V.

CZECH PRACTICE OF INTERNATIONAL LAW

CZECH COURTS AND INTERNATIONAL LAW

Petr Mikeš

Abstract: The article presents a summary of the relationship of Czech courts to international law. Firstly it describes the development of the legal regulation and how the current legislation regulates the status of international law in Czech law. The legal environment is crucial for determining whether and how international law will be applied by national courts. The article also analyzes two decisions of the Czech Constitutional Court, which, according to the author, are the most interesting in the area of the relationship between international and domestic law. The first one actually changed the meaning of the Euro-amendment to the Constitution, and the second addresses the effects of a decision of the ECtHR on ongoing national proceedings. In the last part, the article provides an overview of and brief comments on judicial decisions issued in 2010 that deal with the relationship between international and domestic law.

Resumé: Článek přináší shrnutí vztahu českých soudů k mezinárodnímu právu. Jednak popisuje vývoj právní úpravy a popisuje aktuální právní úpravu postavení mezinárodního práva v českém právu, neboť tato úprava je klíčová pro to, zda a jak bude mezinárodní právo vnitrostátními soudy aplikováno. Článek dále podrobněji rozebírá dvě rozhodnutí Ústavního soudu, která jsou podle autora těmi nejzajímavějšími v oblasti vztahu mezinárodního a vnitrostátního práva. První z nich fakticky reinterpretovalo Euronovelu Ústavy a druhé se podrobně vyjadřuje k některým účinkům rozsudku Evropského soudu pro lidská práva na neukončené vnitrostátní řízení. V poslední části článek přináší přehled a stručné komentáře soudních rozhodnutí z roku 2010 věnujících se vztahu mezinárodního a vnitrostátního práva.

Key words: relationship between international and domestic law, international treaties, international law and domestic court.

On the author: Petr Mikeš (* 1978) graduated from Charles University in Prague, Faculty of Law, in 2002. By that time he was working at the Office of the President of the Czech Republic in the legal department and also dealt with international treaties. From 2004 he worked as an articled clerk and since 2006 he has been an attorney-at-law. He contributes to the publication International Law in Domestic Courts published by Oxford Law Press. From 2003 he was an external PhD student at the Department of Public International Law of the Law Faculty of Charles University. In 2011 he submitted and defended his thesis named Spread of International Law into Decision-Making Practice of Domestic Authorities.

1. Introduction

In principle, international law does not dictate to parties that are subject to it how to achieve compliance with its international legal obligations within their jurisdiction. However, for the effectiveness of international law in each country, the approach taken by legislative, executive and judiciary authorities to international obligations is of vital importance.

The legal rules for the application of international law result from both constitutional and ordinary law. These rules constitute a framework within which institutions applying international law, especially courts, deal with it. On the other hand, it is a fact that decisions of the courts are able to significantly influence how the legal framework is applied. Thus it is possible that courts operating in a relatively closed system are able to promote, through the practice of consistent interpretation, the passage of more international law than courts that operate within a system open to international law but look for reasons why international law does not apply.[1] This reasoning undoubtedly also applies for Czech law and the Czech courts.

2. History of the Application of International Law by Czechoslovak Courts

In order to understand the attitude of the judges applying international law it is important to also understand the history of such application. The former legislation and the attitude of judges undoubtedly inherently involves a certain tendency to inertia and thus is able to also affect the application of new legislation, at least for a certain period of time.

