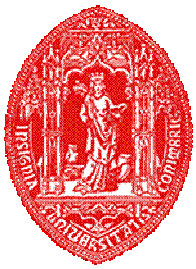

Strasbourg, 7 September 2005

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CDL-UD(2005)012rep
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in the framework of
THE ACTIVITIES OF THE PORTUGUESE CHAIRMANSHIP
OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

in co-operation with
THE UNIVERSITY OF COIMBRA
IUS GENTIUM CONIMBRIGAE CENTRE,
THE FACULTY OF LAW
&
THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW- IACL

UNIDEM Seminar

"THE STATUS
OF INTERNATIONAL TREATIES
ON HUMAN RIGHTS"

Coimbra (Portugal), 7-8 October 2005

REPORT

"THE DIRECT APPLICABILITY OF HUMAN RIGHTS TREATIES"

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I. Introduction

More than forty years ago the American Journal of International Law observed in its Editorial Comment that „[t]he continuing practice of making reference to international law in national constitutions has not produced any one form of wording that has found general adoption." The Comment continued with the observation that „[a]fter each World War of the present century there was a wave of an effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law."[i]

This observation applies specifically to international human rights treaties. At the beginning there is the 1945 Charter of the United Nations, further the 1948 UDHR, the 1950 Convention on Human Rights and Fundamental Freedoms (ECHR) and drafting the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976. These all chartered a new course and opened a new chapter in the history of political thought.

Worldwide examples show how the adoption of international human rights treaties influenced domestic constitutional charters of fundamental rights, eventually even inspired their very adoption in domestic constitutions.

It's seems that the most important role was played by regional instruments. A Bill of Rights based on the ECHR became a standard feature of many Western European constitutions. With the democratization of Eastern Europe and with in the 90's liberated states wishing to enter the mainstream of European political, economic and social activity by securing membership in the Council of Europe, the constitutional protection of human rights in that region was significantly enhanced. A comprehensive Bill of Rights is now an integral part of the constitutions of each of those states.

The entry into force in 1978 of the American Convention on Human Rights (ACHR) also influenced constitution-making in South and Central America (see, for example, the Constitution of Chile (1980), of Columbia (1991), of Ecuador (1984), and of Honduras (1982)).[ii]

On the African continent, the 1981 African Charter of Human and Peoples' Rights (AfCHPR) started the decade of restoration of democracy in several states and the adoption of new constitutions containing justiciable Bill of Rights (see, for example, the Constitution of Angola (1980), of Benin (1990), of Congo (1992), of Ethiopia (1991), of Ghana (1990), of Morocco (1992) and of South Africa (1993)).

Many of these constitutions made specific reference to regional instrument. For example, the preamble to the 1990 Constitution of Benin reaffirmed "our attachment to the principal of democracy and human rights as defined in the AfCHPR, whose provisions make up an integral part of this Constitution and have a value superior to the internal law." Similar provisions can be found in the preambles of some other African states' constitutions, for example those of Congo (1992), Madagascar (1992), and Niger (1992).[iii]

The drafting and adoption of the two human rights covenants and their entry into force in 1976 led many states parties to incorporate statements of fundamental rights in their national constitutions. Among them were the member states of the old Commonwealth whose early attempts to graft a Bill of Rights into given constitutional structures had either not succeeded or had earned just limited success. Probably the most prominent example is the Canadian one.

In 1960 a Bill of Rights was enacted in the form of ordinary statute, which remained in force for more than 20 years. It was nothing more than an aid to the interpretation of statutes. Only in 1982 the Canadian Charter of Rights and Freedoms, enacted in London at request of Canada, offered that country a very modern and far-reaching Bill of Rights.[iv]

Almost all post-ICCPR constitutions now contain a statement of fundamental rights inspired by the Covenant. It was in Hong Kong where the first attempt was made to incorporate in domestic law the rights as defined in the ICCPR. The Hong Kong Bill of Rights Ordinance 1991 was a mirror image of the ICCPR. And even the People's Republic of China, which was not then a party to either Covenant, enacted a law in 1990 which was intended to serve as constitution of Hong Kong starting on July 1, 1997, also incorporated the provisions of the two Covenants in domestic law of Hong Kong (Art. 39 of the Basic Law of the Hong Kong SAR).[v] The Court of Final Appeal of Hong Kong has held that the effect of Art. 39 was to give the provisions of the ICCPR and ICESCR constitutional force in Hong Kong SAR.[vi]

The quoted case demonstrates clearly the principle according to which it is a matter of domestic law (mostly of constitutional law) to determine, and of domestic courts (in the European space, primarily of constitutional courts) to rule on, the status of international law generally, and on the status of human rights treaties in particular, and their effects in domestic law.

