

ERODING CONCEPT OF NATIONAL SOVEREIGNTY: THE TURKISH EXAMPLE

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For the purpose of this paper, the concept of national sovereignty refers to the highest authority or supreme power, which a state is entitled under international law to exercise, in principle, within its borders. However, this paper does not have for its object to study the concept of national sovereignty as such. Rather, it shall examine the situation in Turkey, in the light of the evolution of that concept, with special reference to the developments in the field of human rights and economic and political integration in Europe.

In the first part of the paper, the meaning and the evolution of the concept of sovereignty shall be revisited, while an attempt is made to explain briefly and in the light of basic factors, which characterize the international life, the international limits which international law has imposed on the concept. For that reason, it shall address, in the peaceful first place, the restrictions which have been introduced to maintain the world public order and which emanate from the necessity to have respect for the peaceful co-existence of states, but which are not immediately felt in the internal life of the territorial state. In the second place, the focus shall be on the restrictions which have resulted from mutual interdependence of states and to which states have willingly agreed both within and outside their territories. Finally, it shall elaborate the limits which have been brought to the sovereignty of the state as a result of emergence of the individual as a subject of international law, at least so far as the protection of human rights is concerned.

The second part of the paper shall focus on the question of whether the way in which the Turkish sovereignty is regulated by the Turkish Constitution is compatible with the requirements of international law, so far as it covers international relations.

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I- The Evolution of the Concept of Sovereignty

Jean Bodin who is generally credited for having introduced, for the first time, the concept of sovereignty into the political science in its original sense, described the sovereignty in his famous book *De la Republique* (1577) as the absolute and permanent power within the state¹. Later on, the philosophers of the 17th and 18th centuries described sovereignty as the highest, the most supreme power of the national state which has no power above itself. Thus, during those centuries, sovereignty which was understood as an underived, permanent, and indivisible power which accepted no authority above itself, came to have its original meaning².

However, it must be noted that sovereignty as formulated by Bodin was not without limits: it was conditioned by divine law and the law of nations. It was the subsequent writers who purported to turn it into an unlimited power³.

As a natural result of elimination of feudalism and of the institution of empire to form national states, the proponents of the concept of absolute sovereignty felt obliged to concentrate the political power in the hands of the monarch, who then personified the state, and to exclude the possibility of

1 As to the concept of sovereignty see, among others, Lutem I, *Devletlerarası Hukukta Egemelik Kavramı* [The Concept of Sovereignty in International Law] 1947; Özman, A., "Devletlerin Egemenliği ve Milletlerarası Teşekküller" [Sovereignty of States and International Organizations] in A. Ü. H. F. D. vol XXI, no. 1-4, pp. 53-121; Meray, S.L., "Devletler Hukukuna Giriş" [Introduction to International Law], vol. 1, 1968, pp. 296-300; Çelik, E.F., *Milletlerarası Hukuk* [International Law], vol. 1, 1980, pp. 324-340; Kubalı, H.N., *Anayasa Hukuku Dersleri (Genel Esaslar ve Siyasal Rejimler)* [Courses on Constitutional Law (General Principles and Political Regimes)], 1971, pp. 144,48; Pazarıcı, Hüseyin, *Uluslararası Hukuk Dersleri* [Courses on International Law], Book II, 1989, p. 18ff; Gönlübol, M., "Milletlerarası Politika" [International Politics], 1978, p. 47; Brierly, J.L., *The Law of Nations*, 1930, p. 6; Brierly, J.L., *Law of Nations*, 4 th edition, 1949, p. 142; Oppenheim, L., (Lauterpacht H.) *International Law, A Treatise*, 1961, pp. 754-66; Kelsen, H., "The Principle of Sovereign Equality of States As a Basis for International Organization", *Yale Law Journal*, 1944 pp. 207-20; Kelsen, H., *Principles of International Law*, 1951, pp. 108-10, 155-57, 216-17, 438-44; Lasok, Dominik - Bridge, J.W., *Law and Institutions of the European Communities*, 4th edition p. 289; Lauterpacht, H., *The Development of International Law by the International Court*, 1958, pp. 297-400; Waldock, C.H.M., "General Course on Public International Law", *Hague Recueil*, 1962 - II, pp. 48-59; Brownlie, I., *Principles of Public International Law*, 3rd edition, pp. 287-97; Starke, J.G., *Introduction to International Law*, 9th edition, pp. 95-96; Shaw, M.N., *International Law*, 2nd edition, pp. 12, 25, 40.