During the existence of Czechoslovakia, except for the final two years of its existence, there was an absence of legal regulations on the relationship between international and domestic law at the constitutional level. Therefore, the embodiment of this relationship was stipulated at the level of ordinary laws. The relationship of international to domestic law used to be the subject of lively interest in the doctrine of the so-called Czechoslovak First Republic (1918 – 1938). Its particular, views were quite fragmented. One part of the academic community was positively disposed to the possibility that even without express constitutional authority, an international agreement, or even all sources of international law, could have an immediate effect on individuals. The second, larger, part of academia then rejected such a possibility and concluded that international law may be applied in national law only if an explicit instruction is given to such application in an act of Parliament. The decision-making practices of the Czechoslovak Supreme Administrative Court and the Czechoslovak Supreme Court varied in that time. The Supreme Administrative Court used to systematically refuse to apply international treaties unless there was an explicit instruction for application set forth in an act of the Parliament. On the other

[1] Regarding comparison of two different approaches see e.g. G. Betlem, A. Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation.* European Journal of International Law, 2003, Vol. 14 No. 3. p. 569-589.

hand, the Supreme Administrative Court was able to interpret the relevant statutory authorization in a very flexible way. Although the Supreme Court proceeded mostly in the same manner, there were more than a few decisions issued by it that applied international treaties even without explicit statutory authorization.

The doctrine was aware of the inadequacy of the regulation of the relationship between international and national law. Therefore, some proposals concerning the so-called Constitution of the 9th of May, that was to replace the Constitution from the year 1920 after the Second World War, dealt with this relationship. Due to the communist takeover in February 1948, however, those proposals were not accepted in the final version of the Constitution of the 9th of May 1949.[2] At the Czechoslovak constitutional level, the relationship between international and national law was not dealt with until the adoption of Constitutional Act No. 23/1991 Coll., which introduced the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a constitutional law of the Federal Assembly of the Czech and Slovak Federal Republic.[3] The literature from the time of socialism was very inconsistent in its view of the issue.[4] The courts, except for some entirely isolated exceptions, applied international law only under a statutory reference to the priority application of international law.

After the democratic takeover in November 1989 (the Velvet Revolution), however, the country opened up significantly to international law. That included openness towards the outside through adopting international obligations that made it possible to monitor the Czech Republic's compliance with its international commitments, especially in the field of human rights.[5] There was also greater openness of domestic law to international law. At the constitutional level, this consisted mainly of the incorporation of international treaties on human rights and fundamental freedoms by Constitutional Act No. 23/1991 Coll., which, in its Section 2, stipulated:

International treaties on human rights and fundamental freedoms that the Czech and Slovak Federal Republic ratified and promulgated are generally applicable on its territory and take precedence over the law.

At the constitutional level, the competences of the newly established Constitutional Court of the Czech and Slovak Federal Republic were also important. Such court was established by Constitutional Act No. 91/1991 Coll., on the Constitutional Court of the Czech and Slovak Federative Republic.[6] The Constitutional Court had the competence to perform abstract and concrete reviews of constitutionality, which

[2] Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic.

[3] Enacted on 9th January 1991, with effect from 8th February 1991.

[4] For a detailed overview of the opinions from the time of socialism, see P. Mlsna, J. Kněžínek, *Mezinárodní smlouvy v českém právu. Teoretická východiska, sjednávání, schvalování, ratifikace, vyhlašování a aplikace.* [International Treaties in Czech Law. Theoretical Background, Negotiation, Approval, Ratification, Promulgation and Application] Linde. Praha 2009. p. 115 – 124.

[5] Czechoslovakia acceded, i.a., to the ECHR and made a statement which acknowledged the jurisdiction of the European Commission of Human Rights to receive complaints from individuals, and to the Optional Protocol to the International Covenant on Civil and Political Rights.

[6] Enacted February 27, 1991, with effect from April 1, 1991.

also included international treaties on human rights and fundamental freedoms. The powers of the Constitutional Court regarding international law were subsequently further expanded by Act No. 491/1991 Coll., on the Organization of the Constitutional Court of the Czech and Slovak Federal Republic and on Proceedings before it, which became effective on March 12, 1991. During its brief practice (from April 1992 until December 1993), this court then applied international law on a large scale. In seven out of sixteen published decisions, the most frequent objection from complainants that the Constitutional Court dealt with regarding international treaties concerned the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. However, ordinary courts did not yet start applying international law to a greater exent than they had done during socialism.