We can draw partial empirically-based conclusions from what has already been said: human rights treaties have significant influence on the catalogue of human rights contained in national constitutions and, on the contrary, it follows from the very nature of human rights treaties that they are the result of reflected experience. It concerns experience that individuals have had within individual States with the executive power exercised by various political regimes. The guarantors of rights arising from human rights treaties are the State and the international community, between which exist a relationship of responsibility; however, in relation to both entities, it is the individual who is entitled.

II. The Legal Force of International Treaties on Human Rights in the Domestic Legal Order: Monism versus Dualism

Certain authors draw a distinction between international law and domestic (or municipal) law on the basis of the formal grounds for their validity.[vii] They infer the validity of domestic law from the will of the domestic legislature; international law applies by virtue of the legal convictions that are common to mankind. In their view, domestic law is grounded on subordination, international law on coordination.

International law should therefore regulate the conduct of the subjects of international law (States) *inter se*. Domestic law regulates the legal relations of natural and legal persons subject to it, and then only within the confines of its own legal order.

Today, this conception in its pure form does not appear to be accepted in relation to international law generally, much less can it pass muster as regards the relationship of human rights treaties to domestic law. For example, as F. Sudre said,[viii] an international norm affects individuals, if it is „individualized" and if the States, when adopting it, expressed the intention to grant to individuals rights under international law.[ix] The international legal norms garanteeing human rights contained in international conventions manifestly fulfill these conditions (see below for a discussion of what I mean by human rights).

Thus human rights treaties can garantee to individuals rights which are in conflict with domestic law. Such conflict must be resolved, and it follows alone from the recognition that such a conflict exists and that there is a need to resolve it, that both systems form a normative unit. On this point, it is possible to concur with the advocates of legal monism. It appears that a moderate form of monism applies in the majority of European states, as well as elsewhere (see the Introduction).

In resolving the above-indicated conflict of two legal norms in particular States, an important role is played by the resolution in those legal orders (mostly in constitutions) of the issue of what legal force is accorded to human rights treaties. From this perspective, one can discern the following four approaches to international conventions on human rights in domestic constitutions, or legal orders generally.

1. Constitutions or domestic legal order accord, in varying degrees, legal force to particular sources of international law, while naturally there is no reference to human rights treaties as a separate category. The same legal force is accorded to them as is accorded to all international agreements. It can be said that from its formal source of law is deduced the significance of the content.

2. Some constitutions refer to human rights treaties as a separate category which are accorded a different (higher) legal force than other international agreements, as well as other sources of international law. These constitutions seem to place more emphasis on the content of such treaties than on the form in the sense of a source of law.

3. The constitutional prescription on the legal force of human rights treaties is modified by constitutional court case law.

4. Some constitutions remain entirely silent on the reception of international law into the domestic legal order and the issue of the legal force of particular sources of international law, including treaties on human rights, has been resolved by judicial decision.

Re 1) Constitutions which distinguish between human rights treaties and other international agreement can be subdivided according to the legal force which they accord to international agreements. Sometimes these constitutions categorize treaties according to their content into those whose ratification requires the assent of parliament, which then lends to them the legal force of a statute, and into those „administrative“ agreements, which have the legal force of sub-statutory legal enactment. Thus, in the practice of the former Czecholsovak Socialist Republic, for example, the ICCPR and ICESCR were qualified as treaties whose ratification did not require the assent of Parliament, so that these treaties were merely promulgated by a regulation of the Minister of Foreign Affairs.[x] The German constitutional arrangement also distinguished between treaties with the force of law and administrative agreements; naturally, however, they reached a different conclusion than did socialist Czechslovakia as to the proper categorization of human rights treaties.[xi]

In cases where human rights treaties acquire the force of law, their domestic law validity is then tied to principles, such as *lex posterior derogat legi priori,* and *lex superior derograt legi inferiori*. These treaties are subject to review by the Constitutional Court (both from the formal and material perspectives) in the form of review of the ratification law, by which they are adopted into the domestic legal order, with the possible consequence of their being declared invalid under domestic law. However, since such treaties remains valid under international law, states which fail in this way to fulfill their international obligations arising from such treaties must amend their legal order (Constitution).[xii]

Under this model, human rights treaties have the force of law, and for this reason they cannot serve as a referential grounds for the constitutional court. This is the case for the Federal Republic of Germany, as was demonstrated by the decision of the Second Senate of the Federal Constitutional Court (BVerfG) of 14 October 2004 (2BvR 1481/2004). Among other things, it stated in the decision that the federal legislature adopted the ECHR by an act in the form of a statute pursuant to Art. 59 para. 2 of the Basic Law (Constitution), by Act of 7 August 1952, BGBl. II, p. 685. The Constitutional Court had already in an earlier decision declared that the ECHR has within the German legal order the status of a federal statute.[xiii] The Constitutional Court deduced that ordinary courts must observe and apply the ECHR in the same way as other federal statutory law, moreover by means of a „methodologically defensible interpretation". The Constitutional Court stated that, in consequence of their incorporation into the hierarchy of norms, the guarantees afforded by the ECHR (including its protocols) are not, in the German legal order, direct constitutional referential norms for the Constitutional Court. It further explicitly stated that, for this reason, a complainant cannot (successfully) directly invoke in a constitutional complaint before the Constitutional Court the infringement of human rights contained in the ECHR. It made reference to its older and more recent case law and to scholarly literature.[xiv]

