Constitution. This was because the Constitution provided for the retrial of a case by a higher court in accordance with the law. This role will be played by the International Criminal Court, which thereby supplements the role of domestic courts when the domestic legal authorities have failed to conduct genuine proceedings. According to the Constitutional Court, such a regulation serves the purpose for which the International Criminal Court was established."

Armenia:

ARM-2002-1-001; decision delivered on 22.02.2002 by the Constitutional Court

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

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

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

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

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

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

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

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

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

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

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

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

Austria:

AUT-1987-C-001; decision delivered on 14.10.1987 by the Constitutional Court

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

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

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

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

Belgium:

BEL-1993-2-029; decision delivered on 15.07.1993 by the Court of Arbitration

41. “Articles 14 and 20 of the Constitution, guaranteeing freedom of expression and association, do not preclude the possible imposition of certain restrictions on civil servants in respect of those freedoms, but such restrictions must meet the requirements set out in Articles 10.2 and 11.2 ECHR and in Articles 19.3 and 22.2 of the International Covenant on Civil and Political Rights.”

Czech Republic:

CZE-1999-1-002; decision delivered on 26.01.1999 by the Constitutional Court

42. “In view of the fact that the Civil Procedure Code deprives courts, in proceedings on electoral complaints in local elections, of the power to hold an oral hearing, the court is obliged to decide itself on the conduct of the proceedings and can decide without the participation of the parties. Naturally, it could even go beyond the bounds set by statute and decide on the basis of Article 6.1 ECHR (requiring a fair, public hearing) which, under Article 10 of the Constitution, is directly binding and takes precedence over statutes. However, as the objective conditions which should guarantee the proper conduct of an election should be given more weight than particular individual rights, it was not necessary for the court to do so, especially in view of the fact that the oral hearing before the Constitutional Court fulfils the requirements of Article 6 ECHR.”

CZE-1997-3-009; decision delivered on 14.10.1997 by the Constitutional Court

43. “In addition to reaffirming its position expressed on three previous occasions, the Constitutional Court pointed out that, since the non bis in idem principle is also laid down in Article 4.1 Protocol 7 ECHR, it is directly binding and overrides statutes, so that the ordinary courts should have applied it directly.”

France:

FRA-1975-C-001; decision delivered on 14.01.1975 by the Constitutional Council

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

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

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

Georgia:

GEO-1999-1-001; decision delivered on 15.07.1998 by the Constitutional Court

47. “In addition, the complainants asserted that the disputed normative acts contradict the Act of Restoration of National Independence which recognises the prevailing force of international law over domestic law on the territory of Georgia. The Universal Declaration of Human Rights is one such international act, Article 17 of which ensures the right to own property alone and in association with others.

48. The Constitutional Court held that the disputed acts…. violate the complainants' property rights. …. The universal right to property and its inheritance, acquisition and alienation shall not be abrogated."

Hungary:

HUN-1996-3-008; decision delivered on 04.09.1996 by the Constitutional Court

49. "Article 7.1 of the Constitution declares that the legal system of the Republic of Hungary accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law.

50. Article 29.3 of the Paris Peace Treaty involves the obligation of the Hungarian Government to compensate those Hungarians whose property was taken unlawfully and without compensation by enacting the needed regulation into internal law. The Hungarian Government still had not complied with this obligation, therefore in order to redress this omission, the Constitutional Court called upon the Parliament to meet its legislative duty before the end of June 1997."

HUN-1993-3-015; decision delivered on 13.10.1993 by the Constitutional Court

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

Italy:

ITA-2001-1-003; decision delivered on 19.03.2001 by the Constitutional Court

52. "The governmental power to establish special arrangements for enforcing the sentence of a person transferred to an administering state (enforcing the sentence) under the Convention on the Transfer of Sentenced Persons must comply with the general system established by the Convention. This system gives precedence to the administering state's legal system, and in particular to its constitutional principles and rules.