3. Legal Environment in the Independent Czech Republic

Until 2002, the Constitution of the Czech Republic[7] retained the concept of Constitutional Act No. 23/1991 Coll. and incorporated into the domestic legal order only international treaties on human rights and fundamental freedoms. This concept was the subject of justified criticism on the part of doctrine because it had left an unresolved relationship to other norms of international law and brought great difficulties in interpretation, including the issue of who is authorized to classify an international treaty as a human rights treaty.

Gradually, however, the attitude of Parliament began to change. After the initial rejection of the proposed amendment to the Constitution dealing with the relationship between international and national law in the year 1999, Parliament adopted the so-called Euro-amendment to the Constitution in the year 2001.[8] This amendment, with effect from June 1, 2002, changed the Czech Constitution to the constitution of a standard democratic state that is prepared to apply its international obligations also in domestic law. The Euro-amendment was inspired mainly by the Polish Constitution from 1997, which differs in matters of the relationship between international and domestic law from the Czech one merely in details. Some issues, however, the Polish legislature and courts tend to sometimes resolve differently from the Czech approach.

The Euro-amendment explicitly established, in Article 1, Section 2, of the Czech Constitution, respect for obligations under international law as one of the fundamental constitutional principles. Though this provision is not an incorporation provision, it does represent, however, important interpretative guidance.

It additionally extended, in Article 10 of the Czech Constitution, the category of incorporated international treaties to all that have been promulgated, ratified by the Parliament and by which the Czech Republic is bound. The whole article now reads:

[7] Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic – enacted December 16, 1992, with effect from January 1, 1993.

[8] Constitutional Act No. 395/2001 Coll. amending the Constitutional Act of the Czech National Council No. 1/1993 Coll. Constitution of the Czech Republic, as amended, enacted October 18, 2001.

Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make a provision contrary to a law, the international agreement shall be applied.

Article 10a of the Czech Constitution also allows certain powers of the Czech Republic to be transferred to an international organization or institution. The Euro-amendment established, in Article No. 87, Section 2, a preventative review of the constitutionality of international treaties and annulled the international treaties on human rights and fundamental freedoms as reference standards for abstract reviews of constitutionality. This change was quite important for the application of international treaties by ordinary courts. While the previous wording of the Constitution was not so clear on this point, from procedural rules it was quite clear that ordinary courts could not review potential conflicts between domestic law and international treaty but had to instead refer the matter to the Constitutional Court. From the new wording of the Constitution, it was the duty of ordinary courts not to apply the domestic rule and to apply an international treaty instead if there would be an inconsistency between these two norms. Most scholars welcomed the Euro-amendment, but some of them feared that due to the absence of transitional provisions, the treaties on human rights and fundamental freedoms had ceased to be part of the Czech law.

By amending the Constitutional Court Act,[9] the powers of the Constitutional Court to decide on measures necessary for implementing a decision of an international court which is binding on the Czech Republic if they cannot be executed otherwise, became much more consistent with the terms of the Czech Constitution than under the restrictive original concept. The most significant change was the possibility to reopen a procedure before the Constitutional Court in a criminal case after the EctHR had decided that the Czech Republic has infringed the rights guaranteed by the ECHR.

4. Decision Practice of the Czech Courts

With some exceptions, it can be hardly be said that there exists settled case law of the Czech courts in respect of the relationship between international and Czech domestic law. Many issues were resolved only once in the case law of the courts, often in decisions that were not published in publication collections, and thus it cannot be ruled out that in the future such cases could be resolved differently. Many issues were dealt with by the courts accidentally and often only *obiter dictum*, without a detailed justification addressing the problem. Some issues concerning the relationship between international and domestic law have not been resolved by the courts at all as yet. Notwithstanding the above, some of the decisions of the courts are certainly worth exploring further. I present two cases that are the most interesting in my opinion. The first one because it influences to a large extent the interpretation of the Euro-amendment to the Czech Constitution and is in my opinion even contrary to the text of the Constitution. The second one is interesting because it