Nevertheless, the Constitutional Court hastened to add that the guarantees of the ECHR influence the interpretation of the basic rights and the constitutional principles flowing from the domestic Basic Law. Both the text of the ECHR and the case law of the European Court of Human Rights serves, on the constitutional level, as an interpretive guideline for determining the content and the extent of impact of basic rights and public law principles contained in the Basic Law. Of course, it functions this way under the condition that such an approach does not result in the restriction or decrease in the protection of the basic rights under the Basic Law, an eventuality which the ECHR itself also excludes.

This judgment further adduces arguments on the Basic Law's openness towards international law (*Völkerrechtsfreundlichkeit*) and on the compatibility of the constitutional directive of state sovereignty with the Federal Republic's international law obligations. It concludes that the interpretation of the Basic Law as a whole leads to the conclusion that the Federal Republic of Germany is aiming to incorporate into the community of states as a peaceful member having equal rights in a system of public international law serving peace (point 33 of the mentioned decision).

Nonetheless, it is further asserted in the decision that, on the domestic level, the law of international agreements [apparently including human rights treaties as the given case concerned the ECHR – author's note] is not to be treated as directly applicable law, that is, without a statute subject to the consent of the German parliament under Article 59.2 of the Basic Law and is also not endowed with the status of constitutional law (point 34 of the decision).

In a further part of the decision, the Constitutional Court interprets the Basic Law such that it does not seek submission to non-German sovereign acts if such self-subordination would be removed from every constitutional limit and control. Therefore, the law of international agreements (all) applies on the domestic level only if it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law (point 36 of the decision).

In the Constitutional Court's view, it is not in contradiction with the Basic Law's openness towards international law, if the legislative body, exceptionally, does not comply with the law of international agreements [evidently all, including human rights treaties – author's note], if that is the only way to avert a violation of fundamental principles of the Basic Law (point 35 of the decision).

It is clear from what has been stated above that for the Constitutional Court the formal legal force of international agreements is the starting point for considerations of applicability (although, in its reasoning, the Constitutional Court ties it in with further substantive, structural, and organizational constitutional principles); for the Constitutional Court the content of the treaty is not decisive for its direct applicability.

If we continue with our assessment of the ECHR's status in domestic law on the basis of the constitutional text, in Austria the ECHR had the status of an ordinary law at the time it was published in the Federal Law Gazette BGBl. 210/1958. It was accepted as such by the Austrian Constitutional Court since it had not exlicitly been referred to as amending the Constitution on the occasion of its sanction by the National Council (Nationalrat). It was only afterwards, in 1964, when the Constituent Assembly, by virtue of the 3 March 1964 Constitutional Act, accorded the ECHR constitutional status, that the ECHR was incorporated into domestic law on the constitutional level, with the consequences of heightened legal force.

If we compare the German and Austrian approaches not solely from the formal perspective, we would be justified in asking whether, despite formal openness to international law, the protection of human rights flowing from the ECHR is ascertained in Austria equally intensively as in the Federal Republic. The justification for such question follows from the Austrian reserve in relation to the doctrine of the substantive law-based state which, in contrast, is undisputably accepted in the Federal Republic. It also should not be overlooked that in Austria constitutional complaints cannot be filed against the decisions of ordinary courts, which is in sharp contrast to the broadly conceived constitutional complaint in the Federal Republic.[xv]

Re 2) From its adoption (16 December 1992) until the revision effected by the „Euro-Amendment" on 1 June 2002, the Czech Constitution belonged to this type. In its original wording, Art. 10 provided that international conventions concerning human rights and fundamental freedoms which have been duly ratified and and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.

Human rights treaties were thus accorded a legal force higher than statutes; however, this provision did not resolve the issue of whether they had the same legal force as the Constitution, and the Constitutional Court never expressed an opinion on this point. It should be added, however, that the Constitution provided that these treaties were referential norms for the Constitutional Court (Art. 87 para. 1, lit. a) of the Constitution in the previous wording).

Still the Constitution did not explicitly designate who should determine, in concrete cases, whether or not an international agreement qualified as a human rights treaty. Since, however, Art. 39 para. 4 provided that the consent of three-fifths of all Deputies and three-fifths of all Senators present is required in order to adopt a constitutional act or to approve an international treaty under Article 10, it was evident that Parliament would in the future decide which international agreements should be considered a human rights treaty (naturally on the motion of the executive, not of the Constitutional Court).

The problem consists in the fact that not only treaties, such as the ECHR, which were undisputably human rights treaties, but also a greater and greater number of treaties such as, for example, the ICESCR were received into the domestic legal order prior to the adoption of the Constitution. Thus, none of these treaties was subject to the formal procedure laid down in the Constitution. And since no other constitutional provision made reference to their classification, it was up to the Constitutional Court itself to determine what position it would take on them.