2 See, Oppenheim (Lauterpacht), *supra* note 1, p. 20; Çelik, *supra* note 1, pp. 324-25.

3 See Brierly *supra* note 1, impression of 1930, p. 6.

power-sharing with any other persons and entities. The sovereignty of the state within its borders was designed to be absolute. Thus, a multitude of fully sovereign states which co-existed side by side and which aimed at unification within national boundaries, rather than a universal unity, came to form a new society. But that situation could not be carried too far, for that would have resulted in isolation of the states and in irresponsibility of them towards each other. Because all the states were equally sovereign, they all were supreme within their boundaries. Consequently, an order which could govern the inter-sovereign relations was needed. Otherwise, they would have fallen into a chaos, in which they could have lost much, including their sovereignty⁴.

It was at that point that the movement of Renaissance and Reform started and that America was discovered, which led people to go on adventuring, to try their luck in new lands. Those, in turn, resulted in an improvement of intercommunal relations and in the rise of a sympathy, across the borders, among peoples of the same faith. Last but not the least, revulsion of peoples against wars induced them to find international solutions to avert new wars or to form international alliances against potential aggressions⁵.

All those events cumulatively revealed that the state was not the only, the final and the perfect organized form of human beings; rather there was a wider society that went beyond the state and embraced it: international community. Once, it became clear that there existed such a community, which must be recognized, it immediately became necessary to admit that the community would have its own legal order. The universal maxim that wherever there is a society there is a law which starts to take effect in international relations. It was there that the emergence of international law became inevitable and rose as a direct result and appreciation of that inevitable reality. Remaining loyal to its historical foundation, international law not only turned its back on the idea of empire which aspires to world domination, rather than co-existence of national states, but also rejected the national state as the only fact. Rather, it proceeded on the basis of a multitude of states, constituting an international society. It has linked states with the bond of the rule of law. Thus, it has given shape to a new concept of unity in accordance with the political realities of the time which had given rise to it⁶.

4 *Id.*

5 *Id.* p. 8.

6 *Id.* p. 9

However, the restructuring was not without problems. It was necessary to reconcile the sovereignty of states with the rules and principles of international law which were created to govern the conduct of states and were binding on the latter, independent of the national rules of conduct. Surely, that was to be realized by restricting the sovereignty of the state. Therefore, the compatibility of the sovereignty in its original form with international law has always created difficulties. The very existence of international law means that the conduct of states shall be governed by a pre-fixed set of specific rules, and it makes it impossible to assert absolute sovereignty for states in their international relations⁷. Sovereignty implies the ruler on the one hand and the ruled on the other. It is not to recognize any superior, and it implies the power to take decision or to make binding judgments without the need to receive the consent of equals or inferiors⁸. Given that every state is sovereign, acceptance of absolute sovereignty in international relations would actually mean that international law does not exist.

Besides, when one mentions the rights, duties, equality and independence of states, one immediately has to concede that there exists a superior order which confers rights or imposes duties upon them and makes them equal, in which case it is a logical necessity to accept that sovereignty is qualified by international law. Thus, one may define sovereignty as the highest power which the state has within the parameters set by international law. This is the external aspect of sovereignty which is also called "independence".⁹It refers to the free conduct of the state in its international relations, without any external interference. The internal aspect of sovereignty, on the other hand, sig-

7 See, Oppenheim (Lauterpacht), *supra* note 1, pp. 122-23.

8 Bodin expressed it in the following terms: It is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law. No one who is subject either to law or to some other person can do this. That is why it is laid down in the civil law that the prince is above the law, for the word law in latin implies command of him who is invested with sovereign power. Quoted from *Six Books of the Commonwealth*, Book I, chapter 8, by Lasok, in his work referred to above, at p. 289; see also Çelik, *supra* note 1, p. 325.

