Judicial Application of International and EU Law in Slovenia

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1 Introduction

The Republic of Slovenia, as an independent state, acquired its Constitution on 23 December 1991,[1] i.e. 6 months after adopting documents on independence and 6 months after adopting the Foreign Affairs Act,[2] which regulates substantive and procedural issues related to international treaties. The Constitution in its preamble derives from three principles that are *per se* principles of international law, i.e. respect for human rights and fundamental freedoms, the right to self-determination and the right of sovereign equality of states.[3] The compatibility of the Slovenian Constitution with international law standards was confirmed by the Arbitration Commission of the International Conference on the Former Yugoslavia (known as the Badinter Commission) in its arbitration opinion No. 7 of 11 January 1992.[4]

The legal status of international law in Slovenia is predominantly determined by the Constitution and by the Foreign Affairs Act,[5] but also by the Constitutional Court Act[6] and the case law of the Constitutional Court.

[1] Official Gazette No. 33/91 (as am.).

[2] First published in the Official Gazette No. 1/91 as of 25 June 1991.

[3] Pogačnik (1996), p. 365.

[4] International Legal Materials (1992), pp. 1512–1517.

[5] Zakon o zunanjih zadevah, Official Gazette of the Republic of Slovenia, official consolidated version, 113/03. The Act includes provisions on concluding international treaties.

[6] In Slovenian: *Zakon o ustavnem sodišču*, consolidated version published in the Official Gazette of the Republic of Slovenia, No. 64/2007.

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By obtaining independence, Slovenia became a member of the international community and as a consequence domestic courts increasingly have to deal with issues concerning the application and interpretation of international law.[7] International law has considerably developed in the last decades and now covers numerous fields, from classical issues of international law (e.g. state sovereignty, etc.) to extremely specific issues (e.g. air transport, intellectual property, etc.); it not only concerns relations between states, but more and more the position of individuals (e.g. issues of human rights, international criminal law, international trade and investment law).[8] Considering the increase in the amount of secondary international law and in the number of self-executing provisions, the impact of international law upon the work of domestic courts is significant.

In this respect it is important that in 2004 Slovenia became a Member State of the European Union (EU), and its courts (as well as its administrative authorities) had to start applying 'a new legal order of international law'[9] with many specifics in comparison to 'traditional' international law.

This chapter examines the application of international law by Slovenian courts—to a large extent by the Constitutional Court. Emphasis is given to 'traditional' international law, although the last part of the chapter also considers the application of EU law.

2 Constitutional Status of International Law in Slovenia

The constitutional foundation determining the relationship between the international and Slovenian legal order can be found in Article 8 of the Slovenian Constitution.[10] In the first paragraph it provides the overall position of the generally accepted principles of international law and international treaties in the hierarchy of the Slovenian legal order—by placing them above the laws and other provisions, whereas the Constitution is the highest and basic act of the state.[11] It derives from this that international law has a similar position in the hierarchy of Slovenian law as in the hierarchy of EU law. The Court of Justice of the EU ruled that EU secondary acts must be applied and interpreted in line with international treaties, whereas the position of the founding treaties is comparable to the Slovenian Constitution. The

[7] Sancin (2012), p. 1214.

[8] Sancin (2012), p. 1214.

[9] See Case 26/62 *Van Gend en Loos* [1963] ECR 3.

[10] Article 8 states that '(l)aws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly'.

[11] Umek (2011), p. 132. See also Škrk (2009), p. 53.

competences of the Court of Justice of the EU to review international treaties are comparable to the competences of the Slovenian Constitutional Court.[12]

In this respect, it must be emphasised that Article 153(2)[13] of the Constitution more precisely stipulates that ratification of international treaties is to be performed in two forms: by acts of the Parliament (called the National Assembly) and by government regulations (decrees). It derives from this provision that international treaties ratified by a government regulation should be hierarchically placed below the laws.

It is true that according to the Slovenian Constitution the generally accepted principles of international law hold a sub-constitutional status (they are also considered in the case law of Slovenian courts as part of domestic law, unless in contradiction with the Constitution).[14] Nevertheless, considering that many generally accepted principles of international law protect fundamental legal and societal values, much the same as the Slovenian Constitution, it is hard to imagine a conflict between them and fundamental constitutional principles.[15]

The second paragraph of Article 8 states that international treaties apply directly. For formal and substantive reasons, not all provisions of international treaties are, of course, capable of direct application, but only so-called 'self-executing' treaty provisions—i.e. provisions that concern individuals and contain sufficiently clear and precise rights and obligations for the parties to invoke them before the courts (and this must be determined by the national courts on a case-by-case basis).[16]

3 Slovenian Courts' Structure and Accessibility of Case Law

The judiciary is one of three independent branches of government and its role is outlined in the Constitution. According to the Constitution, judges are independent and are not permitted to belong to political parties. They are elected by the National Assembly from nominees provided by the Judicial Council. Article 126 provides that the organisation and jurisdiction of courts are determined by law.[17] It also

[12] See e.g. Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351.

[13] Article 153(2) provides: 'Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties'.

[14] See judgment of the Supreme Court of the RS, VSRS II Ips 55/98.

[15] Umek (2011), p. 133.

[16] Ibid.

[17] I.e. the Courts Act *(Zakon o sodiščih),* consolidated version published in the Official Gazette of the Republic of Slovenia, No. 94/2007.

states that extraordinary courts may not be established, nor may military courts be established in peacetime.

The court structure is arranged hierarchically with 44 local[18] and 11 district courts,[19] as well as four courts of appeal[20] and a supreme court.[21] These courts deal primarily with civil and criminal cases. Additionally, there are four specialised courts of the first instance competent for the determination of labour disputes, and one of them also for the determination of social security disputes. The Administrative Court of the Republic of Slovenia has the status of a higher court and deals with administrative matters (actions against the state).

Special status is given to the Constitutional Court, which is provided for by the Constitution and governed by the Constitutional Court Act of 1994. Its nine members are appointed by the National Assembly from nominees recommended by the president. Members of the Constitutional Court serve 9-year terms. The primary concern of this court is to safeguard the constitution by monitoring the constitutionality of laws passed by the National Assembly. The Constitutional Court also decides on the conformity of laws and other regulations with ratified treaties and with the general principles of international law. It also deals with cases involving possible infringements of individual rights.

There are three main websites to access the case law of Slovenian courts.

a) http://www.sodisce.si/
   This is the website of the Slovenian Supreme and High Courts. It is only available in Slovenian and offers a variety of information, e.g. office hours, a calculator for default interest, etc. Additionally, it refers to the website http://www.sodnapraksa.si/, which allows for a case-law search in the following fields:

[18] Local or county courts (in Slovenian: *okrajna sodišča*) are courts of the first instance and are vested with jurisdiction over less serious criminal cases: civil cases concerning claims for damages or property rights up to a certain value; all civil cases concerning disturbance of possession, tenancy relations etc.; probate and other non-litigious matters; keeping of land registers and civil enforcement.

[19] District courts (in Slovenian: *okrožna sodišča*) are courts of the first instance as well. They are vested with jurisdiction over criminal and civil cases which exceed the jurisdiction of county courts; juvenile criminal cases; execution of criminal sentences; family disputes, except maintenance disputes; recognition of rulings of a foreign court; commercial disputes; bankruptcy, forced settlements and liquidation; copyright and intellectual property cases and keeping of the company register.

[20] High Courts or Courts of Appeal (in Slovenian: *višja sodišča*) are courts of appellate jurisdiction, which determine appeals against decisions of the local and district courts in their territories and disputes of jurisdiction between local and district courts.

[21] See Article 127 of the Constitution. It is the highest appellate court in the state; it functions as a court of cassation—a court of appellate jurisdiction in criminal and civil cases, in commercial lawsuits, in cases of administrative review and in labour and social security disputes. It is the court of the third instance. The grounds of appeal to the Supreme Court (defined as extraordinary legal remedies) are limited to issues of substantive law and to the most severe breaches of procedure.

- Supreme Court
- High Courts
- Higher Employment and Social Tribunal
- Administrative Court
- Court of Justice of the European Union
- Calculation of immaterial damage
- Professional articles
- Legal opinions

b) http://www.us-rs.si/odlocitve/vse-odlocitve/
This website provides access to the case law of the Constitutional Court of the Republic of Slovenia. It has published all decisions of the Constitutional Court since Slovenian independence. The website also has an English version: http://www.us-rs.si/en/. The Case-Law Section of the website is updated periodically. The aim of the website is to allow the foreign public to be informed of the most important Constitutional Court decisions since 1992. The decisions are presented in the following manner: Registration Number, Date of the Decision, Challenged Act, Keywords, Legal Basis, Abstract, and Full-Text. In addition, decisions and certain orders (if the Constitutional Court so decides) are published in the Official Gazette of the Republic of Slovenia, local official gazettes, on CD-ROM, in the IUS-INFO databases (in Slovene), as well as in the Collected Decisions and Orders of the Constitutional Court (in Slovene along with abstracts in the English language).

c) http://www.iusinfo.si/Judikati/Kazalo.aspx
IUS-INFO is Slovenia's leading online portal for legal and business information. Over the past 20 years, IUS-INFO has become the focal point of legal developments in Slovenia, where all current legal and other information converges into the biggest interconnected collection of legal knowledge. The portal comprises:

- consolidated texts of complete legislation in the Republic of Slovenia
- IUS-INFO Register, a directory of legal acts in force classified by subjects, which contains useful information and references
- the largest collection of case law from all Slovenia's courts
- legislation and case law of the European Union
- comprehensive collection of legal publications, professional articles and legal opinions
- official notices and calls for public tender
- schematic collection of preparatory acts named 'Poročevalec Državnega zbora RS'
- daily updated information on legal matters (news, commentaries and columns).