The Constitutional Court faced the indicated problem in a manner which shows signs partly of pragmatism and partly of undifferentiation. Pragmatism can be seen in the fact that, in its decision-making, the Court took as referential norms those provisions of international conventions, such as the ECHR and ICCPR, which undoubtedly guarantee human rights, yet without further reasoning as to why they were so used.[xvi] Certain Constitutional Court decisions are distinguished by undifferentiation in that they take, as their referential criteria, even conventions on economic, social and cultural rights. That is, without further reasoning, the Court takes these rights to be human rights[xvii] which, without more, the Constitutional Court considered as capable of coming into conflict with rights about which there is no doubt that they are human rights.[xviii]

It was not until the 14 March 2001 decision on a constitutional complaint (II. ÚS 304/98) that an attempt was made at least partially to cope with this problem. At the same time, however, it did not attempt to resolve the issue of whether the right under Art. 6 para. 1 of the ICESCR is indeed a human right. On the contrary, without more detailed reasoning, it simply declared the entire covenant to be a human rights treaty:

The Covenant on Economic Social and Cultural Rights ranks among the duly ratified and promulgated (No. 120/1976 Sb.) treaties on human rights and fundamental freedoms in the sense of Art. 10 of the Constitution of the Czech Republic (as the Constitutional Court also established, for example, in its decision, No. Pl. ÚS 35/93). In addition, its direct applicability and precedence over statutes follows therefrom. However, the „direct applicability“ of an international agreement, which expresses the fact of its reception (incorporation) into Czech law, must be distinguished from the „direct effect“ of that agreement‘s individual provisions in domestic legal relations. Not all provisions of international conventions under Art. 10 of the Constitution are also „directly effective“, rather only those which are appropriate and capable of being directly effective.

Article 6 para. 1 of the Pact provides that „The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.“ The cited provision does not expressly introduce the right to engage in business, but that can clearly be deduced from a broadly conceived „right to work“ and „right to gain one‘s living by work“ in its text. Art. 6 para. 1 of the Covenant does not contain directly effective provisions. It is addressed to the States Parties, and it speaks of “appropriate steps to safeguard this right”. Moreover Art. 6 para. 2 lays down examples of measures “to achieve the full realization of this right”. The right to engage in business, such as it is implicitly protected by the Covenant, is thus of an essentially programmatic character. It allows for variable content in the legislation in individual States Parties, as well as for the dynamic evolution of such content in the States Parties dependent on the dynamics of national economic and social development and in dependence on the actual needs to protect other

economic and social rights. In other words, the Covenant does not guarantee the right to engage in business in a single, absolute and immutable form; on the contrary, it presupposes a concrete statutory framework for the protection thereof and the variability (dynamics) of such legislative measures, under the condition that its aim is "to achieve the full realization of this right".

However valuable is the attempt to distinguish between self-executing (directly effective) and non-self-executing legal norms contained in international agreements, the issue of whether the ICESCR concerns human rights was not substantively argued. It was as if, in this regard, the Czech Constitutional Court tacitly accepted and followed in the line of the doctrines, cultivated in the former Czechoslovak Socialist Republic and in the entire Soviet Bloc, of three generations of rights, where doctrinal thinking on classic human rights was entirely lacking, and to a certain extent even today is still lacking.[xix] It is also quite evident that the European legal academia as a whole does not accept that economic, social and cultural rights are human rights, much less that human rights should be divided into generations;[xx] on the contrary, it appears that this dissenting and critical approach has been gaining force in recent years.

Otherwise the issue of whether a certain right is self-executing can be posed even in relation to human rights contained in international conventions other than those of the second and third generation. In this respect, procedural rights are typically mentioned in the literature (for example, the right to appeal in criminal matters contained in Art. 2 of the 7th Protocol to the ECHR and in Art. 14 para. 5 of the ICCPR), if an institutional mechanism for ensuring such rights is lacking in domestic law.[xxi] Certain authors see a further reason for denying direct applicability of the procedural rights contained in international human rights treaties in cases where the application of the human rights treaty results in domestic provisions being eliminated from the legal order (i.e. annulled in a norm control proceeding) due to their conflict with the human rights treaty.[xxii] These authors base their views on the idea that, the elimination of a legal norm from the legal order due to its (oftentimes even only partial) conflict with human rights treaties, creates a situation that is even less favorable for the bearers of the human right in question, i.e. the individual. In their view, therefore, such an extensive interpretation of the former Art. 10 of the Constitution is flawed. They assert that if a certain provision of a human rights treaty is not self-executing, such provision cannot establish jurisdiction in any court to derogate from domestic law and, in any case, its applicational precedence cannot be realized in fact.

