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ПРАВНИ ФАКУЛТЕТ У НОВОМ САДУ



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ÁLLAM- ÉS JOGTUDOMÁNYI KAR

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Европске уније**

**A szerb és a magyar jog harmonizációja az  
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**Harmonisation of Serbian and Hungarian Law  
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ХАРМОНИЗАЦИЈА СРПСКОГ И МАЂАРСКОГ ПРАВА СА ПРАВОМ ЕВРОПСКЕ УНИЈЕ

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## **International Law in the Practice of the Hungarian Constitutional Court<sup>1</sup>**

**Abstract:** *The paper aims to present the first phase of a research that concerns the role of international law in the practice of domestic courts as it evolves the practice of the Constitutional Court. The application of international legal instruments has two directions; (1) when international law is subject to examination due to its competences; and (2) when international law is an instrument of interpretation. The paper presents comprehensive charts to both of these categories and thus gives an overview of the role of international law in the practice of the Hungarian Constitutional Court.*

According to the Fundamental Law/Constitution<sup>2</sup> of Hungary the State “shall ensure that Hungarian law be in conformity with international law.”<sup>3</sup>

The Constitutional Court is the principal organ for the protection of the Fundamental Law thus it has an important role in protecting democratic State governed by the rule of law, constitutional order and the rights guaranteed in the Fundamental Law and in safeguarding the inner coherence of the legal system. It also means that the Constitutional Court has fundamental role in ensuring that international obligations assumed by Hungary prevail in domestic law and legal practice. To achieve this goal the Constitutional Court competence and practice can be divided into two categories. Before further discussion of the topic, it has

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<sup>1</sup> Writing of the present article is supported by OTKA 101463K project.

<sup>2</sup> In 2011 Hungary has adopted a new constitution. The *Fundamental Law* entered into force on 1st January 2012 [hereinafter: Fundamental Law]. It replaced Act of XX on the Constitution of the Republic of Hungary [hereinafter: Constitution]. The new rules of procedures of the Constitutional Court were issued by Act CLI of 2011 on the Constitutional Court.

<sup>3</sup> Article Q (2) of the Fundamental Law of Hungary; Article 7 (1) of the Constitution.

to be noted that the law of the European Union is not international law in the practice of the Constitutional Court.<sup>4</sup>

This paper is about the role of international law and the practice of the Constitutional Court since its establishment in 1990 until the end of 2011 which encompasses 4407 decisions. The main question of this presentation is not the place of international law in the Hungarian legal system but the appearance and usage of these norms in the practice of the Constitutional Court. Concerning this question, two problems shall be analyzed: the one when *international law is subject to examination due to its competences*; and the other one when *international law is an instrument of interpretation*.

## **1. International law and the competence of the Constitutional Court**

This category aims to define those competences of the Constitutional Court which are related to international legal obligations. The first and most relevant of them Constitutional Court is the examination of conflicts with treaties.

### *1.1. Examination of conflicts with treaties<sup>5</sup>*

Concerning treaties, Hungary's legal system is dualist, so treaties need to be promulgated in the form of a domestic legal act to have legal effects.<sup>6</sup> Sometimes this legal act promulgating a treaty is not in conformity with domestic law and it becomes clear only in the practice. In such cases the Constitutional Court deals the conflict, it annuls in whole or in part the law or contrary to the international treaty, or it invites the legislative organ which concluded the international treaty to resolve the conflict. The Constitutional

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<sup>4</sup> According to Decision 72/2006 of the Constitutional Court the law of the Union is part of the Hungarian domestic law. The Court defines EU law against international law for the purposes of its jurisprudence. But how to deal with the international legal rules which are at the same time part of the EU law? *See*, Blutman, László: Milyen mértékben nemzetközi jog az Európai Unió joga a magyar alkotmányos gyakorlatban? [To What Extent is the Law of the European Union International Law within the Hungarian Constitutional Practice?] Kovács, Péter (ed.): *International Law – a quiet strength / Le droit international, une force tranquille*. (Miscellanea in memoriam Géza Herczegh) Budapest: Pázmány Press, 2011. p. 285-298.

<sup>5</sup> The Constitutional Court examines laws or other legal means of state administration for conflicts with international treaties ex officio or upon the petition of the organs or persons specified in Article 21.