Document cross-referencing enables users to navigate through substantially connected collections and provides an intuitive method to search for an answer to specific legal problems. The search engine uses advanced filtering to classify found documents according to several criteria so that the more important information is presented at the top of the search results. The page MOJ IUS-INFO (MY IUS INFO) allows favourite documents to be saved, which enables

faster access to frequently used content, the management of settings for the daily information tool, IUS Alert, and the management of users' accounts.

4 Application of International Law by the Slovenian Courts

4.1 Introduction

The authority to apply international law by the judiciary is determined by the Constitution, which in Article 125 states that judges are independent in the performance of the judicial function; however, they are bound by the Constitution and laws. In this respect, Article 3 of the Courts Act provides more precisely that when performing his judicial profession a judge shall be bound by the Constitution and laws, and that according to the Constitution he is also bound by the general principles of international law and by ratified and published international treaties. This means that all judges, at ordinary and specialised courts of all instances, are under the obligation to apply international law. Nevertheless, the most important role in this respect is given to the Constitutional Court[22] as the highest judicial authority for the protection of constitutionality and legality as well as of human rights and fundamental freedoms.[23]

International law is part of the legal education of judges and other legal professionals, as it is included as a mandatory course at undergraduate level in all three law schools in Slovenia, whereas specific international law courses (e.g. diplomacy law) are offered as optional courses. Additionally, international law courses are also offered at the masters and PhD level. Nevertheless, the bar exam does not include examination of international law, apart from its constitutional aspects, discussed in this chapter. Further, the bar exam centre for education in the judiciary[24] offers various seminars for judges, e.g. on the recent case law of the European Court for Human Rights, cross-border judicial co-operation, etc.

4.2 Application of Article 8 of the Constitution by the Constitutional Court

Article 8 of the Constitution which provides for the status of international law within the Slovenian legal order is applied by the Constitutional Court in two ways. Firstly, as a subject of interpretation—when the Constitutional Court defines its

[22] Škrk (2007), p. 275.

[23] See Article 1(1) of the Constitutional Court Act.

[24] Center za izobraževanje v pravosodju (CIP).

content by interpreting certain words and concepts mentioned therein, the conditions for the application of international treaties, etc., and secondly, as a legal basis for the application of international legal sources. Additionally, there are three aspects of the application of international law:

as a standard of review of laws and other provisions;
as a subject-matter of constitutional review;
as an interpretative instrument to substantiate its rulings.

4.2.1 Interpretation of Article 8

4.2.1.1 Dualism with Elements of Monism

The Constitutional Court asserts in its rulings that Article 8 at a general level determines the relationship between international law and the legal order of the Republic of Slovenia.[25] International law and domestic law are therefore considered as two separated systems. This view is also shared by Slovenian legal theory,[26] which means that a dualistic approach towards the relationship between international and national law has been adopted. Nevertheless, there are some elements of monism, which can be noticed in the way international treaties are endorsed in the domestic legal order. This endorsement does not require specific legislation, but only confirmation of an act of ratification and the consequent direct application of the provisions of international treaties.

In addition to Article 8, Article 15 of the Slovenian Constitution, which concerns the exercise of human rights and fundamental freedoms, relates to the status of international law in Slovenia. Article 15(5) provides that 'no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent'. The Constitutional Court ruled that 'Article 15 (5) gives human rights and fundamental freedoms, recognised by ratified international treaties, constitutional rank'.[27]

4.2.1.2 Application of Generally Accepted Principles of International Law

Generally accepted principles of international law are not often used as a standard of review in the case law of the Slovenian Constitutional Court.[28] It has, however, defined their meaning. The Constitutional Court says that generally accepted

[25] See e.g. Case U-I-274/02; Case U-I-245/00.
[26] See e.g. Sancin (2012) and Pogačnik (1996).
[27] See e.g. case Up-42/96, para 8.
[28] See Škrk (2012a), pp. 1224–1234.

principles of international law include general legal principles recognised by civilised nations, as well as rules of international customary law. Therefore, in the case concerning military courts, the Court found:

> The provisions of the Decree on Military Courts of 24 May 1944, which even at the time of issuing and application conflicted with the general legal principles recognised by civilised nations as well as the Constitution of the Republic of Slovenia, shall not be applied in the Republic of Slovenia.[29]

Furthermore, in the case concerning 'stolen kids' the Court found that '(j)udicial state immunity has developed on the basis of state practice to become international customary law'.[30]

The Court is competent to review the consistency of legislative and executive acts with generally accepted principles; it cannot, however, present a standard of review of international treaties in the procedures of *a priori* references of constitutionality.[31]

Many generally accepted principles of international law concern relationships between states (e.g. peaceful resolution of conflicts, principle of equality of states, principle of non-intervention, etc.) and are therefore rarely applied in domestic judicial procedures.[32] The exceptional situation concerns *ex post* review of acts of ratification of international treaties. In this respect, the Constitutional Court in the case concerning the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation interpreted the principle *uti possidetis* and ruled that it is 'a generally accepted principle of international law and as such

[29] Case U-I-6/93. The Court held in para 4 (part B-1) that: 'The extent of Constitutional Court control over substantive criminal regulations as defined by the Constitutional Court with the views expressed in this ruling, raises the question of what criteria are used to judge the constitutionality of pre-constitutional regulations. Considering the fact that, in terms of time, the possibility of assessing such regulations is virtually unlimited, they have to be assessed in view of their usefulness in proceedings based on extraordinary legal remedies from the point of view of their conformity with the constitutional and general legal principles in effect at the time and recognised by civilised nations, their applicability in new trials and their conformity with the Constitution'. See also Case U-I-266/04.

[30] Case Up-13/99. The Court ruled in this case that: 'Since there is demonstrated a rational link between the complainant's case – the action for compensation for the damage caused during the Second World War (for the period of time spent in a concentration camp, for mental anguish due to the death of his parents and destroying happiness in his life and for the property destroyed by the occupier's authorities) – and the Republic of Slovenia, the exclusion of judicial protection before a Slovenian court would entail an interference with the right to judicial protection (Art. 23 of the Constitution). The rejection of the action against the Federal Republic of Germany due to the activities performed during the Second World War by its armed forces is an allowed interference with the right to judicial protection'. More on this in Škrk (2007, 2012b), pp. 290–292, 321–350.

[31] See the section on *A Priori* Reference of Constitutionality below.

[32] Umek (2011), p. 136.

applies also to Slovenia'.[33] When applying these principles it is particularly difficult to decide whether a certain rule or principle actually is a generally accepted principle of international law. In this respect, in its older case law, the Constitutional Court did not allow references to the General Declaration on Human Rights, explaining that it did not have the power and nature of an international treaty, whereas later it started to treat it as part of international customary law.[34]

In general, the Constitutional Court has applied generally accepted principles of international law mostly in relation to the regulation adopted during World War II and immediately afterwards. In Case U-I-23/93,[35] it reasoned from the fact that after WWII the international legal order was established on the basis of the condemnation of the Nazi and Fascist regimes and the persecution of the perpetrators responsible for the crimes committed, which was confirmed by the entire international community of that time. In the mentioned decision, the Constitutional Court took the position that certain activities of an individual during the war can be a reason for such a person not to be entitled to Yugoslav citizenship. In the case concerning the Victims of War Violence Act,[36] the Court ruled that:

> Legislation which recognizes the status of victim of war violence to persons who collaborated with the occupying forces would be inconsistent with the generally valid principles of international law, and thereby also inconsistent with the Constitution.[37]

In this respect, it should also be mentioned that in the case concerning the Convention against Torture,[38] Judge Škrk stated in her concurring opinion that:

> we cannot overlook the fact that the Convention against Torture, which defines torture as an offence under criminal law, was adopted on 10 December 1984. Today, the prohibition of torture, alongside the prohibition of genocide and grave massive breaches of human rights, is among the absolutely binding (peremptory) norms of customary international law (*ius cogens*), which have *erga omnes* effects. It is thus the case of norms in international law

[33] Case Rm-1/00, para 24. The Court continued by saying that '(a)pplying the *uti possidetis* principle, the Constitutional Court established that at the moment of the establishment of the sovereign and independent Slovenia, its former republic border with Croatia "within the framework of the former SFRY" became its internationally recognized State border'.

[34] Case Up-490/03.