These indignant reactions were called forth by the Constitutional Court's Judgment No. Pl. ÚS 16/99 of 27 June 2001, in which the Court annulled the entire portion of the procedural code regulating the judicial review of administrative decisions. The Court decided to annul it due to the fact that this statute's provisions did not allow for the full review of administrative decisions; therefore, the Court came to the conclusion that these provisions were in conflict with Art. 6 para. 1 of the ECHR. Naturally, it delayed for 18 months this judgment's entry into effect (it was the longest such period of postponement in the Czech Constitutional Court's history) and thus afforded the government and Parliament ample time to take steps to cure the problem.

What follows from this is that it might be problematic merely to confer higher legal force on human rights treaties, unless further issues are resolved. In particular, it is necessary to resolve the issue of who or which body, and according to which criteria, should determine if a treaty is a human rights treaty; it is equally necessary to create an acceptable doctine of self-executing rights from human rights treaties.

Re 3) This type of approach to human rights treaties can be clarified only through examples. Therefore I will attempt to outline the Czech example, with which I am naturally most familiar. With the adoption of the „Euro-Amendment“, referred to above, normatively there ceased to exist a separate category of „human rights treaties“ which are endowed with a legal force higher than that of statutes. Article 10 of the Czech Constitution now reads:

Promulgated treaties, to the ratification of which 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.

From the formal perspective, human rights treaties also ceased to qualify as referential norms for the Constitutional Court. Also Art. 87 para. 1, lit. a) of the Constitution was modified.[xxiii] This resulted in a constitutional situation which formally is analogous to that which presently applies, for example, in the FRG; the reality is entirely different, however. The ordinary courts, which are obliged to apply any international agreement (i.e. including a human rights treaty) in preference to statutes when they come into conflict, do so only quite exceptionally. On the other hand, the issue of a possible conflict between a human rights treaty and the Czech Constitution has as yet not been resolved. The case law discussed below well illustrates how the Constitutional Court has reacted to what is *prima facie* a normatively quite altered situation.

Its initial reaction was in a proceeding on abstract norm control on 25 June 2002 (Pl. ÚS 36/01) as follows:

The impermissibility of changes to the essential requirements of a democratic state governed by the rule of law [Art. 9 para. 2 of the Constitution] contains a directive for the Constitutional Court as well, by the terms of which no amendment to the Constitution may be interpreted in a sense, in consequence of which the already achieved procedural level for the protection of fundamental rights and basic freedoms would be restricted. . . . The constitutional enshrinement of the general incorporating norm, and thus the overcoming of the dualist conception of the relationship between international and domestic law, cannot be interpreted in the sense that it removed the referential point of view provided by ratified and promulgated treaties on human rights and fundamental freedoms for the Constitutional Court‘s assessment, with derogational effects, of domestic law. . . . For this reason the extent of the concept, constitutional order, cannot be interpreted solely with regard to Art. 112 para. 1 of the Constitution, rather also in view of Art. 1 para. 2 of the Constitution, and to include within its confines also ratified and promulgated international treaties on human rights and fundamental freedoms.

The Constitutional Court’s approach was heavily criticized in the Czech legal academia.[xxiv] The head of the Department of Constitutional Law at the Charles University Law Faculty wrote that the Constitutional Court lacks respect for the law and the constitutional text, for the legislature and the Constituent Assembly. He criticized the Constitutional Court that it misappropriated to itself the role of Constituent Assembly. „Despite the unambiguous intention of the Parliament to consider all international agreements in domestic law as having the same legal force and thus to abolish the special significance of human rights treaties, the Constitutional Court designated that precisely these treaties are a component of the constitutional order under Art. 112 of the Constitution, without Art. 112, which exhaustively defines the content of this concept, giving it any sort of authority to do so.“[xxv]

In its decision of 15 April 2003 (I. ÚS 752/02), the Czech Constitutional Court expressed its views on the conflict of obligations flowing from different treaties, concluding that precedence must be accorded to treaties on human rights. That decision was issued in a proceeding on a constitutional complaint in which the Court reviewed whether the complainant's basic rights had been violated in a proceeding seeking his extradition. Among other things, it stated the following:

In the complainant's case, two international obligations of the Czech Republic stand in conflict. On one side is the obligation of the Czech Republic, as a part to the European Convention on Extradition (no. 549/1992 Coll.), in which it agreed to extradite all persons who are being prosecuted for a crime by the appropriate bodies of the applying party (Art. 1). On the other side, the Czech Republic is also bound by the cited international agreements on human rights and fundamental freedoms. The Constitutional Court here states that in such a case it is appropriate to give priority to obligations from the agreements on the protection of human rights. The priority of the obligations from agreements on the protection of human rights, in the event of conflict between obligations under international agreements, arises primarily from the content of these agreements, in connection with Art. 1 para. 1 of the Constitution, under which the Czech Republic is a state governed by the rule of law. The respect and protection of fundamental rights are defining elements of the substantively understood state governed by the rule of law; therefore, in a case where a conventional obligation protecting a fundamental right exists side by side with a conventional obligation which tends to endanger that same right, the first obligation must prevail. Although after amendment of the Constitution (Constitutional Act No. 395/2001 Coll.) agreements on the protection of human rights no longer form an independent category of legal norms with priority in application under the previous wording of Art. 10, nonetheless they are a special group of norms, and at the same time represent a reference point of view, both for the abstract review of norms under Art. 87 para. 1 of the Constitution, and for proceedings on constitutional complaints. In this respect the Constitutional Court does not agree take the opinion of the Minister of Justice, indicated by his statement on the constitutional complaint. The Constitutional Court holds the opinion expressed in the judgment, the legal conclusion of which the Minister of Justice disagrees with, that no amendment of the Constitution can be interpreted to the effect that it would result in restricting an already attained level of procedural protection of fundamental rights and freedoms (Pl. ÚS 36/01, published under no. 403/2002 Coll.). The scope of the concept of constitutional order therefore can not be interpreted only with regard to Art. 112 para. 1 of the Constitution, but in view of Art. 1 para. 1 and 2 of the Constitution, it is necessary to include in it ratified and promulgated international agreements on human rights and fundamental freedoms, for the reasons given above.

The fact remains that, even following amendment to the Constitution, the Constitutional Court still does not draw ani distinction between self-executing and non self-executing rights, and has not even resolved, in a decision of principle, the issue of what human rights are. In a proceeding on abstract norm control, held on 5 February 2003 (Pl. ÚS 34/02), the Constitutional Court issued a quite problematic judgment in which it stated that the Charter of Local Autonomy, even though it is not directly applicable, is a genuine international agreement which binds the contracting parties. On the strength of a broad conception of the constitutional order (Art. 112 para. 1 in conjunction with Art. 1 para. 2, as amended), which is open to international law, the Constitutional Court is authorized to adjudge whether Czech statutes are in conformity with the Charter. Neither the framework character of the Charter, nor the special character of the collective rights contained therein hinders its use as a benchmark for the abstract control of the constitutionality of statutes.

This judgment is problematic also due to the fact that, although it makes reference to the above-cited judgment of 25 June 2002 (Pl. ÚS 36/01), it goes beyond the objective expressed therein, which is to maintain the level of rights achieved. Of course, it is difficult to speak of a level of rights that has been achieved in respect of an international convention which provides for obligations for the State alone, and solely in the form of a goal which is meant to be attained progressively.

It follows from what has been said above that the approach whereby Constitutional Court jurisprudence (case law) provides a corrective to the normative text, even if very accommodating to international treaty law, can be very problematic, unless this jurisprudence is structured in the sense meant in the conclusion stated at the close of point 3).

Re 4) It can be said that where neither the Constitution nor the legal order contain any normative prescription concerning international law, that is, naturally it does not resolve even the issue of the legal force in the domestic legal order, it becomes a matter for judicial decision-making

Thus, for example, the legal order of the State of Israel does not resolve the issue of the incorporation of international law into the domestic legal system. However, in one of the early decisions of the Israeli Supreme Court,[xxvi] that court adopted a broadly monistic approach which could be interpreted to the effect that all international legal norms are incorporated without any further distinction (that is, without regard to their content, also without regard to the source of international law in which they are contained). In substantiating its authority to apply international law, the court based its reasoning on the absolute independence of the State of Israel. By achieving that independence, the new State had also acquired that access to international law and customs which all states enjoy by virtue of their sovereignty, and enriched its legal system by the accepted principles of the law of nations. In reality, this decision solved the applicability of customary norms. A month after the Stampfer decision, the Supreme Court clarified its position on the applicability of international law in the Samra case.[xxvii] This politically very delicate case, regarding Arab villages which came under the jurisdiction of Israel on the basis of an international treaty (Israeli-Jordanian General Armistice Agreement), concerned the applicability of international treaties. In rejecting this claim the Court adopted the common law approach that treated only customary law, and not international treaties, as binding law. The Armistice Agreement, being a treaty, could not be invoked in Israeli courts. And this fundamental distinction between customs and treaties is still the law today.

The rationale of this distinction is found in the separation of powers doctrine. Since in Israel the government is empowered to conclude and ratify treaties, the claim goes, the automatic incorporation of treaties would mean granting the government the power to introduce norms into the Israeli system, thereby bypassing the legislature. In criticizing the validity of this argument, it has been noted that the same line of thought should have required the court to disregard customary law, which is also the outcome of governmental action or inaction.

Since only customary international law may be invoked before the Israeli courts, a crucial issue is what evidence is required in order to establish the existence of such a custom. In two cases that related to the issues of statelessness and freedom of religion[xxviii], the Supreme Court took a rather broad interpretation of international custom, and drew within its ambit multilateral agreements like CCPR and declaration like UDHR.