<sup>6</sup> *See*, 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*. (ed.: András Jakab, Péter Takács and Allan F. Tatham) Kluwer Law International, Alphen aan den Rijn, 2007. 455-471.

Court shall examine legal regulations on request or *ex officio* in the course of any of its proceedings.<sup>7</sup>

This competence creates further possibility to establish the coherence of Hungarian law and international legal orders, especially because the competence can also be performed *ex officio*. According to Decision 4/1997 (I. 22.) of the Constitutional Court, if any provision of a treaty were found unconstitutional by the Constitutional Court, it would establish the unconstitutionality of the domestic statute promulgating thereof. The decision declaring unconstitutionality has no effect on the obligations assumed by the Republic of Hungary under international law. The legislator must harmonize the obligations assumed under international law and domestic law, and pending this process, the Constitutional Court suspends its proceedings concerning the determination of the date of nullification for a reasonable time.<sup>8</sup> According to Decision 53/1993 (X. 13.), the second sentence of Article 7 (1) of the Constitution – *the harmony between international obligations and domestic law* – applies to every ‘*assumed*’ international obligation, including the generally recognized rules of international law and the contents of international treaties as well. It is necessary to harmonize obligations assumed under international law with the entire domestic law, with particular regard to the provisions of the Constitution. In assessing the above, it is necessary for enforcing Article 7 of the Constitution to examine whether or not the obligations assumed under international law are in harmony with the Constitution.<sup>9</sup>

The Constitutional Court had 4407 decisions between 1<sup>st</sup> January, 1990 and 31<sup>st</sup> December, 2011. The examination happened 17 times and those treaties can be seen on the chart below which caused conformity problems and it can also be observed that most of the conflicts concern fundamental rights issues.

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<sup>7</sup> If the Constitutional Court establishes that a law at a higher level than the law promulgating the international treaty conflicts with the international treaty, it invites the legislative organ which concluded the international treaty to resolve the conflict, setting a deadline based on the consideration of circumstances. Act XXXII of 1989 on the Constitutional Court [hereinafter: Act on the Constitutional Court (1989)] Article 44-48; Since 1<sup>st</sup> January, 2012 the proceedings may be requested by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor 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. See, Act CLI. of 2011 on the Constitutional Court [hereinafter: Act on the Constitutional Court (2011)], Section 32 (1).

<sup>8</sup> Constitutional Court Decision 4/1997 (I. 22.) ABH [1997] 41.

<sup>9</sup> See Constitutional Court Decisions 53/1993 (X. 13.) ABH [1993] 327. and 32/2008. (III. 12.) ABH [2008] VI. 2.

<b>Chart 1 - Examination of conflicts with treaties in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>			
<b>International treaties</b>	<b>No. of cases</b>	<b>Conflict</b>	<b>No conflict</b>
International Covenant on Civil and Political Rights (New York, 1966)	4	–	4
Treaty Peace of Paris (Paris, 1947)	3	1	2
Charter of fundamental rights of the European Union (referred to as a part of the Lisbon Treaty, 2007)	2	2	–
International Covenant on Economic, Social and Cultural Rights (New York, 1966)	2	–	2
Agreement between the Holy See and the Republic of Hungary on the financing of public service and other particular religious activities... (Vatican City, 1997)	2	1	1
Convention on the Rights of the Child (New York, 1989)	2	1	1
European Convention on Human Rights (Rome, 1950)	2	1	1
„Geneva Conventions” (Geneva, 1949)	1	1	–
Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988)	1	1	–
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 1948)	1	–	1
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 1950)	1	–	1
Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979)	1	–	1
UNESCO Convention against Discrimination in Education (Paris, 1960)	1	–	1
European Social Charte (Torino, 1961)	1	–	1

### *1.2. Ex ante examination of unconstitutionality*

Before confirming an international treaty, the Parliament, the President of the Republic and the Government may request the examination of the constitutionality of provisions of the international treaty thought to be of concern. If the Constitutional Court establishes the unconstitutionality of a provision thought to be of concern in the international treaty, the international treaty may not be confirmed before the organ or person concluding the international treaty eliminates such unconstitutionality.<sup>10</sup>

There were only 4 cases concerning *ex ante* review of and three of them raised problems related to retroactivity. Only the case of *Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity* (New York, 1968) and the *nullum crimen sine lege* principle prevailed in domestic law (the Constitution and the Criminal Code) was declared to be in confor-

<sup>10</sup> Art. 36 of the Act on the Constitution Court (1989) ; Section 23. (4) of the Act on the Constitution Court (2011)

mity with each other as the principle of procedure and punishment of war crimes and crimes against humanity belongs to *ius cogens* norm of international law. *Ius cogens* is declared to be superior of the constitution, and is transformed into domestic law by virtue of the Constitutional as general principle of international law, the possibility to derogate the *nullum crimen sine lege* had already been established in domestic law, the treaty declaring the same provision is thus not in conflict with the Constitution.<sup>11</sup>

Concerning the treaties which gave base to an *ex ante* norm control, see the *Chart 2* below.