[9] Act No. 182/1993 Coll., on the Constitutional Court, enacted June 16, 1993, with effect from July 1, 1993.

deals with the unusual problem of implementing a decision of the ECtHR in a case where a domestic procedure had not yet been completed before Czech courts. Other judgments certainly worth mentioning are the judgments of the Constitutional Court regarding the preliminary review of constitutionality because they also in many regards in fact modified the Constitution. There were only three judgments dealing with this procedure and all of them dealt with the Lisbon Treaty. All of these three judgments were already described in the first volume of the Czech Yearbook of International Law[10] so there is no need to repeat the reasoning of the Constitutional court, even though some aspects of the relationship between international and domestic law were not mentioned in the article since its primary interest was the Lisbon Treaty itself.

4.1 Powers of the Constitutional Court Regarding International Law in Abstract and Specific Review of Constitutionality

The powers of the Constitutional Court are enshrined mainly in the Constitution of the Czech Republic. However, through its decision practice, the powers of the Constitutional Court came to be significantly modified. As was mentioned above, after the emergence of the Czech Republic, the Czech Constitution incorporated only international treaties on human rights and fundamental freedoms. The Constitutional Court was empowered to review Acts of Parliament with regard to their compatibility with these treaties and to review whether ordinary courts obeyed them in their decision practice. When the draft Euro-amendment to the Czech Constitution was proposed to Parliament by the government, the draft also included specific powers of the Constitutional Court regarding provisions on human rights and freedoms stipulated in international treaties. However, these provisions were removed in Parliament. It was also quite clear from the Parliamentary debate that this was intentional and not merely an omission on the Parliament's part. Also, most scholars concluded after the enactment of the Euro-amendment that the Constitutional Court cannot use international treaties on human rights and fundamental freedoms as the basis for an abstract review of domestic norms. They also expected that a failure by the courts to respect international treaties can be used as the basis for a specific review of constitutionality only through the right to a fair trial and not directly.

Constitutional Court Judgement File No. Pl. ÚS 36/01[11] was adopted only 24 days after the Euro-amendment took effect and brought an entirely different view of the adopted amendment to the Czech Constitution. The Constitutional Court, irrespective of the relatively clear will of the Parliament and the majority opinion of scholars, concluded that international treaties on human rights and fundamental freedoms were still the reference standard for an abstract review of constitutionality,

[10] E. Ruffer, *The Quest of the Lisbon Treaty in the Czech Republic and Some of the Changes it Introduces in EU Primary Law*, Czech Yearbook of International Law, Vol. 1, Prague : Česká společnost pro mezinárodní právo, 2010. p. 23-64.

[11] From the date of June 25, 2002, published in the Collection of Decisions of the Constitutional Court volume No. 26, year 2002, p. 317 under publication No. 80/2002 and under No. 403/2002 Coll.

since according to the Constitutional Court they were part of the constitutional order. The main arguments of the Constitutional Court were the following.

The first one was an argument based on the constitutional maxim in Art. 9, Section 2, of the Czech Constitution, which forbids removal of substantive requisites of a democratic, law-abiding state. According to the Constitutional Court, this rule also contains an instruction to the Constitutional Court that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms. This means that the Constitutional Court implicitly concluded that the Euro-amendment was contrary to these requisites and therefore contra constitutional. Some scholars concluded that such a statement devalues the importance of this constitutional provision and pointed out international comparisons where a foreign constitutional court used similar provisions only if there was a major threat to democracy in the country concerned.[12]

This conclusion is based on the fact that from now on it should be the ordinary courts, and not the Constitutional Court, that are empowered to review the consistency of an Act of Parliament with an international treaty. The Constitutional Court concluded in this regard that if such a decision were taken by a court of any level, in a legal system which does not contain judicial precedent having the quality and binding nature of a source of law, it could never have even *de facto* derogative consequences. The Constitutional Court therefore did not agree with the theories pointing out that the differences between precedent-based legal systems and continental legal systems are rather theoretical.