In the Abu Aita case[xxix] the Supreme Court stated: ”From the nature of the matter, customary international law refers to accepted behavior which has merited the status of binding law: General practice, which means a fixed mode of action, general and persisting, which has been accepted by the vast majority of those who function in the said area of law. The burden of proving its existence and status is borne by the party propounding its existence. The views of an ordinary majority of states are not sufficient, the custom must have been accepted by an overwhelming majority at least.”

Under this model, heightened responsibility is place on the courts to resolve conflicts between the observance of the standards of international law (especially those of human rights guaranteed by international conventions) and the interests of the State‘s citizens, including their interest in basic safety. It is open to question whether this model is the most appropriate.

III. Concluding remarks

As was stated in the introduction, human rights treaties have constituted a source of inspiration for national constitutional catalogues of human rights. In connection therewith, at times (sometimes later), constitutions began to resolve the issue of the direct domestic law effects of international treaties, including human rights treaties. On this level, contemplations on human rights treaties play out only from the position of their external expression in the form of sources of law. Of course, this is a purely positivistic way of approaching the issue, and the response to questions raised in the context of this approach are necessarily limited by positivism itself. At the same time, it is quite evident that the field of human rights is concerned primarily with the effective protection of those rights, and the formally conceived issue of sources, in which these rights are merely declared, appear rather as subsidiary. It seems that the issue of the direct applicability of human rights, regardless of the source in which they are contained, is an issue more closely connected with the domestic tradition of the approach to the interpretation of law than with formal constitutional directives. And it is clear that especially the Central European region has been deeply afflicted by legal positivism (quite often in the form of normativism), which prefers to devote attention to the formal sources and the relations between them, rather than devoting attention to the content of human rights.

As is stated in the preceding text, however, the domestic applicability of human rights treaties can take on a large number of forms, which in and of themselves (and not viewed formally) indicate nothing about the level of human rights protection in the particular state. This aspect of the issue must be borne in mind as well when further consideration is given to the topic discussed at this conference.

ENDNOTES

[i] *Wilson, International Law in New National Constitutions, 58* ***AJIL*** *432 (1964).*
[ii] *N. Jayawickrama,* ***The Judicial Application of Rights Law – National, Regional and International Jurisprudence****, (Cambridge University Press, 2002), p. 110.*
[iii] *Ibid, at 110, 111.*
[iv] *Ibid, at 111.*
[v] *Ibid, at 113.*
[vi] *Hk SAR v. Ng Kung Sin, Court of Final Appeal of the Hong Kong SAR, (2000), 1 HKC 117, as quoted in N. Jayawickrama – See Note 2, p. 114.*
[vii] *I. Seidl – Hohenveldern,* ***Public International Law*** *[from the Czech translation,* ***Mezinárodní právo veřejné****], 1999, Codex Bohemia, p. 113.*
[viii] *F. Sudre,* ***International and European Law of Human Rights*** *[****Mezinárodní a evropské právo lidských práv****], MU Brno, 1997, p. 59.*
[ix] *Neither is this opinion unproblematic, especially bearing in mind international custom, which States do not adopt, rather they form it through their practice.*
[x] *Article 42 of the then valid Constitution provided, among other things, that Parliament must give its assent to treaties of a political and of a general economic natural and to treaties, the execution of which requires a statute.*
[xi] *See Art. 59 para. 2 of the Basic Law.*
[xii] *See Note No. 7, p. 59, where the author cites the decisions of the Austrian Constitutional Court of 20 February 1952 and of 14 October 1961. The 27 April 2005 decision of the Polish Constitutional Court on the European Arrest Warrant perhaps also belongs in this group.*
[xiii] *BVerfGE 74, 358 (370); 106 (120).*
[xiv] *See point 32 of the analyzed decision.*
[xv] *In 1992 Austria adopted the „Basic Rights Complaint Act" [„Grundrechtsbeschwerdegesetz"] (BGBl. 1992/864), pursuant to which a person whose personal liberty has been infringed by means of a criminal judgment can submit a complaint of the violation of a basic right, and jurisdiction to hear such complaints is vested in the Austrian Supreme Court. This procedure cannot be used to seek protection of other basic rights.*
[xvi] *There are a large number of such decisions. I am citing examples of those decisions which are translated into English and accessible on the website of the Constitutional Court of the Czech Republic, www.concourt.cz, IV. ÚS 215/94 – Art. 6 ECHR, IV. ÚS 81/95 – Art. 4 para. 1 of the Seventh Protocol to the ECHR, IV. ÚS 98/97 – Art. 7, para. 2 ECHR.*
[xvii] *For example, Judgment No. Pl. ÚS 3/2000 of 21 June 2000, which concerns Art. 16 of the European Social Charter. It is of interest that in the case of the European Social Charter, the Parliament refused to qualify it as a human rights treaty, that is, it gave its assent to it as it would to any ordinary international agreement. The Constitutional Court nevertheless treated it as a human rights treaty, as is clear from this judgment.*
[xviii] *In my dissenting opinion to Judgment Pl. ÚS 16/04 of 4 May 2005, I expressed my views on the issue of the capacity of classical fundamental rights and of social rights (even if on the level of rights guaranteed by the domestic bill of rights) to stand in competition with each other. I concluded that social rights are not entirely capable of being referential norms in the case of abstract norm control, as they require a statute for their implementation, as is envisioned by the Czech Charter of Fundamental Rights and Basic Freedoms itself. That means that the ordinary legislature determines the content of those rights.*
[xix] *Coincidentally it is K. Vasak, who is of Czech origin, who is credited with authorship of the concept of separating right into so-called generations. See K. Vasak, A 30 Year Struggle, in UNESCO-Courier 18 No. 1 (1977).*
[xx] *Of all critics, for example např. K. Stern, The Concept of Human Rights - and Basic Rights, in* ***The Handbook of Basic Rights in Germany and Europe*** *[Die Idee der Menschen –und Grundrechte, in* ***Handbuch der Grundrechte in Deutschland und Europa****], p. 32 and following, or from other critical perspectives, K. Terraya, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights,* ***EJIL*** *(2001), Vol. 12, No. 5, p. 924 and following.*
[xxi] *The Italian Constitutional Court's decision of 6 February 1979 can serve as an example. The Court, which had jurisdiction in the matter pursuant to a special statute on criminal proceedings on the bribery of ministers of the Italian government, concluded that Art. 14 para. 5 of the ECCPR, which guarantees the right to an appeal in criminal proceedngs, could not be directly applied. The reason the Court did not consider this right as self-executing was the fact that there was no appellate instance that is authorized to review Constitutional Court decisions. It should not be the task of the judiciary to establish such an instance, rather it is the task of the legislature. The decison is cited in Z. Kühn, The Self-Executing Nature, Direct Applicability and Certain Theoretical Issues of the Application of International Agreements in Domestic Law,* ***Lawyer*** *[Samovykonatelnost, přímá účinnost a některé teoretické otázky aplikace mezinárodních smluv ve vnitrostátním právu,* ***Právník****] No. 5/2004, p. 483.*