9 In the arbitration of the Island of Palmas, the Arbitrator Max Huber expressed this principle in the following terms: "Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state." See the Island of Palmas Case (United States and the Netherlands), reprinted in Bishop's *International Law, Cases and Materials*, 3rd edition, pp. 400-401.

nifies that the state has exclusive authority over all persons, things, found in or on its territory and consequently has the power to establish its own institutions as it wishes and to legislate and govern freely. To put it shortly, sovereignty in international law means the autonomy of the state in its internal affairs and its independence in its external affairs within the parameters set by international law.¹⁰

At this point, it may be useful to list the restrictions on sovereignty, taking into account the factors and the needs which characterize the former. Therefore, one ought to look into the factors which render international life possible and which characterize international relations as being relevant to the protection of world public order, independence of nations and the increasing importance of the individual in international society.

In the following pages, an attempt shall be made to make such a grouping.

1.1. Restrictions Necessitated by the Need for Peaceful Co-existence of States

1.1.1. General Restrictions

Given that the international community is composed of sovereign states, all states have to renounce such part of their sovereignties as is necessary for the establishment and preservation of world public order. Otherwise, international life shall turn into a chaos. Therefore, the concept of the sovereign equality of states has come to comprise the following principles: all states are equal before the law; territorial integrity and political independence of every state is inviolable; every state has the right to choose its political, social, economic and cultural systems; every state shall respect its obligations and carry them out in good faith and shall live in peace with other states.¹¹

On the other hand, it is a well established principle of international law that a state can exercise its sovereignty, as referred to above, only within its own

¹⁰ Cf. Çelik, *supra* note, 1, pp. 327-31.

¹¹ See, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, as contained in the Annex to Resolution 3625 (XXV) of the General Assembly of the United Nations, adopted on 24 October 1970, reprinted in *Basic Documents in International Law*, ed. by I. Brownlie, 2nd edition, p. 32ff.

territory. In other words, no state may exercise its sovereignty outside its territory.¹²

As a corollary to the principle that every state has sovereignty within its territory, it is absolutely forbidden to interfere in the internal affairs of other states. Corresponding to this principle is the equally established principle that no state may allow its territory to be used for the operation of terrorists or otherwise destructive or subversive activities against other states.¹³

As a result of equality of states, a state, generally speaking, cannot exercise its jurisdiction over another state. The same principle is applied to diplomatic representatives of foreign states over whom national authorities cannot entertain jurisdiction without consent of the states of the former¹⁴

States have also pledged themselves to solve their differences through peaceful means in order to preserve the world peace and to maintain the world public order. For that reason, the use of force has been put, in principle, in the hand of the Security Council of the United Nations. The latter acts, under Articles 24 and 25 of the Charter, on behalf of the member states. The Council may take not only binding decisions by a majority of its members, as opposed to the resolutions about world peace, but it may also order enforcement measures, including the use of armed forces, if it has come to the conclusion that there is "any threat to the peace, breach of peace or act of aggression", a power which it may exercise under Article 39 of the Charter. That power it used in the Gulf conflict. The problems arising out of abuse of veto power granted to the permanent members of the Council aside, a state

12 This principle was stated very clearly by the Permanent Court of International Justice in 1927 in the *Lotus* case:

Now, the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state.

See, the S.S. "*Lotus*" (France vs. Turkey), P.C.I.J. Ser. A. No. 10 (1927). The text of the case is also reprinted, among others, in Bishop's *International Law, Cases and Materials*, 3rd edition, pp. 536, 539.

13 The U.N. Declaration, as mentioned in *supra* note 11, states that:

Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere, in civil strife in another state.

14 As to the principles regarding the sovereign immunity of states, see Gündüz, Aslan, *Yabancı Devletlerin Yargı Bağışıklığı ve Milletlerarası Hukuk* [Jurisdictional Immunities of Foreign States and International Law], İstanbul: Beta, 1984.

other than a permanent member against which such a decision has to be taken, cannot block such a decision, even if it is a non-permanent member.¹⁵

Thus, resort to war, which was once an attribute of sovereignty of every state, has ceased to be a right under present international law. Today, such a right is limited only to the existence of a situation of self-defense. This power has been taken away from states in the interest of world peace.¹⁶ This restriction is applied not only to the executive branch of the state but also, equally, to the legislative and the judiciary as well. For example, the legislature cannot declare a war which is not a war of self-defense. A treaty whose object is aggression against another state is null and void.