The Constitutional Court then concluded that ratified and promulgated international agreements on human rights and fundamental freedoms must be included within the scope of the concept of the constitutional order, disregarding the fact that they are not included in the exhaustive enumeration of norms forming the constitutional order set forth in Art. 112 of the Czech Constitution. The Constitution must be interpreted to the effect that an ordinary court has an obligation to submit to the Constitutional Court for evaluation a matter in which it concludes that the statute which is to be used for resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms.

Almost every conclusion of the Constitutional Court is quite disputable and was criticized by many scholars. Unfortunately, the conclusions of the Constitutional Court are very brief, with a minimum of argumentation, where all of the reasoning consists of about one page of text from the judgement. Unfortunately, even in its

[12] See, especially, Z. Kühn, J. Kysela. *Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je? (Euronovela Ústavy ve světle překvapivého nálezu Ústavního soudu*. [Is the Constitution always what the Constitutional Court states that the Constitution is? (The Euro-amendment to the Constitution in light of the surprising ruling of the Constitutional Court] Časopis pro právní vědu a praxi, 2002, No 3, Vol. 10. p. 199-214, where the authors show that they found only a few decisions of the Indian Constitutional Court in cases not comparable to the situation addressed by the Czech Constitutional Court.

subsequent decision practice, the Constitutional Court has not dealt with the arguments and blindly pointed to the reasoning in respect of Judgment File No. Pl. ÚS 36/01, even though scholars showed that the reasoning is quite weak and incorrect. The Constitutional Court has maintained this view without any adjustment to the present day. What I feel to be the worst outcome of this decision is that the Constitutional Court, instead of encouraging the ordinary courts to apply international law, which could lead to a greater availability of international law to domestic law subjects, kept a monopoly on making decisions on human rights treaThe subsequent decision practice of ordinary courts differs. In its decisions, the Supreme Court in principle deferred to the Constitutional Court, but the Supreme Administrative Court has repeatedly stood up against this doctrine. An unambiguous opposition might be found especially in the judgment of the Supreme Administrative Court File No. 6 As 55/2006,[13] in which the court concluded:

The Supreme Administrative Court concludes that this conclusion of the Constitutional Court was expressed obiter dictum without any connection with the case resolved, that this conclusion was not justified in detail and that in the subsequent discussion of the scholars, these few arguments came under fierce criticism. In this situation, the Supreme Administrative Court finds it impossible to disregard the clear wording of the constitutional order.

Based on Constitutional Court Judgement File No. Pl. ÚS 36/01, the Constitutional Court also interprets the Czech Constitution in a way so that it has the power to take the international treaties on human rights and fundamental freedoms as the standard for specific reviews of constitutionality based on the conclusion that they form part of the constitutional order.[14]

4.2 Impacts of an ECtHR Decision on the Ongoing Domestic Procedure

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

The complainants had previously filed, on 3 March 1998, an individual application to the European Commission of Human Rights against some decisions of Czech Courts. They alleged that they had been the victims of violations of several articles of the ECHR. The ECHR found their application partially admissible regarding a breach of Articles 3, 8, 13 and 14 of ECHR. Regarding Article 6 of ECHR, the Court found admissibility only regarding the length of the domestic procedure but not regarding the fair trial because not all domestic remedies had

[13] From the date of July 11, 2007, published in the Collection of Decisions of the Supreme Administrative Court, 2007, Vol. 11, p. 956, under publication No. 1351/2007.