[xxii] *Ibid, at 485 and further Z. Kühn and J. Kysela, Is the Constitutional Always that which the Constitutional Court Says that it is?* ***Journal of Legal Science and Practice*** *[Je ústavou vždy to, co ÚS řekne, že Ústava je?,* ***Časopis pro právní vědu a praxi****], Issue No. 10 of 2002, p. 212 and following.*

[xxiii] *Paradoxically and quite disconnectedly, the Constitutional Court was at the same time endowed with a new competence, that of hearing petitions for rehearing, which was introduced by amendment to the Act on the Constitutional Court. § 119 para. 1 of that Act provides: Should the Constitutional Court have decided in a criminal 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.*

The Constitutional Court should, thus, open the road to the revision of its own decisions, in the case they resulted in an infringement of human rights guaranteed by human rights treaties, which, however, should allegedly not have been taken into consideration as a referential norm in the original decision on the constitutional complaints.

[xxiv] *The massive amount and indignant nature of the critiques is attested to by the titles of certain articles, for example, Judgment No. 403, like a Gauntlet Thrown Down by the Constitutional Court to the Constituent Assembly, or the title of the article cited in Note 22.*

[xxv] *V. Pavlíček, The Sovereignty of Statutory Law in the EU, in* ***Statutes in Continental Law*** *[Svrchovanost zákona v EU, in* ***Zákon v kontinentálním právu****] (ed. A. Gerloch, and P. Maršálek, Eurolex Bohemia, Prague, 2005). Otherwise this very author often in his writings defends the primacy of statutes in the sense that they are the product of the will of a democratically elected legislature. In other words, from his writings is quite evident the antagonistic perception of democracy on the one hand and liberalism (in the sense of human rights) on the other. Apart from positivism in the sense of intensive textualism, as well as in the sense of excessive formalism, this aspect as well are phenomena well known not only in the Czech Republic, but perhaps in other post-Communist States as well. This reality also has to be taken into account as well when considering the direct applicability of human rights treaties.*

[xxvi] *Stampfer v. Attorney General, 23 ILR 284, 289, as quoted in E. Benvenisti, Judicial Misgivings Regarding the Application of the International Law: An Analysis of Attitudes of National Courts, in: EJIL, Vo. 4 (1993), No. 2, pp. 159 – 183.*

[xxvii] *Custiodian of Absente Property v. Samra, at al., 10, Judgments 1825 (1956), 22 ILR 5, cited as in note 26.*

[xxviii] *Curtz and Latushinski v. Kirschen, 21 (2) Judgments 20 (1967), 47 ILR 212; The american European Beth-L Mission v. Minister of public Welfare et al., 21 (2) Judgements 325 (1967), 47 ILR 205, cited as in note 26.*

[xxix] *Abu Aita et al., v. Commander of the Judea and Samaria Region at al., 37 (2) Judgments 197, at 238-239, cited as in note 26.*