Those restrictions are universal in character in that they bind all states. They constitute the minimum conditions for peaceful co-existence of states. They are both included in the customary rules of international law and embodied in the provisions of the Charter of the United Nations.

1.1.2. Domestic Jurisdiction of States and Sovereignty

In international law, such areas of state activities which are not subject to international law constitute the domestic jurisdiction of a state¹⁷. The scope of those areas, however, depends on international law and varies with the degree of development of the latter. Thus, matters which fall by interna-

15 See, among others, Belik, Mahmut, *Devletin Harp Selahiyetinin Tahdidi ve Milletlerarası İhtilafların Sulh Yolu ile Halli Usulleri* [Restriction of Right to Resort to War of the State and Procedures for Peaceful Settlement of International Disputes], 1956, p. 144-179.

16 Belik, *supra* note 15, pp. 42-47.

17 See, D.W. Bowett, *The Law of International Institutions*, 4th edition, pp. 24-25; Meray, S.L., *Devletler Hukukunda Birleşmiş Milletler Anlaşması ve Tatbikatına Göre Millî Yetki Meselesi* [Domestic Jurisdiction in International Law According to the Charter and Practice of the United Nations], 1952; Meray, S.L., *Devletler Hukukuna Giriş* [Introduction to International Law], vol. 1, 1968, pp. 305ff.; Çelik, E.F., "Millî Selahiyetin Hukuki mahiyeti Hakkında İleri Sürülen Nazariyeler" [Theories as to the Legal Nature of Domestic Jurisdiction], in *S.B.F.D.* 1956, vol. XI, no. 3, pp. 119-49; Pazarca, Hüseyin, *Uluslararası Hukuk Dersleri* [Courses on International Law, Book II, 1989, p. 75; Belik, M.R., *Devletin Harp Selahiyetinin Tahdidi* [Restriction of the Right to Resort to War of the State], 1956, p. 141; Brownlie, I., *Principles of Public International Law*, 2nd edition, p. 244 ff.; Brierly, J.L., "Matters of Domestic Jurisdiction", in *BYIL*, 1925, pp. 8-19; Waldock, C.H.M., "General Course on Public International Law", in *Hauge Recuell*, 1962 - II, pp. 173-91; "The Plea of Domestic Jurisdiction before International Legal Tribunals", in *BYIL*, 1954, pp. 96-142; Fitzmaurice, G., "The General Principles of International Law", in *Hauge Recuell*, 1957 - II, pp. 59-67.

tional law within the domestic jurisdiction of a state at a given time are considered to be outside the operation of international law. As a result, international organizations or any other state or group of states do not have legal power to intervene in such matters.¹⁸ This principle was stated in Article 15, paragraph 8, of the Convention of the League of Nations, just as it is stated in Article 2, paragraph 7, of the Charter of the United Nations:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

It is generally accepted that a body seized of a dispute has the competence to decide on a preliminary question of whether a certain matter falls within the domestic jurisdiction or not.

On the other hand, international courts have been able to express themselves on the question of when a matter falls in the domestic jurisdiction. In the Nationality Decrees in the Tunisia and Morocco case, the Permanent Court of International Justice ruled that the question of when a matter fell in the domestic jurisdiction was relative, depending on the development of international relations. In its view, even a matter such as the determination of nationality, which is considered in principle within the domestic jurisdiction of states, may cease to be so if and when it is partly or wholly regulated by international law. In such a case, the state in question will restrict its sovereignty by having undertaken obligations in form of a treaty or otherwise towards another state or states, and consequently, the matter so regulated, ceases to be a matter of domestic jurisdiction only.¹⁹ The International Court of Justice, too, has consistently applied this principle wherever the occasion has arisen.²⁰

The organs of the United Nations have been able to discuss the topic on various occasions, but that has not prevented them from taking resolutions or decisions on violations of human rights, the principle of right to self-

¹⁸ For details, see Belik, *supra* note 17, p. 141.