<b>Chart 2 - Preliminary norm control and international obligations in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>	
<b>International treaty</b>	<b>Conflict/no conflict</b>
Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (Vienna, 2006)	C
Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara, 1961)	C
Protocol Relating to an Amendment to the Convention on International Civil Aviation (Montreal, 1975)	C
Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. (New York, 1968)	–

### *1.3. Ex post facto examination of unconstitutionality*

The petition initiating the *ex post* establishment of unconstitutionality shall request the partial or total annulment of the law or the other legal mean of state administration. As regards international norms, it can happen that a domestic legal norm conflicts with international obligations and this becomes clear only when norm are applied in practice.<sup>12</sup> In such cases the legislation promulgating the international obligation (the treaty itself) is unconstitutional as it conflicts with Article 7 (1) of the Constitution declaring that domestic law shall be in conformity with international law. During the supervised period, it happened 9 times that the Constitutional Court pursued this kind of procedure and in 2 cases it declared the unconstitutionality. *Chart 3* shows those treaties which were promulgated in an act that was the object of the procedure of *ex post facto* examination.

<sup>11</sup> A typical example: Constitutional Court Decision 54/2004. (XII. 13.) ABH [2004] 690-776.

<sup>12</sup> Article 37 of the Act on the Constitution Court (1989); of the Act on the Constitution Court (2011).

<b>Chart 3 - Treaties related to <i>ex post facto</i> examination of unconstitutionality in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 2007)
North Atlantic Treaty (Washington, 1949)
Convention on the Civil Aspects of International Child Abduction (The Hague, 1980)
Treaty on the Bases of Good Neighbourhood and Co-operation between the Republic of Hungary and The Ukraine (Kiev 1991)
Treaty Between the Hungarian Republic and the Slovak Republic on Good-Neighbor Relations and Friendly Cooperation (Paris, 1995)
Treaty between the Republic of Hungary and Romania on Understanding, Cooperation and Good Neighborhood (Temesvár, 1996)
Charter of the International Monetary Fund (Bretton Woods, 1944)
Charter of the International Bank for Reconstruction and Development (Bretton Woods, 1944)
Agreement Free Trade Between The European Communities And Their Member States And The Republic Of Hungary (Brussels, 1991)
Protocol to the Convention on the Contract for the International Carriage of Goods by Road (Genf, 1978)
Agreement of the Government of the Republic of Hungary and the Government of the Republic of Croatia regarding cooperation and mutual assistance and customs matters (Zágráb, 1999)
Agreement between the Government of the Hungarian People's Republic and the Government of the US-SR on the Legal Status of Soviet Forces ... (Budapest, 1957)

#### *1.4. Unconstitutionality by omission*

If the Constitutional Court establishes *ex officio* or upon petition that a legislative organ failed to fulfill its legislative tasks issuing from its lawful authority, thereby bringing about unconstitutionality, it instructs the organ which committed the omission, setting a deadline, to fulfill its task. The organ which committed the omission shall fulfill the task by deadline.<sup>13</sup>

Sometimes this forgotten legislative task issues from international obligation and rarely happens that the international obligation reveals two procedures in the same time: the examination of conflict with treaty and the unconstitutionally by omission as well in connection with the same norm or with different international sources. In many of these cases the petitioner ask an alternative examination of norms that is if there is no conflict between international and domestic law, the Constitutional Court shall examine whether the legislator fulfilled its task issuing from the treaty in question.

During the period of the research, there were only 6 cases in which the Constitutional Court dealt with the question of unconstitutionality by omission related to international obligations. One part of these cases declared the lack of proper legislation concerning the compensation for expropriated property as the

<sup>13</sup> Article 49 of the Act on the Constitutional Court (1989); Section 46 of the Act on the Constitutional Court (2011).