[35] In Case U-I-23/93 the Constitutional Court reviewed the statutory regulation by which the post-war Yugoslav authorities had denied persons of German nationality who during the occupation had been loyal to the German Reich the possibility to acquire Yugoslav citizenship. It established that such a regulation was not inconsistent with the general legal principles which were already then recognised by civilized nations.

[36] Case U-I-266/04.

[37] Ibid, para. 20. Nevertheless, the Court ruled that 'it does not follow from the Constitution that the concept of victim of war violence should be restricted to only those civilian persons who had been subject to violent acts or forcible measures by the armed forces of the occupier. Therefore, it is inconsistent with the Constitution that the legislature excluded from the circle of civilian victims of war violence all those persons who had been subject to violent acts or forcible measures by the armed forces of the other warring side'.

[38] Up-555/03 Up-827/04, para 8.

which in the hierarchy of legal norms are above other norms and principles of international law.[39]

4.2.1.3 What Is an 'International Treaty'?

What constitutes an international treaty is at an informal level left to the Ministry for Foreign Affairs. In line with the Vienna Convention on the Law of Treaties, the Slovenian Foreign Affairs Act defines an international treaty in Article 69.[40] The second paragraph of the same provision states that an opinion on whether an international instrument is an international treaty shall be given by the Ministry of Foreign Affairs before the commencement of the procedure for the conclusion of an international treaty. This is a soft-law provision, as in the case of dispute the Constitutional Court is competent to define what constitutes an international treaty.[41]

The Constitutional Court has adopted a broad interpretation of international treaties, so that Article 8 of the Constitution also encompasses treaties *sui generis* (e.g. Vatican accords, concordats, pacts, etc.). In its ruling concerning the Agreement between the Republic of Slovenia and the Holy See, the Court had to determine whether the Agreement was an international treaty, as it would otherwise not be competent for its review. The Court found:

> The Agreement is being reached by the Republic of Slovenia as an independent and autonomous State and the Holy See as a *sui-generis* subject of international law. Treaties that the Holy See enters into as the highest and sovereign authority of the universal Catholic Church refer to the issues that are directly connected with the Catholic Church in States – treaty parties (. . .). Irrespective of the special character of agreements between the States and the Holy See (known as concordats, conventions, covenants, modus vivendi, protocols or agreements) the prevailing theory of international law treats them as real treaties, which do not only confirm the existing rights of treaty parties (e.g. the free activities of the Church), but can also create new rights and obligations for both sides. What applies to the interpretation of these agreements as well as to treaties entered into by States are the rules of the Vienna Convention on Contract Law (. . .), which was also signed and ratified by the Holy See.[42]

It should also be emphasised that in the case concerning the Act on the Reestablishment of Agricultural Communities and Restitution of their Property

[39] On the basis of this, Judge Škrk concluded that '(c)ertainly there exists an obligation under international law for Slovenia to incriminate in (the Criminal Code) the criminal offence of torture, as defined in Article 1 of the Convention against Torture, on the basis of the obligations assumed by acceding to this Convention in 1993'—ibid, para 10.

[40] The first paragraph of Article 69 provides: 'An international treaty shall be understood to be an agreement that the Republic of Slovenia has concluded in writing with one or more states or international organisations and to which international law applies, regardless of the number of instruments of which it is composed and regardless of its particular name'.

[41] Škrk (2009), pp. 51–52.

[42] Case Rm-1/02, para 9, footnotes omitted.

and Rights, the Constitutional Court stated that legislation, which would condition enforcement of a ratified and published international treaty binding upon Slovenia with the adoption of a new international treaty, would contravene Articles 8 and 153 (2) of the Constitution.[43]

4.2.1.4 The Role of Ratification and Publication

Ratification and publication of international treaties are of paramount importance for their application.[44] In the Case Rm-1/97 concerning the European Association Agreement, the Court held:

> Article 8 of the Constitution provides that proclaimed and ratified international agreements shall apply directly. From the viewpoint of international law, ratification is unilateral declaration of intention of one contracting party addressed to the other contracting party, to the effect that it accepts the content of a signed agreement as binding. Such declaration of intention is delivered by the State on the occasion of exchanging instruments of ratification. According to the provision of indent 5 of article 107 of the Constitution, such instruments are published by the President of the Republic.
>
> However, the President of the Republic may publish such instrument of ratification after the National Assembly has passed the law on ratification of an international agreement. The instrument of ratification is an international act, and the law on ratification is an act under internal law, whose importance is twofold. On the one hand, it is a sort of authorization granted to the President of the Republic, allowing him to publish an instrument of ratification and, on the other hand, it is a normative act by which obligations under international law are transformed into internal law of the State (. . .).
>
> Thus, provisions of an international agreement are integrated in the internal legal system of the Republic of Slovenia with the coming into force of such agreement on condition that they have been ratified in accordance with the internal law of the Republic of Slovenia. By an international agreement, rights and obligations are created for the State.
>
> When the international agreement has been approved by the law on ratification, it can create rights and obligations also for natural and legal persons in the country if its provisions

[43] Case U-I-308/02, para 18.

[44] Article 77 of the Foreign Affairs Act provides: 'International treaties shall be published in the Official Gazette of the Republic of Slovenia in the Slovene and a foreign language. If the Slovene language does not feature among the languages in which an international treaty is concluded, the treaty shall be published in a foreign language and in the Slovene translation.

An international treaty shall be published in the Official Gazette of the Republic of Slovenia prior to its entry into force under international law. Information regarding entry into force and termination shall be published in the Official Gazette of the Republic of Slovenia.

Following a decision by the Government, instruments referred to in Article 75, paragraph 8 of the present Act may also be published in the Official Gazette of the Republic of Slovenia, and following a decision by the National Assembly or the Government, international instruments that are not international treaties may also be published in the Official Gazette of the Republic of Slovenia'.

> are by their nature such that they make this possible (in the case of the so called 'self-executing treaty').[45]

This subject-matter has also been explored by the Constitutional Court in the case concerning the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation. In relation to the effects of ratification the Court held[46]:

> Ratification[47] creates internal legal effects of an international treaty; the latter becomes a part of the domestic legal order. This does not change the international obligation of the state. Quite to the contrary, with ratification of an international treaty the state upholds international obligations covered by international law (. . .) Non-fulfilment of the obligation is a breach of the treaty – it means that the court has made an international tort.

If a treaty is not ratified and published in the Official Gazette, it does not apply in Slovenia.[48] This was clarified by the Constitutional Court, e.g. in the case concerning the Israeli Agreement, which was signed by army officials only.[49] However, it is sufficient if the act of ratification is only published in the Slovenian language.[50]

From the point of view of ratification, two groups of treaties must be distinguished:

a) Treaties ratified by an act of the National Assembly; and
b) Treaties ratified by a Government regulation (decree).

The former are considered to be hierarchically above laws, whereas the latter are considered to be below laws, adopted by the National Assembly.[51] The internal hierarchy of legal acts *per se* does not affect the fulfilment of international treaties. Problems could therefore arise if the provisions of such a treaty are inconsistent with a national act of a higher rank (the Constitution, a law), as the constitutional demand for consistency of legal acts requires primacy of the constitution over all international treaties and primacy of parliamentary acts over international treaties ratified by the Government—whereas the principle of international law '*pacta sunt servanda*' requires respect of international treaties *bona fide*.[52] It should also be

[45] Case Rm-1/97, paras 16–19, footnotes omitted.

[46] Case U-I-376/02, para 10.

[47] The Court added in footnote 1 that the substance of an international treaty becomes part of the Slovenian legal order through an act of ratification; one can therefore talk about adoption (endorsement) and not about transformation, whereby every rule of international law needs to be expressly transformed into the domestic legal order—thereby referring to Andrassy et al. (1995), p. 6.

[48] Article 154(1) of the Constitution provides: 'Regulations must be published prior to coming into force. A regulation comes into force on the fifteenth day after its publication unless otherwise determined in the regulation itself'.

[49] Case U-I-128/98.

[50] Case U-I-376/02, para 14.

[51] This has been confirmed by the Constitutional Court—Case U-I-147/94.

[52] In the case of inconsistency, Article 87 of the Foreign Affairs Act provides that 'If the provisions of an international treaty do not conform to the law or other regulations, the Government shall initiate a procedure for amending the law or other regulation, or for amending or terminating the

emphasised that the Government may not ratify a treaty if this requires the adoption of new laws or the changing of existing ones.

4.2.1.5 Self-Executing Effect of International Treaties

The second paragraph of Article 8 of the Slovenian Constitution provides that international treaties apply directly. Direct application, however, is possible only of so-called 'self-executing' treaty provisions—i.e. provisions that concern individuals and contain sufficiently clear and precise rights and obligations for the parties to invoke them before the courts.[53] Whether a treaty provision is self-executing must be determined on a case-by-case basis by the national courts.[54] When this is not the case, the treaties oblige the authorities to adopt further regulation.