¹⁹ See, P.C.I.J., Series A, No. 4, 1923, pp. 7, 23-24.

²⁰ See, Aegean Sea Continental Shelf case (Greece vs. Turkey), I.C.J. Reports, 1976, pp. 2-4, paragr. 52.

determination, on colonialism and non-self-governing countries. Generally speaking, they have not refrained from taking decisions or resolutions regarding actions repugnant to the aims and principles of the UN, or in cases where a decision had to be taken that a state party to a dispute breached or threatened the world peace.²¹

Thus, in international law, it is accepted, in principle, that there are areas where the state has exclusive jurisdiction. Its scope is determined by international law. It is not fixed or permanent; rather, it varies with the development of international relations. Even such areas as the regulation of citizenship or nationality, which is generally considered to fall within the exclusive jurisdiction of state, may cease to be so if the state has undertaken towards other states international obligations. The state then may have concurrent jurisdiction with other states or even no jurisdiction at all. This is nothing but acceptance of the fact that even in areas where a state has unlimited jurisdiction, the latter may be restricted as international law further develops.

1.2. Restrictions Necessitated by Scientific - Technological Developments, Polarization in the World, Interdependence and the Need for Cooperation

1.2.1. Restriction of Sovereignty for the Purpose of Institutionalized Cooperation

Developments in the fields of science and technology have enabled peoples to better know one another, to be informed of developments in any part of the world and have provided physical conditions for freer movement of goods, capital and labour. On the other hand, states have come to a point where they find it very difficult to satisfy by themselves alone the ever-increasing demands of their populations. That has, in turn, not only given a new impetus to the development of international trade, but also it has given life to the structural means whereby such trade could be conducted. While states which are able to produce goods at the highest quality are dependent on the raw materials from other states, states commanding energy sources are able to influence the rest through their decisions and actions.²²

21 See, Brownlie, *supra* note 17, pp. 294-95.

22 Cf. Friedmann, W., *The Changing Structure of International Law*, 1964, p. 60.

States which alone had no or little power of competition in the world markets felt obliged to cooperate with others to gain such power together. States which alone were not able to provide for the well-being and prosperity of their peoples have seen that they could do so when they cooperate with others. That phenomenon has given permanence to ad hoc cooperation arrangements which, in turn, resulted in the birth of international organizations. Thus, institutionalized cooperation started; hence, the establishment of OECD, EC, EFTA, LAFTA, World Bank, COMECON etc.

On the other hand, polarization after World War II required that institutionalized international cooperation be extended to political and military areas. Hence, the establishment of the Council of Europe, Western European Union, NATO, Warsaw Pact which is now dissolved.

One has to admit that the emergence of international organizations has inevitably diminished the sovereignty of states. They have voluntarily renounced, through treaties they have freely entered, such part of it as was necessary for the establishment of such organizations.

However, membership of all the international organizations does not diminish the sovereignty of the members to the same extent. In that respect, many variations exist. We suggest to break them down into two groups as a matter of convenience:

1. Classical international organizations
2. Supranational or quasi-supranational organizations

What distinguishes the latter from the former may be summarized as follows:

If an organization has:

- a) a constitution-like statute or charter.
- b) at least one body which is capable of taking binding decisions with a majority vote of the members.
- c) a mechanism for execution of its decisions.
- d) the power to take decisions binding not only upon the member states but also upon their citizens, and
- e) its own court,

it is considered to be a supranational organization. Lack of one or two of the

above-mentioned qualifications may disqualify it from that group.²³

NATO may exemplify the classical international organization, while the EC surely falls in the category of supranational organizations. The mechanism established within the context of the Council of Europe and the European Convention on Human Rights to give effect to the rights and freedoms guaranteed therein through what we call the Strasbourg Institutions (the Commission, the Court and the Committee of Ministers), comes close to the latter rather than to the former group. Perhaps the same thing could be said with regard to the UN, taking into account the powers conferred upon the Security Council by the Charter though, in practice, they are hardly exercisable because of the abuse of the veto power by the permanent members.²⁴

Turkey is a member of the NATO, the Council of Europe respectively and co-founder of the UN, and has applied for full membership to the EC. Therefore, its sovereignty is affected by its membership of or relationship with those organizations. An attempt shall be made below to indicate the extent to which membership of those organizations requires renunciation of sovereignty. First, we shall briefly explain the structure of the EC, leaving our considerations of the UN and the Council Europe to a latter stage.