[14] The First decision stating this explicitly: judgment of the Constitutional Court from the date of April 15, 2003, File No. I. ÚS 752/02, published in the Collection of Decisions of the Constitutional Court, 2003, Vol. 30, p. 65, under publication No. 54/2003.

been exhausted (namely a constitutional complaint). The Czech Republic and the complainants reached an amicable settlement. The ECtHR approved the amicable settlement and struck out the application from the list by its judgment.

Meanwhile, there were still some procedures underway regarding the same issues at the domestic level, including a constitutional complaint before the Constitutional Court. The complainants partially withdrew their constitutional complaint since they had concluded the amicable settlement but insisted on a decision in respect of the rest of the complaint regarding the breach of Article 6 of ECHR concerning the length of the procedure after submission of the complaint to the European Commission of Human Rights and as well as regarding the fair trial.

The Constitutional Court discontinued the procedure on the constitutional complaint, applying analogically the procedural provisions governing situations when applicants withdraw their constitutional complaint. The Constitutional Court reasoned in the following way. The post- Euro-amendment Constitution incorporated into the Czech legal order a large group of international treaties and the courts are bound by them. On the other hand, none of the provisions of the Constitution incorporate decisions of an international court based on an international treaty which is, according to Article 10 of the Constitution, part of the Czech legal order. Therefore, these decisions do not have the same effects as the decisions of Czech courts. The Constitutional Court did not have any doubts that the content of a binding ECtHR judgment in a case against the Czech Republic constituted an obligation of the Czech Republic arising from international law. The duty to observe such obligation is also stipulated in Article 1, Section 2, of the Constitution, which article also binds the Constitutional Court. The ECtHR is not entitled to resolve the dispute before the applicants have exhausted all domestic remedies. If the ECtHR decided to accept the amicable settlement before the Constitutional Court decided on the matter, then this has to be interpreted in the way that the ECtHR did not feel it necessary to wait for the decision of the Constitutional Court. It would be contrary to the spirit of the ECHR, the principle of subsidiarity, logic and the judgment of the ECtHR itself if after striking out an application from of the list of cases the procedure were to continue at a domestic level. The content of an ECtHR judgment represents an international obligation for the Constitutional Court. By virtue of its nature, the content of the international obligation cannot be unilaterally changed by a subject that is subordinated to the jurisdiction of the Czech Republic by means of domestic law (within the procedure on the constitutional complaint).

On one hand, the resolution of the Constitutional Court is on a general level quite friendly to the decisions of international courts. Even though the Constitutional Court arrived at the conclusion that such a decision is not formally binding on it, the Constitutional Court accepted its obligation to observe the content of such a decision. On the other hand, in my opinion the Constitutional Court passed importance of the decision on admissibility. By this decision, the ECtHR defined which matters but also which legal issues will be subject to its review when, *inter alia*,

the ECtHR rejected the review regarding a breach of Article 6 as regards the fair trial due to such review being premature. If the parties had been unable to reach an amicable settlement, the ECtHR would be deciding by means of a judgment on merits only about the matters and legal issues that were defined by the previous decision. Therefore, if the parties reach an amicable settlement, then this amicable settlement covers only matters that would be otherwise be subject to the ECtHR review.

In the commented case, the Constitutional Court concluded that the ECtHR had had to conclude that there is no need to wait for the decision of the Constitutional Court because otherwise the ECtHR could not deliver its judgment. But the ECtHR could deliver its judgment only as regards matters and legal issues that were found admissible. Therefore, the question of a fair trial had not yet been resolved and there was no reason for discontinuing the procedure in this regard. It seems that the Constitutional Court adhered too much to a domestic understanding of a petition to a court, where it is usually only the relief that is deemed to be of decisive importance, not the reasoning.

Also, it is quite problematic to argue that the reason for not continuing in the procedure about the constitutional complaint was the duty of the Constitutional Court to observe the international obligations of the Czech Republic. According to Article 53 of ECHR, the high contracting parties are in no way prevented from providing greater protection of human rights on their territories than is guaranteed by the ECHR. Therefore, from the point of view of international law, the possibility of providing more remedies in domestic law than merely the payment of the agreed amount would not constitute a breach of any international obligations of the Czech Republic. It would only, to a certain extent, prevent the complainants from making a new application to the ECtHR.