State had unfulfilled obligations issuing from the 1946 treaty peace of Paris and from bilateral treaties with a neighbouring state concluded after the border modifications of the World War II.<sup>14</sup>

Other decisions declared unconstitutionality because of the lack of proper transformation as sometimes charts and annexes belonging to a treaty were not included in the domestic legislation;<sup>15</sup> or for example the right to change of name was altered due to a Constitutional Court decision which pointed out that the Hungarian legislation had not followed the international standards set out in treaties signed and ratified by the Hungarian State.<sup>16</sup>

*Chart 4* shows those treaties which revealed the procedure of unconstitutionality by omission in the examined period.

<b>Chart 4 - International obligations and unconstitutionality by omission in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>	
<b>Treaties</b>	<b>Omission/No omission</b>
Vienna Convention on Diplomatic Relations (Vienna, 1969)	No omission
Treaty Peace of Paris (Paris, 1947)	Omission
Protocol between the Government of the Hungarian People's Republic and the Czechoslovak Socialist Republic on the real estate related assets (?; 1964)	Omission
European Social Charter (Torino, 1961)	No omission
International Covenant on Civil and Political Rights (New York, 1966)	No omission
European Convention on Human Rights (Rome, 1950) and its seventh protocol (Strasbourg, 1984)	Omission

### *1.5. Review of resolutions of the National Election Commission*

Resolutions related to ordering referendum are issued by the National Election Commission (NEC) and the objections raised against them were supervised by the Constitutional Court until 31<sup>st</sup> December, 2011. Now it is the competence of the Supreme Court.<sup>17</sup>

National referendum may not be held on obligations set forth in valid international treaties and on the contents of laws prescribing such obligations.<sup>18</sup> Among the 4407 decisions of the Constitutional Court, there were 475 cases in

<sup>14</sup> See, Constitutional Court Decisions 21/1990. (X. 4.) ABH [1990] 73-79.; 15 /1993. (III. 12.) ABH [1993] 112-142.; 16/1993. (III. 12.) ABH [1993] 143-156.

<sup>15</sup> See, Constitutional Court Decision 54/2004. (XII. 13.) ABH [2004] 690-776.

<sup>16</sup> See, Constitutional Court Decision 58/2001. (XII. 7.) ABH [2001] 558.

<sup>17</sup> Article 130. § (1)-(2). Act C of 1997 on the rules of procedure of election.

<sup>18</sup> According to Article 28/D of the Constitution, at least 50,000 voting citizens are required for a *national popular initiative*. A national popular initiative may be for the purpose of forcing the Parliament to place a subject under its jurisdiction on the agenda. There is no circle of prohibited subjects as the result of the initiative does not create a legislative obligation for the Parliament – in contrary to the referendum. See Constitutional Court Decision 10/2006 (II. 28.) ABH [2006] 222-223.



which the object of the procedure was a resolution of the NEC and among them, 31 raised the question of international obligations. In 18 of these cases the conflict was declared; that is the question to be posted on referendum touched the field of international obligations.

*Chart 5* shows those sources of international obligations which caused the most problem in the field of ordering referendum.

<b>Chart 5 - Review of resolutions of the National Election Commission and international obligations in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>	
<b>Sources of international obligations</b>	<b>No. of cases</b>
Accession Treaty (Luxembourg, 2003)	4
Agreement Free Trade Between The European Communities And Their Member States And The Republic Of Hungary (Brussels, 1991)	4
EU Convention (2004) (not ratified, not in force)	3
„bilateral investment treaties”	2
European Convention on Human Rights (Rome, 1950)	2
European Convention on Nationality (Strasbourg, 1997)	2
North Atlantic Treaty (Washington, 1949)	2
OECD Code Of Liberalisation of Capital Movements (not treaty)	2
Treaty Peace of Trianon (Trianon, 1920)	2
Agreement on mutual care for the graves and memorials for Hungarian and Russian (Soviet) soldiers who fell in the other country’s territory (Moscow, 1995)	1
ILO Holidays with Pay Convention (Geneva, 1970)	1
International Covenant on Civil and Political Rights (New York, 1966)	1
Rome Statute of International Criminal Court (Rome, 1998)	1
Treaty establishing the European Economic Community (Rome, 1957)	1
Treaty establishing the European Union (Maastricht, 1992)	1
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 2007)	1
Treaty Peace of Paris (Paris, 1947)	1
UNESCO Convention against Discrimination in Education (Paris, 1960)	1
Vienna Convention on the Law of Treaties (Vienna, 1969)	1