So, for example, the Constitutional Court decided in a case concerning the Convention on Children's Rights that the Convention is directly applicable and overrides a provision of Slovenian law on the right of a child to keep contacts with his parents. The Court claimed that the principle '*lex posterior derogate legi priori*' does not apply in the relation between the Convention and national legislation, but that the former is hierarchically higher than the latter. On the other hand, as regards some procedural rights of children guaranteed by the European Convention on the Exercise of Children's Rights, the Court decided that they are not directly applicable and cannot be assured without appropriate legislative action of the national authorities:

> If treaties are not directly applicable, such ratified and published treaties create international obligations for the state to adopt in its national legal order appropriate national legal acts by which it ensures compliance with such obligations.[55]

In this respect also the Constitutional Court's ruling on the Convention against Torture is illustrative. The Court found therein that:

> Most certainly, the Convention against Torture does compel the legislature to incriminate torture in (the Criminal Code) and such in a form as the aforementioned criminal offence is defined in Article 1 of the same. The Convention against Torture leaves it to the national legislature to determine the penalties for such, while it compels the legislature to define torture as regards the prescribed penalties as a grave criminal offence. Thus, such requirements of the Convention against Torture cannot be ascribed the nature of self-executing provisions or provisions that can be applied directly before Slovenian criminal courts. The impediment to the direct application of the Convention against Torture in the prosecution of alleged offenders of torture is the requirement to respect the principle of legality (*nullum crimen nulla poena sine lege praevia*), which is a universally recognized general principle

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treaty concerned. Pending the decision of the competent body, the international treaty shall be applied'.

[53] Buergenthal (1992), p. 317. See also Škrk (2007), pp. 298–300.

[54] Umek (2011), p. 133.

[55] Case U-I-312/00.

> of law, recognized by civilized nations and determined in Article 28 of the Constitution. However, the obligations accepted by means of treaties bind the state to comply with such obligations. (...) As regards the discussed issues, the Constitutional Court refers to the generally recognized treaty law principle of *pacta sunt servanda*, which compels contracting states to perform treaties in good faith.[56]

When an international treaty provision is in conflict with a domestic law provision, the question arises whether a national judge may adopt a ruling that is faithful to international law. If the conflicting national law was adopted prior to the applicability of an international treaty in Slovenia, judges should follow the Constitutional Court position that the hierarchically higher provisions of the treaty override the contrary provisions of national legislation. However, when contrary national legislation was adopted after the international treaty started to apply in the domestic legal order, it is disputable whether a judge may apply the international treaty provision or whether he should start a procedure for a constitutionality review of the conflicting law before the Constitutional Court. The Slovenian Constitutional Court has still not decided on this matter. However, on the basis of its human rights case law, Umek concludes that judges may deliver a ruling themselves if consistent interpretation of domestic law in the light of the treaty is possible. In the opposite situation, however, they should ask the Constitutional Court for a constitutionality review.[57]

4.2.2 Application of International Law as a Standard of Review of National Law

4.2.2.1 Applicable Approaches

The Constitutional Court has developed several approaches to the review of national regulation in the light of international treaties and generally accepted principles of international law.

When interpretation of a right under an international treaty is comparable to the interpretation of a right under the Slovenian Constitution, the Court considers the asserted breach of the right on the basis of the Constitution only. Consequently, the Court ruled that Article 6 of the European Convention on Human Rights (ECHR) does not assure a broader right to effective judicial protection than the Constitution and therefore reviewed the challenge only in light of Article 23 of the Constitution.[58] Similarly, the Court reviewed the requirement that courts in civil

[56] Case Up-555/03 Up-827/04, para 6, footnote omitted, KZ (Kazenski zakonik) replaced by 'Criminal Code'. See also the Constitutional Court ruling in the Case Rm-1/97.

[57] Umek (2011), p. 140. Cf. Case 106/77 Simmenthal [1978] ECR 629.

[58] Case Up-610/05, U-I-100/07, para 5.

proceedings should enable parties to use a language which they understand only in the light of Article 62 of the Constitution,[59] whereas the Court only reviewed the asserted procedural mistakes, which also breached Article 6 ECHR, in light of Articles 22 and 23 of the Constitution.[60] The Court noted that these two provisions 'guarantee at least such extent of protection as the first paragraph of Article 6 ECHR'.[61] Another example in this series of cases concerned the right to property as assured by Article 1 of the First Protocol to the ECHR, but which is also regulated by Article 33 of the Constitution. For this reason the Court reviewed the asserted breach of this right only in view of the constitutional provision.[62]

When, on the other hand, the substance of international treaty provisions does not overlap with similar provisions of the Constitution or when the latter does not contain any similar provision, the Court reviews the contested provision of national law directly in the light of the relevant international treaty. In this respect, the Court usually uses the Vienna Convention on the Law of Treaties and legal doctrine as well as the case law of international courts and other institutions.

Consequently, in the case concerning the Lipica Stud Farm Act, the Constitutional Court reviewed the Act in the light of the Aarhus Convention and ruled:

> The provision of the Act on the Amendment to the Lipica Stud Farm Act which with regard to the spatial regulation plan excludes a procedure for the preparation and adoption of such a plan in accordance with general spatial regulations although the plan is considered to be a state detailed area plan, and thereby also prevents the public from participating in such, is inconsistent with the Aarhus Convention.[63]

4.2.2.2 References to the European Convention on Human Rights

Particular importance is given to the case law of the European Court of Human Rights (ECtHR), which is binding upon Slovenia. For example, in a case concerning the right to a trial, the Slovenian Constitutional Court emphasised:

> Irrespective of its positions mentioned in the previous paragraph of the reasoning, in the review of the challenged Administrative Dispute Act's provisions the Constitutional Court must consider the case law of the ECtHR, according to which the effective judicial protection of the right to a trial within a reasonable time is ensured only if it also encompasses protection which affords appropriate satisfaction. The Constitutional Court must consider this case law irrespective of the fact that it was adopted in a case in which

[59] Article 62 protects the right to use one's language and script and provides: 'Everyone has the right to use his language and script in a manner provided by law in the exercise of his rights and duties and in procedures before state and other bodies performing a public function'.

[60] Article 22 protects equal protection of rights, and Article 23 protects the right to judicial protection.

[61] Case Up-1378/06, para 8.

[62] Case U-I-90/03, para 8.

[63] Case U-I-406/06. See also Case U-I-312/00 in which the Court found a provision of the Marriage and Family Relations Act inconsistent with the International Convention on Exercise of Children's Rights.

> Slovenia itself did not participate in proceedings before the ECHR. It namely concerns a clear and well established practice of the ECtHR, according to which conditions which must be fulfilled are determined in abstract so that concerning the ECHR it is possible to consider that the legal system of any contracting state contains an effective legal remedy against the violation of the right to a trial within a reasonable time also in cases in which a violation has already ceased.[64]

Furthermore, in a case concerning the Housing Act, the Constitutional Court stated that although the Slovenian Constitution does not recognise the right to a home, this does not mean that such a right is not guaranteed by international treaties that are binding upon Slovenia, and consequently relied on Article 8 ECHR and the ECtHR ruling in *Larkos v. Cyper*.[65] It derives from here that the Constitutional Court relies on the case law of the ECtHR in all relevant cases, not only when reviewing the compatibility of a law or decree with the ECHR or when considering a breach of a right guaranteed by the Convention—irrespective of whether the parties rely on the Convention or not.[66]

It is true, however, that the Court often does not expressly use international law as a standard for review of the national law, but it is evident only from its reasoning that the Court also used international law when reviewing a provision. For example, in its ruling concerning the Criminal Procedure Act, the Court found that '(t)he regulation determined in the Criminal Procedure Act (. . .) according to which the President of the court appoints a legal representative without obtaining the prior opinion of the defendant, is not inconsistent with the Constitution.' However, from its reasoning it follows:

> Neither the Constitution nor the ECHR and International Covenant on Civil and Political Rights grant a defendant the right to require the right to choose a legal representative also in cases in which a legal representative is appointed ex officio. (. . .) It does not follow from the text of the above-mentioned provisions of ECHR or from the case law of ECtHR that a defendant should be guaranteed the right to a particular legal representative in cases in which a legal representative is appointed ex officio.[67]

Furthermore, in the case concerning the Non-litigious Civil Procedure Act, the Constitutional Court reviewed compulsory detention in closed wards of psychiatric hospitals and in this respect in its reasoning relied on the case law of the ECtHR:

> The European Court of Human Rights (hereinafter ECtHR), deciding in the case *Winterwerp v. The Netherlands*, determined three fundamental requirements that must be met for the detention of mental patients to be lawful. According to the ECtHR, involuntary commitment is allowable only if the mental disorder has been reliably demonstrated based on objective medical expertise, and if the patient's mental disorder is of such a kind or such a gravity as to make him an actual danger to himself or to others. The third demand refers to

[64] Case U-I-65/05, para 12, footnote omitted.

[65] Case U-I-172/02.

[66] Umek (2011), p. 141.