5. Case Law in the Year 2010

When this article appears in the Czech Yearbook of International Law, I feel that it is important to pay special attention to the decisions rendered by Czech courts in the previous year, i.e. in the year 2010, even though they are not always the key ones. On the other hand, many decisions are very interesting and represent new approaches to international law on the part of Czech courts.

In its decision of February 15, 2010, the Constitutional Court affirmed its unclear position on the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, when the court explicitly said:

The question of whether the Aarhus Convention is to be regarded as an international human rights treaty, is something that the Constitutional Court leaves open.

The qualification of a treaty as a human rights treaty is essential for its standing in the Czech domestic legal order based on the above mentioned judgment of the Constitutional Court File No. Pl. ÚS 36/01. This decision confirms the same view

as had already been expressed by the Constitutional Court on June 30, 2008 in its decision File No. IV. ÚS 154/08.

By its judgment from March 31, 2010,[15] the Supreme Administrative Court confirmed that even in domestic law, what is decisive is the authoritative text of a treaty in the language set forth by the international law, which does not have to be the Czech version even though the treaty was concluded also in Czech. In the addressed case, the courts had to apply the Agreement between the government of the Czech Republic and the Government of the Socialist Republic of Vietnam on the Readmission of Citizens of Both States (2007). This agreement stipulated in its final provision that is done in Czech, Vietnamese and English and that in case of a divergence in interpretation, the English version shall prevail. The Czech version was using the term "expulsion order in legal force" while the English version was using the term "an enforceable expulsion order ". In the case before the court, the expulsion order was already in legal force but was not yet enforceable. The Regional Court in Ústí nad Labem, Liberec branch, took into consideration only the Czech version, so the Supreme Administrative Court quashed the judgment and ordered the regional court to use the English version instead.

The Constitutional Court showed an elegant solution for resolving conflicts arising from international obligations on the one hand and from the constitutional order on the other hand in its judgment from May 4, 2010.[16] The Municipal Court in Prague sent to the Constitutional Court a proposal for the annulment of one provision in the Act on the Protection of Classified Information and Security Capacity. This provision prohibited the accused and their lawyers in the criminal proceedings from familiarizing themselves with the classified information of foreign powers if they were not holders of security clearance certificates. The criminal procedure file included two attachments that were proposed as evidence in the trial but such attachments were marked as classified information in relation to NATO. The municipal court considered such legal restrictions to be in conflict with the Czech Charter of Fundamental Rights and Freedoms because they prevented the accused from freely choosing his defense counsel, reduced the right to a hearing of his case in his presence and the possibility to express his views on all evidence and also undermined the principle of equality of parties in the proceedings. The Constitutional Court concluded that there was a conflict between the rights of defense on the one hand and the state's interest to protect classified information on the other hand, where this interest to protect classified information also represents a constitutional obligation concerning the fulfillment of the international obligations under the Agreement Between the Parties to the North Atlantic Treaty for the Security of Information. If the Czech Republic were to be unable to fully provide the required confidentiality, the High Contracting Parties might be unwilling to provide certain sensitive information to the Czech Republic, which could lead to a threat to its security or to other essential interests

[15] File No. 2 As 80/2009, published in the Collection of Decisions of the Supreme Administrative Court, 2010, Vol. 7, p. 648, under publication No. 2078/2010.