53. … [T]he article of the law implementing the Convention that provides for the possibility of concluding an agreement between the sentencing and administering states, preventing the sentenced person from enjoying the advantages provided for by the system in force in the administering state must therefore be declared unconstitutional.

54. It was argued on these grounds that the law implementing the Convention on the Transfer of Sentenced Persons violated the constitutional principles prohibiting penalties involving treatment contrary to human dignity (Article 27.3 of the Constitution) and protecting health as a basic right of the individual (Article 32.1 of the Constitution).

55. The incorporation into the Italian system of both generally recognised standards of international law and convention-based international standards has limits which are aimed at safeguarding its identity and which therefore mainly derive from the Constitution.

56. In some cases the Constitution itself provides a specific foundation for the incorporation of international law, assigning a particular legal value to the rules introduced into the Italian system. This is the case of Article 10.1 of the Constitution, which lays down that the Italian system "shall conform" with the generally recognised principles of international law, and Article 11 of the Constitution, which mentions the founding treaties and standards of international organisations ensuring "peace and justice between nations". However, in both cases the incorporation of such standards into the domestic legal system is subject to respect for the "fundamental principles of the constitutional system" and the "fundamental human rights".

57. On the other hand, where there is no specific constitutional basis, convention-based international legal standards take on the legal force of the domestic implementing instrument in the national system. Consequently, when the Court is asked to consider the constitutionality of the law introducing the treaty into the domestic system, it will do so as it would with any other piece of domestic legislation."

Lithuania:

LTU-1995-3-008; decision delivered on 17.10.1995 by the Constitutional Court

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

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

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

Poland:

POL-1995-3-016; decision delivered on 21.11.1995 by the Constitutional Tribunal

61. "Unreasonable limitations on the freedom to be a member of trade unions are not allowed in a democratic State ruled by law, especially when they infringe international treaties ratified by the Republic of Poland.

62. Moreover, the new law, as far as the said prohibition was concerned, was contrary to ILO Convention no. 151, which provides for the acceptable limitations on the freedom to be a member of a trade union and to Article 11 ECHR and Article 17 ECHR."

POL-1994-3-020; decision delivered on 23.09.2002 by the Constitutional Tribunal

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

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

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

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

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

Romania:

ROM-2001-2-005; decision delivered on 03.07.2001 by the Constitutional Court

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

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

70. In considering the objection, the Court found that although the provisions of Section 6.a of Act no. 188/1999 were acknowledged to be fully in keeping with the terms of Article 16.3 of the Constitution, the objecting party had requested a review under Article 20 of the Constitution

concerning the primacy of international human rights provisions in the event of conflict with domestic law.

71. In the light of Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, the Court found that the right to work established by Article 38.1 of the Constitution could not be restrictively interpreted as the right of entry to either a regular civil service post or a similar post. Exercise of the right to work may be subject to conditions (education, age, etc) which are not to be construed as restricting the right to work. In the case of the civil service, there are other specific requirements besides these conditions.

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

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

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

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

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

ROM-1994-3-004; decision delivered on 15.07.1994 by the Constitutional Court

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

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

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

ROM-1993-R-001; decision delivered on 27.04.1993 by the Constitutional Court

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

Switzerland:

SUI-2003-2-006; decision delivered on 17.01.2003 by the Federal Court

81. "In short, in refusing family reunification, the Administrative Court had committed no breach of federal, constitutional or treaty law."

SUI-1999-C-001; decision delivered on 23.03.1999 by the Federal Court

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

SUI-1999-2-006; decision delivered on 26.07.1999 by the Federal Court

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

…

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

85. In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed

with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision."

SUI-1997-3-008; decision delivered on 20.10.1997 by the Federal Court

86. "Under Article 139.a OJ, an application for review of a Federal Court judgment is admissible where the European Court of Human Rights or the Council of Europe Committee of Ministers has upheld an individual complaint of breach of the European Convention on Human Rights or its protocols and compensation is obtainable only by means of review….