[67] Case U-I-204/99, para 15, footnotes omitted.

the duration of commitment. Commitment may last only as long as the mental disorder justifying it persists.[68]

4.2.2.3 References to the International Law Within the Scope of a Constitutional Complaint

A constitutional complaint is a legal remedy by which a constitutional complainant in proceedings before the Constitutional Court claims a violation of human rights or fundamental freedoms.[69] A constitutional complaint cannot be lodged due to the erroneous application of substantive or procedural law or due to an erroneously established state of the facts in proceedings before courts. A constitutional complaint may, as a general rule, be lodged against a judicial decision only after all (ordinary and extraordinary) legal remedies in the Republic of Slovenia have been exhausted.[70] As such, it cannot be used to claim breaches of Article 8 as a fundamental constitutional principle.[71] Nevertheless, the complainants may challenge breaches of rights that have been made by wrongful interpretation or application of international treaties and generally accepted principles of international law under the same conditions as are imposed for a review of wrongful interpretation or application of domestic regulation. Further, the complainants may directly challenge breaches of human rights guaranteed in international treaties that are binding upon Slovenia. In practice, the most frequent document of reference is understandably the ECHR, but also the International Covenant on Civil and Political Rights and the General Declaration on Human Rights that is considered as international customary law in Slovenia and as such directly applicable. With the entering into force of the Lisbon Treaty, the Charter of the EU on Fundamental Rights also gained binding force and as such needs to be applied by the Slovenian Courts.

There are some cases where the Constitutional Court reviewed a human rights breach only from the perspective of an international treaty, mostly concerning the right to examine incriminating witnesses.[72] For example, in decision Up-207/99 the Constitutional Court examined a constitutional complaint against the decision of the Supreme Court, thereby referring to the third paragraph of Article 6 of the

[68] Case U-I-60/03, para 11, footnotes omitted.

[69] See e.g. Kaučič and Grad (2003), pp. 318–319.

[70] Before all extraordinary legal remedies have been exhausted (however, not before all appeals, which have the nature of an ordinary legal remedy, have been exhausted), the Constitutional Court may exceptionally decide on a constitutional complaint if two conditions are met: (1) the alleged violation is manifestly obvious, and (2) irreparable consequences for the complainant would result from the implementation of the individual act—see Guide through the Constitutional Court. What is a constitutional complaint and in what instances may one be lodged? http://www.us-rs.si/en/about-the-court/institution/frequently-asked-questions/4-what-is-a-constitutional-complaint-and-in-what-i/. Accessed 21 March 2013.

[71] See Cases Up-123/05 and Up-605/05.

[72] Umek (2011), p. 143.

ECHR. It stated that the defendant must be allowed to challenge incriminating statements, either in the investigation phase or at the main hearing, and to examine the author thereof with respect to such statements. In that case, it decided that the right to examine witnesses against the defendant was not violated, as the defendant had had the opportunity to examine the injured party in the investigation phase but did not use the opportunity for reasons he was responsible for. In this decision, the Constitutional Court took into account the positions of the ECtHR in *Kostovski v. The Netherlands* (1989), in which the ECtHR explained the substance of the right to examine witnesses against the defendant.[73]

4.2.3 References of Constitutionality

International law is also applied by the Constitutional Court in a different role, i.e. as a subject-matter of review in the ratification procedures of international treaties, when the Constitutional Court reviews their consistency with the Constitution.

4.2.3.1 A Priori Reference of Constitutionality

According to Article 160(2) of the Constitution, 'In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court'. A similar provision is also contained in Article 21 of the Constitutional Court Act[74] as well as in Article 70 of the same act, which also states that 'the Constitutional Court adopts such opinion at a closed session'.[75]

In the above-mentioned case concerning the European Association Agreement, the Constitutional Court held that an opinion of the Constitutional Court is not a consultative opinion:

> Regardless of a different designation, what is involved is a decision of the Constitutional Court whose legal character is, with respect to its effects, identical with other decisions of the Constitutional Court. It differs from decisions in that it cannot be used by the Constitutional Court in a manner which will interfere with the international agreement itself, so as

[73] See also Case Up-1378/06.

[74] Paragraph (2) of this Article states: 'In the process of ratifying a treaty, the Constitutional Court issues an opinion on the conformity of such treaty with the Constitution in the manner provided by this Act'.

[75] See Škrk (2009), pp. 54–61.

> it can interfere with acts of internal law – which are abrogated retrospectively or prospectively whenever a nonconformity has been identified.[76]

The Court also emphasised that in the case of assessing the conformity of an international agreement with the Constitution, it acts as a State body governed by internal law. For this reason it will carry out a review of an international agreement from the viewpoint of its conformity with the Constitution, but not also from the viewpoint of international law.[77] The Court made clear that an opinion concerning conformity with the Constitution as established does not bind just the National Assembly but, to an equal degree, with regard to the scope of and the reasons for the review, it also binds the Constitutional Court itself—and thus has the effect of a matter adjudged *(res iudicata)*.[78]

In the same case, the Court confirmed that a proposal for the evaluation of constitutionality can only be filed by three petitioners who are defined as such by the Constitution: the President of the Republic, the Government, or one third of the Deputies of the National Assembly.[79] It can be lodged only during the ratification procedure, that is, at the time when an international agreement has already been signed and after a proposed law on ratification has been submitted for consideration but has not yet been adopted by the National Assembly.[80] As the Constitution provides that the National Assembly shall be bound by any such opinion of the Constitutional Court, the National Assembly can, after a motion for constitutional review has been filed, decide concerning the ratification only after the opinion of the Constitutional Court has been delivered to it.

The Constitutional Court also explained that it evaluates the conformity of provisions of an international agreement with the Constitution at the time of reaching the decision, and regardless of when (if at all) the agreement will become effective.

It should also be mentioned that in the case concerning the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, the Court found:

> The Agreement of the Presidents of the Governments of the states parties (. . .) is not a regulation as it was neither ratified nor published, and thus did not become a part of the internal law. Therefore, according to Art. 160.1 of the Constitution, the Constitutional Court does not have jurisdiction to review it.[81]

In the case concerning the Nuclear Power Plant Krško,[82] the Court explained that the purpose of the preventive constitutional review of treaties is to prevent the

[76] Case Rm-1/97, para 15, footnotes omitted.

[77] This is under the competence of the International Court of Justice in The Hague and other international courts and tribunals. See Škrk (2009), p. 53.

[78] More on this in Škrk (2009), p. 59.

[79] Ibid, p. 58.

[80] Ibid, p. 57.

[81] Case U-I-376/02, abstract. Umek (2011), p. 138.

[82] Case Rm-2/02, a review of the Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Regulation of Status and Other Legal Relations Connected with the Investments in the Krško Nuclear Power Plant, its Use and Decommissioning.

State at the moment of ratifying a treaty from assuming an obligation under international law that would be inconsistent with the Constitution.[83] It continued by holding that when the Constitutional Court issues an opinion that the individual provisions of a treaty are inconsistent with the Constitution, the effect of such a decision can be double:

(1) if the treaty can be ratified with a proviso, the National Assembly can ratify such only provided that it uses its proviso concerning those provisions for which the opinion on inconsistency was issued;
(2) if the treaty does not allow a provision or if such is not admissible according to the provisions of the Vienna Convention on the Law of Treaties, given the valid constitutional system, the National Assembly must not ratify such a treaty or can ratify such only after it appropriately amends the Constitution. When the Constitutional Court issues an opinion that a treaty is not inconsistent with the Constitution, the decision on adopting an act of ratification is a matter of the political decision-making process of the National Assembly. Similarly, as when it reviews regulations, the Constitutional Court may not embark on the issue of the appropriateness of certain solutions when it decides on the consistency of a treaty with the Constitution; even less so can it review the issue of whether certain solutions are favourable for the State, or not.[84]

As already mentioned, the Constitutional Court is competent to review the consistency of legislative and executive acts with generally accepted principles of international law; however, it cannot present a standard of review of international treaties in the procedures of *a priori* references of constitutionality. In the case related to the Agreement between the Republic of Slovenia and the Holy See on Legal Issues, the Constitutional Court ruled:

> On the basis of Art. 160.2 of the Constitution, the Constitutional Court is vested with a special power of the preliminary (a priori) constitutional review of treaties. This power only refers to the review of conformity with the Constitution, not with ratified treaties and the general principles of international law. The purpose of the preliminary constitutional review of treaties is to prevent the State, at the ratification of a treaty, from assuming an international-law obligation that would be inconsistent with the Constitution, or from being compelled, after the ratification, to adjust the treaty with the Constitution, what could cause serious complications.[85]

Additionally, the Constitutional Court emphasised that it does not have jurisdiction to review the mutual consistency of treaties.[86]

[83] Ibid, para 19.
[84] Ibid, para 21.
[85] See e.g. Case Rm-1/02, para 8.
[86] Case Rm-1/97.

4.2.3.2 A Posteriori Reference of Constitutionality

Although *a posteriori* reference of constitutionality is not foreseen in the Constitution, the Constitutional Court in its opinion Rm-1/97 already declared it was competent to review already ratified treaties,[87] although this is rare in practice.[88] This concerns indirect review of the legality of international treaties—through reviewing the act of ratification and can be both substantive and procedural. In this respect, the Court may review acts of ratification adopted both by the National Assembly and by the Government.