## **2. International law as an instrument of interpretation in the practice of the Constitutional Court**

As Hungary shall ensure that Hungarian law be in conformity with international law in many cases the Constitutional Court relies on international legal instruments to interpret domestic law to demonstrate the harmony between domestic (Hungarian) law and international law. According to Decision 53/1993 (X. 13.) of the Constitutional Court, the second sentence of Article 7 (1) of the Constitution – the harmony between international obligations and domestic law – applies to every international obligation “assumed”, including the generally recognized rules of international law and the contents of international treaties as well.<sup>19</sup>

<sup>19</sup> Constitutional Court Decisions 53/1993 (X. 13.) ABH [1993] 327. and 30/1998 (VI. 25.) ABH [1998] VI. 3 *See* Molnár: *op.cit.* 464.

The legal instruments that the Constitutional Court uses in its practice are mainly the classical sources of international law: treaties as written sources of international law. The most frequently invoked treaties can be seen on *Chart 6* below.

<b>Chart 6 - The most frequently invoked treaties in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>		
<b>Treaty</b>	<b>No. of citation in the reasoning of the judgment</b>	<b>No. of citation in minority opinions</b>
European Convention on Human Rights (Rome, 1950)	117	36
International Covenant on Civil and Political Rights (New York, 1966)	65	12
Vienna Convention on the Law of Treaties (Vienna, 1969)	16	3
Universal Declaration on Human Rights (New York, 1948)	10	1
Convention on the Rights of the Child (New York, 1989)	8	1
Charter of the United Nations (San Francisco, 1945)	7	4
International Covenant on Economic, Social and Cultural Rights (New York, 1966)	6	5
Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988)	5	–
EU Convention (Rome, 2004) (unratified)	5	3
Charter of the European Union (Nizza, 2000)	4	2
Framework Convention for the Protection of national Minorities (Strasbourg, 1995)	4	3
Convention for the Protection of Human Rights and Dignity of the Human Being with Regards to the Application of Biology and Medicine (Oviedo, 1997)	4	4
European Social Charter (Torino, 1991)	4	5
Accession Treaty (Brussels, 2003)	4	–
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973)	3	–
International Convention on the Elimination of all Forms of Racial Discrimination (Strasbourg, 1965)	3	2
Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. (New York, 1968)	3	–

However, *ius cogens* and customary international law as unwritten sources are invoked in a few number of cases but this kind of norms are just declared to be such and the obligation embodied in them is cited as the codified form, that is the convention or the treaty provision is relied upon.<sup>20</sup>

Apart from these sources, decisions of international organizations appear as well in the reasoning of the Constitutional Court. There are two categories of decisions of international organizations: binding and non - binding ones. As regards

<sup>20</sup> See for example Constitutional Court Decision 53/1993. (X. 13.) ABH [1993] 335-336.

binding resolutions of international organizations, the typical example is the Security Council as it is entitled to elaborate binding resolutions containing sanctions and coercive measures. The Constitutional Court does not rely on this kind of binding decisions; it invoked two Security Council resolutions in its whole practice and only with the purpose of example.<sup>21</sup> Concerning non-binding decisions of international organization, it is the Council of Europe which is the main source.

Apart from the amount of cited international legal instruments, their role in the reasoning is the other aspect which needs to be clarified a little bit more.

Concerning the role and effect of international legal instruments on the reasoning of the Constitutional Court, 3 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 International Covenant on Civil and Political Rights 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 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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<sup>21</sup> See Constitutional Court Decision 53/1993 (X. 13.) ABH [1993] 329.

<sup>22</sup> 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.

<sup>23</sup> See 1968 New York Convention, Article III-IV.

<sup>24</sup> Constitutional Court Decision 53/1993. (X. 13.) ABH [1993] 323-338.

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 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 based on the relevant articles of the International Covenant on Civil and Political Rights,<sup>25</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter: ECHR] with its Protocol no. 6. dealing with the right to life.<sup>26</sup> 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.<sup>27</sup> Usually, if the decisions of international organizations and 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.<sup>28</sup>

International law has *supportive effect* in those cases whereby the reference to international legal instruments is to strengthen a decision based on domestic

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<sup>25</sup> 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.