87. On the substance of the application the Federal Court found some inconsistency between Article 50 ECHR and Article 139.a OJ. Under Article 50 ECHR award of just satisfaction could be contemplated only where internal law allowed only partial reparation for the consequences of the violation finding; the Federal Judicature Act, on the other hand, provided for review only as a subsidiary remedy. Which rule took precedence depended on the circumstances of the particular case."

SUI-1996-2-005; decision delivered on 16.04.1996 by the Federal Court

88. "The Federal Court … considered that in accordance with the rules of international law, the exchange of letters between India and Switzerland constituted an international treaty, irrespective of what it was actually called. Accordingly, it took precedence over domestic law relating to judicial co-operation. This did not however deprive Switzerland of the right to agree to co-operation having due regard to any broader regulations contained in domestic legislation.

89. A request for co-operation could, however, only be approved if the procedure abroad conformed to the principles of procedure generally accepted in democratic States and defined in particular by the European Convention on Human Rights. India was not a party to this Convention but had acceded to the International Covenant on Civil and Political Rights of 16 December 1966. On an international level, this Covenant was the counterpart of the European Convention on Human Rights; in Article 14 it lists the guarantees contained in Article 6 ECHR, even going beyond this provision, since, for example, paragraph 5 of Article 14 corresponds to Article 2 Protocol 7 ECHR. It could therefore be presumed that the Contracting Party would honour its international commitments."

SUI-1991-S-003; decision delivered on 15.11.1991 by the Federal Court

90. "According to the Federal Constitution, the Federal Court is required to apply the laws and agreements passed by the Federal Parliament. The European Convention on Human Rights is part and parcel of Swiss law, the Federal Parliament having approved the accession of Switzerland to the Convention. The Federal Court, like any other authority, is thus bound by the Convention. It ranks higher than a mere federal law. International public law (Vienna Convention on the Law of Treaties, 23 May 1969, to which Switzerland is a party) expressly provides that international treaty law is to prevail over domestic law. The Federal Constitution does not preclude the Federal Court from inquiring as to whether a federal law is compatible with the Convention; it merely precludes repealing or amending it; on the other hand, it may

refrain from applying it in a specific case where to do so would be contrary to international law and would thus render Switzerland liable to a conviction for contravening that law. In examining whether a provision of federal law is in accordance with the European Convention on Human Rights, the Federal Court must first of all ascertain whether it is possible to interpret such a provision as being in accordance with the Convention."

SUI-1991-C-002; decision delivered on 15.11.1991 by the Federal Court

91. "According to the Federal Constitution, the Federal Court shall apply federal legislation and treaties approved by the Federal Assembly. The European Convention on Human Rights is also part of Swiss law, since the Federal Assembly has approved Swiss accession to this treaty. Like all other authorities, the Federal Court is thus bound by this Convention.

92. The Convention has a higher status than a simple federal law. Under public international law (Vienna Convention on the Law of Treaties of 23 May 1969, to which Switzerland is a party), international law in conventions takes precedence over domestic law. The Federal Constitution does not prohibit the Federal Court from examining the compatibility of federal legislation with the Convention, it only prohibits it from annulling or modifying such legislation. On the other hand, it may refrain from applying it in a particular case, if this infringes international law and thus exposes Switzerland to a finding that it has violated the Convention. In deciding whether a provision of Swiss federal law is compatible with the European Convention on Human Rights the Federal Court must first establish whether such a provision can be interpreted in a way that is compatible with the Convention."

SUI-1989-C-001; decision delivered on 22.03.1989 by the Federal Court

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

Ukraine:

UKR-2001-C-002; decision delivered on 11.07.2001 by the Constitutional Court

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

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

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

UKR-2001-2-006; decision delivered on 11.07.2001 by the Constitutional Court

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

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

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