In the case concerning the Agreement between the Republic of Slovenia and the Republic of Croatia on military pensions, the Court held:

> Since on the basis of article 160 of the Constitution, the Constitutional Court is competent to assess the constitutionality and legality of statutory regulations, the subject of assessment of constitutionality and legality is the Decree on ratification of the Agreement. With the assessment of the constitutionality and legality of this Decree, the Constitutional Court also of course indirectly judges the constitutionality of the Agreement itself. Such an indirect assessment of the constitutionality of international agreements is also validated in the practice of the Italian Constitutional Court and the German Federal Constitutional Court.[89]

A specific question related to *a posteriori* reference of constitutionality is whether the Constitutional Court is also competent to review the legality of international treaties ratified by a decree of the Government. The Court decided in the case concerning the Code of Conduct for Fishermen on the border with Croatia that a review of a decree of the Government by which a treaty was ratified cannot justify the jurisdiction of the Constitutional Court to review the legality of a treaty. This means that a statute and a treaty ratified by a decree may be inconsistent, but the Constitutional Court does not have jurisdiction to review such inconsistency.[90] The Constitutional Court will review inconsistency between a statute and a treaty ratified by a decree of the Government only if the inconsistency is a violation of the principle of the rule of law. In such a case, the question of the legality of the decree on ratification (for which the Constitutional Court has jurisdiction) could be raised. The question of the constitutionality of a decree is also raised in the case of the unconstitutionality of one of the provisions of a treaty.

[87] See also Case U-I-128/98 concerning the Israeli Agreement.

[88] Umek (2011), p. 144. See also Škrk (2009), pp. 66–67.

[89] Case U-I-147/94, para 9.

[90] According to Škrk (2009), p. 70; and Škrk (2007), pp. 308–310, this changes the position the Court implied in Case U-I-147/94 (the pensions case), where it left at least the hypothetical possibility to review the legitimacy of international treaties ratified by a governmental decree.

In such a case, the decree would violate the Constitution, as it would incorporate an unconstitutional legal norm into the internal legal order.[91]

4.2.4 Application of International Law as an Interpretative Instrument

In practice, international law is often used as an instrument when interpreting certain provisions of the Constitution and defining the scope of certain constitutional rights. For example, in the case concerning the Act on the Census of the Population, Households, and Housing,[92] the Constitutional Court declared that collecting data on the religious beliefs of citizens by the state is not inconsistent with the principle of the separation of religious communities and the state, as the Act on the Census of the Population ensures that the persons counted freely declare their religion, or decide whether at all to answer such a question. Thereby, it emphasised that the Universal Declaration of Human Rights of the United Nations ensures everyone the right to freedom of thought, conscience and religion (Art. 18). The Court explained that pursuant to the Universal Declaration of the UN, this right includes the freedom to change one's religion or belief, and the freedom, either alone or in community with others and in public or private, to manifest one's religion or belief in teaching, practice, worship and observance. The Court also found that, in compliance with the Universal Declaration of the UN, the right to the freedom of thought, conscience and religion is also ensured by Art. 9 ECHR and Article 18 of the International Covenant on Civil and Political Rights and concluded that the freedom of religion arises from the provisions of the Constitution and the binding instruments of international law (Art. 8 of the Constitution).

Further, in the case concerning the Enforcing the Public Interest in the Field of Culture Act,[93] the Court held that the particularities of the work and profession of theatre actors follow from the nature of the matter and therefore this is not like any other type of work. It said that the legislature could thus regulate their fixed-term employment relations differently from other workers, given that ensuring a quality cast is a sound reason for the different regulation of the employment relations of theatre actors and for the greater possibility to apply fixed-term employment relations. In this respect, the Court also referred to the European Social Charter, which provides for the right to work, which should, however, be defined by statutory legislation.

[91] Case U-I-376/02. Thus, the Constitutional Court did not review whether the Code of Conduct for Fishermen during Fishing is inconsistent with the law. The petitioners did not assert that a manifest inconsistency of this Code with the stated laws would be a violation of Art. 2 of the Constitution. The allegations on inconsistency with other constitutional provisions were general; therefore the Constitutional Court did not review them.

[92] Case U-I-92/01.

[93] Case U-I-278/07.

4.3 References to International Law by Ordinary Courts

As mentioned above, the Constitutional Court is not the only court bound to apply international law in Slovenia, but also ordinary courts of all instances.[94] Concluding from the case law of the Supreme Court, they most often refer to and apply the ECHR. This is necessary if the state wants to avoid condemnation by the ECtHR. Employment tribunals also often refer to the conventions of the International Labour Organisation (ILO). A few examples of applying the ECHR by the Slovenian Supreme Court are presented in this section.

As stated above, the Constitutional Court often applies the ECHR—both when reviewing the legality and constitutionality of the Slovenian legislation, as well as of executive acts and when considering constitutional complaints. Additionally, the Supreme Court of the Republic of Slovenia has referred to the ECHR and the case law of the ECtHR in numerous decisions.[95] Betetto[96] found that the civil law department of the Supreme Court directly referred to the ECHR in at least 63 cases, whereas it referred to the case law of the ECtHR in at least 224 cases. The number of references is rapidly increasing.[97] The impact of the ECHR and the case law of the ECtHR extends to various fields:

(a) The right to a fair trial (including the right to access to court,[98] the right to be heard,[99] the right to a hearing within a reasonable time[100]);
(b) The right to respect for private and family life[101];
(c) The right to freedom of expression[102];

[94] In the past years this has become increasingly accepted by judges at all instances. There were cases in the past, however, when judges claimed that the parties may not refer to the ECHR before the national courts, but only before the ECtHR—see e.g. Case P 166/06. For a comment, see Knez (2012), p. 104.

[95] Betetto (2012), pp. 1235–1248.

[96] Judge and vice-president of the Supreme Court.

[97] From about five cases a year in 2001–2004 to about 50 cases a year in 2010 and 2011.

[98] This is the most common ground to refer to the ECHR—see e.g. the following decisions of the Supreme Court: VSRS II Ips 996/2006, VSRS II Ips 367/2008, VSRS II Ips 868/2009 and VSRS II Ips 64/2010.

[99] See e.g. VSRS II Ips 288/2009, VSRS II Ips 908/2007, VSRS II Ips 431/2010, VSRS II Ips 410/2010, VSRS II Ips 133/2011 and VSRS II Ips 134/2011.

[100] See e.g. VSRS II Ips 477/2008, VSRS II Ips 362/2010, VSRS II Ips 198/2010, VSRS II Ips 232/2008 and VSRS II Ips 297/2008.

[101] In the Case VSRS II Ips 462/2009, the Supreme Court referred to Article 14 ECHR when considering the rights of same-sex couples. In the case VSRS II Ips 706/2009, the Supreme Court was deciding on the right to contact children after divorce and was in this respect critical of the ECtHR ruling in *Hokkanen v. Finland* (Case 19823/92).

[102] In Cases VSRS II Ips 274/2005 and VSRS II Ips 275/2005, the Supreme Court referred to *Malone v. United Kingdom* (ECtHR Case 8691/79) and *Roemen and Schmitt v. Luxembourg* (ECtHR Case 51772/99). In Case Cp 8/2004, the Supreme Court referred to Article 10 ECHR

(d) The right to receive information.[103]

In contrast, there are provisions of the ECHR, which, according to the Supreme Court decisions, are not directly applicable as they are not sufficiently clear and precise in defining rights and obligations to enable application by the national courts. An example of such a provision is Article 13 ECHR on the right to effective legal remedy.[104] In relation to this provision of the ECHR, the ECtHR ruled in *Kurić and others v. Slovenia*[105] that Slovenia violated Article 13 ECHR. On 26 February 1992, the date on which the Aliens Act became applicable, the municipal administrative authorities removed those who had not applied for or obtained Slovenian citizenship from the Register of Permanent Residents and, according to the Government, transferred them into the Register of Aliens without a Residence Permit (the so-called erased case). However, since the Supreme Court considers Article 13 ECHR directly inapplicable, a 'systematic solution' by the National Assembly was necessary.[106] The Supreme Court similarly declines that national courts would be granting damages on the basis of Article 41 ECHR guaranteeing just satisfaction, as, according to the Supreme Court, this is limited to procedures before the ECtHR and concerns international liability for damages of states.[107]

5 References to the Case Law of Foreign Courts

In decisions of the Slovenian Constitutional Court, one can also find references to the case law of foreign courts. This case law is understandably not binding upon the Court; however, it gives a comparative law perspective to the reasoning of the Court and serves as an interpretative instrument that strengthens the arguments of the Court. The courts to which the Slovenian Constitutional Court most often refers include the German *Bundesverfassungsgericht*, the French *Conseil Constitutionnel*, the Italian *Consiglo dello Stato* and the US Supreme Court. A few examples are given as follows.