<sup>26</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. 4 November 1950, Rome, 213 U.N.T.S. 222. [hereinafter: ECHR] 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.

<sup>27</sup> Constitutional Court Decision 23/1990. (X.31.) ABH [1990] 94-145.

<sup>28</sup> 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.

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 thus generally they are invoked in the company of treaty based provision and ECHR 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.<sup>29</sup>

As it is seen from the charts attached to the article, the ECHR is the most frequently cited convention, many decisions of the European Court of Human Rights in the reasoning of Constitutional Court decisions and concerning decisions of international organizations; it is the Council of Europe which is at the top of the citation pyramid. This remark confirms the fact that when the Constitutional Court applies international legal instruments, it is mainly in the field of fundamental law.

As for the decisions and judgments of international judicial organs, the Constitutional Court had the occasion to hold that the judgment of the International Court of Justice concerning a dispute between Hungary and Slovakia<sup>30</sup> 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 bet-

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<sup>29</sup> 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.

<sup>30</sup> See Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) [1997] ICJ. Rep. 7.

ween 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 fulfill its international legal obligations by ensuring the conformity of international legal obligations with domestic legislation.<sup>31</sup>

The role of international different types of international norms in the practice of the Constitutional Court can be seen on *Chart 7*. The category of decisions of judicial organs are not indicated on it as this group of international legal instruments is rather interpretation of treaty provisions than sources of international law.

<b>Chart 7 - Role of international different types of international norms in the practice of the Constitutional Court (01.01.1990 - 31.12.2011.)</b>					
<b>Cited international legal norms</b>	<b>No. of decisions (total: 4407)</b>	<b>Role of international norm in the argumentation</b>			
		<b>definitive</b>	<b>complementary</b>	<b>supportive</b>	<b>no role</b>
<i>ius cogens</i>	2	1	—	—	1
customary international law	1	1	—	—	—
treaty/convention	195	52	40	71	11
decision of international organization	46	—	13	19	1

<sup>31</sup> Constitutional Court Decision 988/E/2000 ABH [2003] 1281.

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## **Nemzetközi jog a magyar Alkotmánybíróság gyakorlatában**

**Összefoglaló:** *Az Alaptörvény rendelkezése szerint Magyarország nemzetközi jogi kötelezettségeinek teljesítése érdekében biztosítja a nemzetközi jog és a magyar jog összhangját.*

*Az Alkotmánybíróság az alkotmányosság őre, és ezt a funkciót többek között úgy gyakorolja, hogy hatásköre gyakorlása közben igyekszik eleget tenni az említett kötelezettségnek, és nemzetközi kötelezettségekkel konform módon végzi a tevékenységét. Ennek során a nemzetközi jogot alkalmazza.*

*A tanulmány a magyar Alkotmánybíróság gyakorlatát vizsgálja abból a szempontból, hogy a nemzetközi jog alkalmazása milyen szerepet játszik. Két külön kategória különböztethető meg: a hatáskörökkel összefüggésben megjelenő nemzetközi normavizsgálat, illetve a nemzetközi jogi instrumentumok jogértelmezésben való felhasználása. Jelen cikk szerzője az Alkotmánybíróság több mint 20 éves gyakorlatának 4407 határozatát vizsgálva vont le következtetéseit, és igyekezett képet alkotni a magyar alkotmánybíráskodás és a nemzetközi jogi normák kapcsolatáról.*

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## Међународно право у пракси мађарског Уставног суда

**Сажељак:** Према Уставу, Мађарска ради осцваривања својих међународноправних обавеза обезбеђује осцваривање склада између међународној и мађарској права.

Уставни суд је чувар уставности. Ову функцију осцуњава између осцалој и шиме шцо своју надлежности врши у складу са наведеном обавезом, односно своју делатности осцварује у складу са међународним обавезама. При шоме црмењује међународно право.

У раду се анализира цракса мађарској Уставној суда из аспекти улоге међународној права у цримени права. У овом смислу се могу разликовати две цосебне категорије: анализа норми међународној права у вези са надлежностима, односно њихова цримена у шумачењу инцирумената међународној права. Аутор је до својих закључака дошао анализом 4407 одлука Уставној суда насталих у цракси суда сада већ дужио од 20 година, на основу чеа је цокушао да створи слику о односу цраксе Уставној суда и норми међународној права.