[16] File No. 7/09 published under No. 226/2010 Coll.

protected by the Constitution. Under this situation, the Constitutional Court refused to repeal the contested provision of law but also concluded that the principle of a fair trial and the presumption of innocence also has to be fulfilled. The court cannot use as proof anything that the defense has been denied access to. The international commitment has priority and the criminal prosecution authorities have to decide whether they can conduct criminal proceedings while preserving such commitment, or whether such proceedings will have to be abandoned. I consider the solution adopted by the Constitutional Court to have been appropriate, as it upholds the international commitment as well as the constitutionally protected right of defense. Unfortunately, such a solution is applicable only in horizontal relations between the state and an individual, where it is against the state. It does not give a solution for opposite situations (i.e. where the evidence will be necessary for the defense) and also for possible disputes between individuals in cases where there would be a need to provide in a civil procedure evidence that is protected as classified information. Also, the Constitutional Court did not explain why it classified the agreement as a treaty that is incorporated into the Czech legal order through Article 10 of the Constitution. Specifically, what was lacking was approval by Parliament and the treaty had not been ratified by the president.

In its judgment of May 19, 2010,[17] the Constitutional Court was very strict in admonishing ordinary courts for ignoring ECtHR jurisprudence when applying national law implementing the provisions of the ECHR. The Municipal Court in Prague, when deciding whether to award compensation for non-pecuniary damages caused by delays in the previous procedure, concluded that the applicant did not allege and did not prove that that delays in the previous procedure negatively affected the personal affairs of the complainant in a way that would give rise to a right to compensation of non-pecuniary damage. The Constitutional Court referred to ECTHR settled case law, which concludes that there is no need for proving the non-pecuniary damage. There is a rebuttable presumption that the injury is caused already by an excessive length of proceedings. The Constitutional Court also referred to ECtHR case law in that regard, stating that a clearly erroneous application of the ECHR is also deemed to have occurred in the event of an incorrect application or incorrect interpretation of ECtHR case law. The Constitutional Court pointed pointed out in this case the lack of knowledge or the ignorance of ECtHR case law on the part of the ordinary courts. According to the Constitutional Court, this situation is alarming and negates domestic remedies and therefore leads to a risk of liability for a breach of the ECHR by the Czech Republic. However, it is questionable whether this was the appropriate case for the Constitutional Court to be admonishing the ordinary courts. The general courts were faulted for a lack of knowledge of the case law of the ECtHR but the Municipal Court in Prague had in fact referred to an earlier published decision of the Constitutional Court that had arrived at the same

[17] File No. II. ÚS 862/10.

conclusions as those of the Municipal Court in Prague even though they had been mentioned *obiter dictum*.[18]

An interesting case was addressed by the Constitutional Court on the date of August 12, 2010 under File No. III. ÚS 123/08. The Constitutional Court had decided in previous cases that members of so called housing co-operatives have a right to transfer ownership title to the flats in which they live, a right guaranteed by Article 1 of the Additional Protocol to ECHR. In the addressed case, the creditor of members of a housing co-operative asked a court to issue an interim measure preventing the housing co-operative from transfering the flats. The members of this housing co-operative filed an appeal that was dismissed by the court due to the fact that under the Civil Procedure Code they did not have the right to appeal against a decision on an interim measure. The Constitutional Court concluded that if a person has a substantive right guaranteed by the ECHR, such a substantive right has to prevail over domestic procedural rules. This decision is quite controversial because even the doctrine on the self-executing effects of international treaties excludes a self-executing effect in cases where a court does not have jurisdiction to decide the matter.[19] Unfortunately, the Constitutional Court did not explain in the reasoning how it managed to transform a substantive right into a procedural right. Moreover, I believe that the Constitutional Court would have been able to resolve the issue at stake through a consistent interpretation of the Civil Procedure Code, instead of trying to apply directly the Additional Protocol to ECHR.

[18] It was a Decision of the Constitutional Court from the date of Setember 27, 2007, File No. III. ÚS 712/06, published in the Soudní judikatura, 2008, No. 7, p. 496, under publication No. 87/2008.

[19] See e.g. Frolova v U.S.S.R. 761 F.2d 370 (7th Cir. 1985).