In the case concerning the Restrictions on the Use of Tobacco Products Act,[108] the Court ruled that a statutory regulation which prohibits smoking in indoor public places and indoor working places does not breach the right of assembly. It

when declining the appeal against a decision of a lower court to fine the appellant for contempt of court.

[103] See Cases VSRS II Ips 274/2005 and VSRS II Ips 275/2005.

[104] See Cases VSRS II Ips 591/2008 and VSRS II Ips 470/2009.

[105] ECtHR Case 26828/06.

[106] See the Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 76/2010, as well as the Supreme Court's decision in VSRS II Ips 315/2010.

[107] Betetto (2012), p. 1248.

[108] Case U-I-218/07.

explained *inter alia* that the 'right of assembly requires assembly with the intention of common expression with the objective of participating in a public expression of opinions'.[109] In this respect, the Court referred to the German Federal Constitutional Court decision in the Loveparade Case.[110]

In the case concerning the Organization and Financing of Upbringing and Education Act,[111] the Court reviewed the question of whether the exclusion of denominational activities from the premises of public and licensed kindergartens and schools, outside the scope of performing their public service, admissibly interferes with the positive aspect of the freedom of conscience of an individual. In paragraph 13, the Court interpreted the meaning of negative religious freedoms and in this respect referred to the case law of the German Federal Constitutional Court[112] and of the US Supreme Court.[113]

In the case concerning the Rules of Procedure of the National Assembly,[114] the appellant referred to the German Law, and the Constitutional Court found:

> In German law (...) the budget is adopted in the form of a law, since the German Constitution explicitly determines this in the first paragraph of article 110. In the practice of the German courts and in German legal theory, the standpoint has been formed that the budget (act) is a law only in the formal sense, and that it does not have external effect, that it does 'not provide grounds for and does not remove rights (claims) and obligations' (decision of the Federal German Constitutional Court – BVerfGE, 38, 125 and following). It is thus possible to find a firm basis in German legal theory and court practice (quite contrary to what the appellant states) for concluding that the budget does not contain legal norms which would have to be adopted in the form of a law in compliance with article 87 of the Constitution.[115]

In the case of the Agreement between the Republic of Slovenia and the Holy See on Legal Issues,[116] the Court referred to the French Conseil Constitutionnel and stated:

> An interpretative decision (*la décision de non-contrariété sous réserve*) was introduced in the constitutional review of treaties by the French Conseil constitutionnel. Instead of finding that a treaty provision is inconsistent with the constitution, it interprets such in a manner such that makes possible a review that it is not inconsistent with the constitution.[117]

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[109] Ibid, para 20.

[110] The Loveparade Case, BVerfG, 1 BvQ 28/01, dated 12 July 2001, para 16.

[111] Case U-I-68/98.

[112] BVerfG, judgment dated 16 May 1995—1 BvR 1087/91 in BVefGE 93, 1 and BVerfGE, judgment dated 16 May 1995—1BvR 1087/91.

[113] *Stone v. Graham*, 449 U.S. 39 (1980) and *Lee v. Weisma*, 505 U.S. 577 (1992).

[114] Case U-I-40/96.

[115] Ibid, para 12.

[116] Case Rm-1/02.

[117] Ibid, footnote 41.

As the last example, in the case concerning the Quality, Labelling, and Packing of Feedingstuffs,[118] the Court referred not only to the decision of the Court of Justice of the European Union,[119] as the case concerned Directive 2002/02/EC, but also to the *Conseil d'État* and *Consiglio di Stato*:

> As the reasons due to which it established serious doubt as to their validity, the (CJEU) mentioned lack of a legal basis in Art. 152(4)(b) of the EC Treaty, the violation of the fundamental right to property, and the violation of the principle of proportionality. The temporary suspension of regulations of member states issued on the basis of the disputed Directive was for similar reasons also adopted by the French State Council (Conseil d'État) and the Italian State Council (Consiglio di Stato). Concerning the above-said, the Constitutional Court established that there was a serious doubt as to the validity of the mentioned Directive. In view of the fact that the request for preliminary ruling as submitted to the EC Court by the English court entirely covers the reasons which also in the petitioners' opinion point to the fact that the disputed provisions of the mentioned Directive are invalid, and due to which also the Constitutional Court found a serious doubt as to their validity, it is not necessary that the request for preliminary ruling as regards the validity of the disputed Directive provision is also submitted by the Constitutional Court.[120]

6 Association Agreement: Towards the '*New Legal Order of International Law*'

In May 1992 the Agreement on the Establishment of Diplomatic Relations between the EEC and Slovenia entered into force. On the basis of this agreement, the so-called Co-operation Agreement was signed in April 1993, introducing the Most-Favoured Nation principle and covering commercial, technical and financial cooperation, as well as trade issues, which were then under the exclusive competence of the EEC. In January 1997 the so-called Interim Agreement on Trade[121] started to apply, which began the process of gradual liberalisation of trade between the parties. This agreement was repealed by the Association Agreement,[122] which entered into force on 1 February 1999 and served as a legal basis for intense integration of the EU legal order into Slovenian law. When the Association

[118] Case U-I-113/04.

[119] Case C-453/03 *ABNA Ltd and Others v. Secretary of State for Health and Food Standards Agency* [2005] ECR I-423.

[120] Case U-I-113/04, para 10, footnotes omitted.

[121] The Interim Agreement on Trade and Trade-Related Affairs between the Republic of Slovenia of the one part and the European Community, European Steel and Coal Community and European Atomic Energy Community of the other part—ratification act published in the Official Gazette of the Republic of Slovenia, No. 8/1997.

[122] The Europe Agreement Establishing an Association between the European Communities and their Member States, acting within the Framework of the European Union, of the one Part, and the Republic of Slovenia, of the Other Part, ratification act published in the Official Gazette of the Republic of Slovenia, No. 13/1997.

Agreement was signed in June 1996 Slovenia also officially applied for membership.[123]

The Association Agreement was considered as an ordinary international treaty and has been applied by the Slovenian Constitutional Court in three cases.

Firstly, the Association Agreement was the subject of an *a priori* constitutional review, which was requested by the Government in the procedure of ratification.[124] The Court ruled that the following provisions were consistent with the Slovenian Constitution:

a) the provision according to which subsidiaries of Community companies shall have the right to acquire and sell real property and, as regards natural resources, agricultural land and forestry, the same rights as enjoyed by Slovenian nationals and companies, where these rights are necessary for the conduct of the economic activities for which they are established in so far as a subsidiary of a Community company shall be deemed to be a company established, registered and operating on the territory of Slovenia and in accordance with the law of the Republic of Slovenia;
b) the provision according to which foreigners shall, in accordance with international agreements, enjoy all those rights which are guaranteed by the Constitution, with the exception of those rights which only citizens of Slovenia may enjoy pursuant to the Constitution or the law, in so far as interpreted in the sense that the citizens of the Member States of the European Union shall have the right to purchase real property in Slovenia under conditions equal to those applying to the citizens of the Republic of Slovenia.

In contrast to this, the Court found the following provisions inconsistent with the Constitution:

a) the provision of the Association Agreement according to which Slovenia shall grant to Community nationals and branches of Community companies the right to acquire and sell real property and, as regards natural resources, agricultural land and forestry, the same rights as enjoyed by Slovenian nationals and companies, where these rights are necessary for the conduct of economic activities, in so far as the right to acquire and sell real property refers to land as Article 68 of the Constitution at that time provided that foreigners may not acquire title to land except by inheritance subject to reciprocity;
b) the provision according to which Slovenia shall take the measures necessary to allow the citizens of the Member States of the European Union, on a reciprocal

[123] Ilešič et al. (2000), pp. 30–31.

[124] Case Rm-1/97 as of 6 May 1997 concerning the Ratification of the Europe Agreement Establishing an Association between the Republic of Slovenia, of the one part, and the European Communities (hereinafter: the Community) and their Member States, Acting within the Framework of the European Union, of the other part. The whole opinion is accessible at: http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/920B1846747C32CCC12571720029D449. Accessed 3 April 2013.

basis, the right to purchase real property on a non-discriminatory basis (. . .) in so far as the right to purchase real property refers to the purchase of land;

c) the provision according to which Slovenia shall grant to the citizens of the EU Member States, having permanently resided on the present territory of the Republic of Slovenia for a period of 3 years, on a reciprocal basis, the right to purchase real property (. . .) in so far as the right to purchase real property refers to land.

The Court also emphasised that a competent State body may not approve any such commitment of the Republic of Slovenia under international law that would be in disagreement with the Constitution. A commitment under international law would be in disagreement with the Constitution if, by the coming into force of an international agreement, it created directly applicable unconstitutional norms in internal law, or if it bound the State to adopt any such instrument of internal law as would be in disagreement with the Constitution. It also held that by passing a law on ratification of the Association Agreement, the Republic of Slovenia would bind itself to adopt legal instruments which would guarantee the rights to purchase land, in particular a statute for amending the applicable constitutional provision according to which foreigners may not acquire title to land.[125]

In addition to the constitutional review, the Constitutional Court later referred to the Association Agreement in two other cases.

In the case concerning the conditions for leasing areas beside motorways for the construction of facilities for associated activities,[126] the Court ruled that the Association agreement does not apply, as the disputed Order preceded its application:

> The European Agreement on Association (. . .) did not enter into validity with the concluding document signed on 10 June 1996 in Luxembourg (hereinafter: EA). It came into effect, namely, on the first day of the second month of the date on which the contract parties informed each other that the internal procedures for approving the agreement in Slovenia, on the one hand, and in all member states on the part of the European Union on the other (article 131 EA) were completed. The positive opinion of the European parliament is also required (. . .). The impugned provision of the Order also ceased to apply prior to the introduction (8.8.1997) of the Ratification Act (. . .), with final documents and protocols with which is adopted the European Agreement (. . .), whereby the National Assembly approved that the State of Slovenia binds itself in international law to fulfilling the EA. The impugned provision of the Order also ceased to apply prior to the Ratification Act of the Interim Agreement (. . .), which covered only the trade part of the (association) agreement. This provision of the Order even ceased to apply prior to 1.1.1997, that is prior to the date from which this Temporary Agreement which was signed in Brussels on 11 November 1996, was temporarily used even prior to its ratification in the National Assembly. So an investigation in the sense of whether the impugned provision of the Order was in conflict

[125] The Constitutional Act amending Article 68 of the Constitution was proclaimed by the National Assembly on 14 July 1997, so that since then it provides: 'Foreigners may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly'.

[126] Case U-I-296/96.

> with adopted international obligations which derive from the EA was unnecessary, even if the initiator were to have introduced it.[127]

In the case concerning the method and conditions by which non-residents buy securities in the Republic of Slovenia,[128] the Court rejected the petitions of companies Publicum and Catalia for the commencement of proceedings to review the constitutionality and legality of the Order on Cross-Border Payment and to review the constitutionality and legality of the Order on the Method and Conditions by which Non-residents Buy Securities in the Republic of Slovenia. The Court held:

> The challenged regulation does not regulate legal relations between a stock exchange broker and an alien. It has only an indirect impact on these relations, and insofar as the stock exchange broker must obey these regulations when entering into transactions for an alien. Therefore, the stock exchange broker does not have a legal interest for challenging thereof. The Europe Association Agreement (EAA), to which the second petitioner refers to does not relate to it, as it is not a resident of Slovenia neither a resident of the Community. Therefore, it does not have a legal interest to challenge the regulation, which is alleged to be inconsistent with EAA.[129]

The Association Agreement has also been applied by the Slovenian Supreme Court, although rarely. However, in most cases when the parties relied on it the Court decided the Agreement does not apply. For example, in Case X Ips 13/2010 the appellant invoked the Agreement by requiring the application of a preferential customs duty. Nevertheless, the Supreme Court held that the imported goods could not be considered as goods having origin that is required for the Association Agreement to apply.[130] In Case X Ips 845/97, the Court denied the application of the Association Agreement to mutually recognise a customs information document issued by the Austrian customs authorities. Courts that quite often relied upon the Association Agreement include the Administrative Court. Relevant cases concern duty-free shops,[131] competition law,[132] patents,[133] etc.[134] It has generally been accepted that the provisions of the Association Agreement apply directly on the basis of Article 8 of the Slovenian Constitution and that national courts may, if they

[127] Ibid, para 14.

[128] Case U-I-94/97.

[129] Ibid, abstract.

[130] See also Cases I Up 147/2004, I Up 969/2004, I Up 1282/2004, I Up 1441/2004, I Up 83/2005, X Ips 77/2009, X Ips 375/2009, X Ips 63/2010 and X Ips 65/2010. Most of these cases concern situations where goods were initially recognised of appropriate origin for the Association Agreement to apply, but then falsification of the relevant documents on origin was proven and the customs procedures were renewed by denying the application of the Associational Agreement.

[131] Case I-U-700/2010.

[132] Case U 1286/2003.

[133] Case U 706/2001.

[134] In Case I-U-82/2009, the Administrative Court also referred to the Stabilisation and Association Agreement with Croatia.

consider specific provisions self-executing, grant rights to individuals directly on the basis of such a provision of the Agreement.[135] It has in this respect also been accepted that they should *mutatis mutandis* apply the case law of the Court of Justice of the European Union in cases concerning mirror provisions of the Treaty establishing the European Community. This was important to catalyse delay in the work of the executive and legislative authorities in bringing the Slovenian law in line with the EU law.[136]

For the application of EU law to come into practice, it was important to introduce various seminars on EU law for those judges and others under duty to apply EU law, who did not have EU law courses at university level. Courses on EU law had already been gradually introduced since 1992, first as one semester optional courses of general EU law, then as an obligatory course of two semesters. After accession, Slovenian law faculties introduced more specialised courses on EU law (e.g. institutions and principles of EU law, internal market law, judicial protection in the EU, EU competition law, European civil procedure, European environmental law, etc.). An examination of EU law is also included in the bar exam.[137]

7 Application of EU Law After Accession

With Slovenian membership in the EU, it was no longer sufficient to grant EU law a subconstitutional status as for traditional international law. If Article 8 was being applied also in relation to EU law, the principle of supremacy of EU law as defined by the Court of Justice of the European Union in the cases *Van Gend en Loos*[138] and *Costa/ENEL*[139] could not have full effect. There were intense discussions about whether the Constitution should be changed for this purpose. The decision was taken to amend the Constitution in order to pave the way for a limited transfer of sovereignty to EU institutions, as otherwise the Accession Treaty would on the basis of Article 8 of the Constitution be below the Constitution, and the Slovenian Constitutional Court could hold primary and secondary EU law inapplicable in Slovenia for reasons of its conflict with the Slovenian Constitution.[140] As this is not

[135] Professor Mirko Ilešič prepared an overview of the Agreement's provisions in terms of their direct effect. See Ilešič (1997), pp. 1323–1351.

[136] See e.g. Ilešič (1999), pp. 3–4.

[137] See Ilešič (1995), pp. 26–27.

[138] In the Case 26/62 *Van Gend en Loos* [1963] ECR 3, the CJEU held: 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields'.

[139] In Case 6/64 *Flaminio* Costa *v ENEL* [1964] ECR 585, it was held: 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.

[140] See Cerar (2011), pp. 83–84.

in accordance with the principle of supremacy of EU law, various solutions were proposed to amend the Slovenian Constitution—from abstract (to enable a transfer of sovereignty to international organisations in general) to concrete (to mention the EU expressly, and potentially some other organisations, e.g. NATO). A combined solution was also proposed, but the abstract approach prevailed. Consequently, by a Constitutional Law of 2003,[141] the Constitution was amended, so that a new Article 3a was added[142] which recognises that EU law actually is a different kind of international law and that it can produce effects which override the highest Slovenian law—the Constitution.

As to the application of EU law by the Slovenian courts, a conclusion can be made that in the first few years EU law was relatively rarely applied—mostly by administrative courts, but gradually also other courts started to apply it more regularly.[143]

Most EU-related cases of Slovenian courts concern public law: asylum cases, issues concerning indirect and direct taxation (including excise duties), environmental protection, health services (e.g. cost reimbursement), recognition of professional qualifications, free movement of goods, the European arrest warrant, etc. Civil law cases related to EU law, on the other hand, mostly concern competition law, employment law and recognition of judgments. Despite initial passiveness by the Slovenian courts as to referring questions for a preliminary ruling to the Court of Justice of the EU, in the past few years some questions have been referred.[144]

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[141] Official Gazette of the Republic of Slovenia, No. 24/03.

[142] Article 3a of the Slovenian Constitution provides: 'Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal shall pass at the referendum if a majority of voters who have cast valid votes vote in favour of such. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present'.

[143] See Knez (2012).

[144] Case C-403/09 PPU Detiček—concerning recognition of foreign judgments (referred by the High Court in Maribor); Case C-536/09 Omejc—concerning the Common Agricultural Policy (referred by the Administrative Court); Case C-603/10 Pelati—concerning taxation (again referred

8 Conclusion

Slovenia has adopted nearly 3,000 bilateral international acts and nearly 1,500 multilateral international acts,[145] although Slovenian courts do not often apply them. The Constitutional Court is to a certain extent an exception in this regard as it often applies international treaties—much more often than customary international law.[146] Reservations as to its application also stand for EU law, although to a lesser degree, particularly because of the directly applicable EU regulations. Regardless of the increasing application of EU law by Slovenian courts, some systemic problems can still be noticed, e.g. distinguishing between direct applicability and direct effect, the relationship between the Constitution and EU law, the applicability of EU law *ratione temporis*, etc.[147] Notwithstanding this, however, there is a legal basis, as well as a duty, to apply international and EU law in situations provided for by law. What is needed is for judges to become increasingly aware of the provisions covered by their duty enshrined in the maxime '*iura novit curia*', and for parties before Slovenian courts to become better informed about their rights recognised by international and EU law, as then they can also claim these rights before national courts.

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[145] Drenik (2009), pp. 127–129.

[146] Sancin (2012), p. 1220.

[147] Knez (2012), p. 109.

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