1.2.2. Supranationality and Transfer of State Sovereignty: The EC Example

The EC is an organization which has its own legal system, its own personality and is endowed with real powers as a result of corresponding powers being transferred to it from the member states. In other words, the member states have created a community with such powers as binding both them and their citizens.²⁵ The European Court of Justice has stated that fact in the *Costa/Enel* case, which was to become very famous, in the following terms:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of

23 For details, see Arsava, A.F., *Avrupa Toplulukları Hukuku ve Bu Hukukun Ulusal Alanda Uygulanmasından Doğan Sorunlar* [The Law of the European Community and Problems Arising out of Its Application in National Sphere], 1985, p. 17, note 53.

24 Recent rapprochement between the West and the East may change this position, as is shown by the solidarity of the permanent members in the case of Iraqi invasion of Kuwait.

25 See, among others, Lasok, D. - Bridge, J.W. *Law and Institutions of the European Com-*

the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from the states to the Community, the Member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.²⁶

For the reasons referred to above by the Court, Community Law prevails over national laws in certain areas. The member states cannot, in law, even through legislations, take actions which would result in the abolition or weakening of Community Law. The Court went on to put it in emphatic terms:

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the state, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of the Community law cannot vary from one state to another in deference of subsequent domestic law, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.²⁷

After having made some other statements for the reasons which we need not

munities, 4th edition, pp. 27ff; Dolmans Maurits, J.F.M., *Problems of Mixed Agreements, Division of Powers within the EEC and the Rights of Third States*, 1985, pp. 7ff; Doğan, İzzettin, *Türk Anayasa Düzeninin Avrupa Toplulukları Hukuk Düzenine Bütünleşmesi Sorunu* [The Problem of Integration of the Turkish Constitutional Order into the Legal Order of the European Communities] 1979; Pazarıcı, Hüseyin, *Uluslararası Hukuk Açısından Avrupa Ekonomik Topluluğu'nun Yaptığı Anlaşmalar* [Agreements Made by the European Communities: An Analysis from the Angle of International Law], 1978, pp. 20 ff.

²⁶ Case 6/64 (1964), EC R., p. 583, 593, reprinted in *Leading Cases in the Law of the European Communities*, eds. D.J. Gilstra-H.G. Schermers - E.L.M. Volker - J.A. Winter, 4th edition, p. 87, 91, 113, 290, 354, 454.

mention here, in support of its reasoning, the Court felt obliged to touch Article 189 of the Treaty of Rome. As it is a common knowledge, that article is about the supremacy and direct applicability of Community Law:

In order to carry out their task, the Council and the Commission, shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.²⁸

Taking into account those aspects of the article in question, the Court said:

The precedence of Community Law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable' in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community Law.²⁹

It would not be wrong to say that a renunciation by member states of a part of their national sovereignty lies at the foundation of the functioning and vitality of the EC, as was put by the Court:

28 As to the supremacy of Community Law, see, in addition to the works referred to in *supra* note 25, Wyatt, I.-Dashwood, A., *The Substantive Law of the EC*, 2nd edition, p. 25ff.

29 See, *Costa/Enel case*, *supra* note 26, p. 114. Equally important is the *Van Gend en Loos case*, in which the Court said:

The conclusion to be drawn from this is that 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, and the subjects of which comprise not only Member States but also their nationals.

See, *Van Gend en Loos vs. Netherlands Fiscal Administration*; case 26/62 preliminary ruling of 5 February 1963, 1963 ECR 10, reprinted in *Leading Cases*, pp. 83-86.

This transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.³⁰

The Court reiterated the same line of thought in the Second Art Treasure case as well:

The grant made by Member States to the Community of rights and powers in accordance with the provisions of the Treaty involves a definitive limitation on their sovereign rights and no provisions whatsoever of national law may be invoked to override this limitation.³¹

Restriction of sovereignty not only entails compatibility of Community Law with the present national law, but also requires that future legislation of the Member States should be so.³² On the other hand, the Court supervises the application of Community Law. National courts are bound not only to apply Community Law, but they are also required to refer to the Court any dispute or hesitation over its interpretation for its preliminary opinion.³³ Consequently, in areas where the Community is endowed with exclusive power, the exercise of sovereignty of the Member States is transferred to the former.

1. 3. Restrictions Resulting from the Ever-Increasing Protection at the International Level of the Individual

1. 3. 1. The Individual as a Subject of International Law

International law was born as the law among states, and to a great degree it still retains that character. The persons whom it addresses are, in principle, states. That is why international courts and tribunals have declared that international law does not directly confer rights or impose duties upon the individual, but that it would do so through the state of which the individual is a

30 See, *Costa/Enel case*, *supra* note 26, p. 114.

31 *Second Art Treasure case (Commission of the EC vs. Italian Republic)*, case 48/71, judgment of 3 July 1972, 1972 ECR, 532; reprinted in *Leading Cases*, pp. 103-104.

32 *Simmenthal case 106/77 (1978)*, ECR 692, 643, 644, reprinted in *Leading Cases*, p. 138.

33 See, *Treaty of Rome*, Article 177.

national. In the *Mavromatis* case, the Permanent Court of International Justice stated that principle in the following words:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.³⁴

As a corollary to that principle, even in cases where rights are conferred upon individuals through treaties concluded between states, the former cannot ask for vindication of rights in questions in his own right. Likewise, where the individual is wronged in foreign states he does not have any legal standing at the international level, if his state does not take up his case through diplomatic representations.

Although this is still the prevailing position in international relations, the developments recorded in international law after the second half of the 20th century have resulted in the individual becoming partly the subject of international law.³⁵

In the first place, today an individual who has committed war crimes or crimes against peace and humanity is personally responsible at international level. This was proved to be the case at the Nuremberg and Tokyo Trials. The international instruments adopted subsequently have been added to that list.³⁶

In the second place, the personal responsibility of pirates at the international level is today beyond any doubt. All national courts in custody of them shall have jurisdiction to try them.³⁷

In the third place, there have developed a set of new principles under which apartheid, illicit traffic in narcotic drugs, traffic in women and children and hijacking of aircrafts are viewed to be crimes giving universal jurisdiction.³⁸

34 See, *Mavromatis Palestine Concessions*, P.C.I.J. Series A, No. 2, reprinted in Bishop's *International Law, Cases and Materials*, 3rd edition, pp. 747-48.

35 See, Lauterpacht, H., *International Law and Human Rights*, 1950, pp. 27ff.

36 *Id.*, pp. 35-48.

37 See, Convention on High Seas of 1958, Geneva, Article 19; U.N. Convention on the Law of the Sea of 1982, Jamaica, Article 105.

On the other hand, attempts to protect the rights of workers at an international level have gained a momentum since the establishment of the International Labour Organization (I.L.O.) in 1919.³⁹ A practical and reasonably effective legislative and enforcement mechanism established within the ILO system has made it possible and easier for workers to gain additional support from abroad in their struggle to form trade unions and to pursue collective bargaining with employers. Parallel to that development, the European Social Charter has introduced common rules for the protection of workers at the regional level, with its supervisory mechanism.⁴⁰

Moreover, new developments and improvements in the other fields of human rights must be specifically mentioned here. The Charter of the United Nations which proceeds from the idea that an enduring world peace can only be established and maintained if human rights are respected, and which has for its object to avert the repetition of cruelties and brutalities of World War II, provides for not only basic principles regarding the protection and maintenance of world peace but also principles requiring respect for human rights and freedoms.⁴¹

However, the Charter does not define the rights in question. To fill that gap in the years following the acceptance of the Charter, additional proclamations were issued and instruments or conventions were adopted. In 1948, the Universal Declaration on Human Rights was adopted by the General Assembly of the United Nations.⁴² In 1966, the International Covenant on Civil and

38 See, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Article 1, in *Human Rights, A Compilation of International Instruments*, United Nations, 1988, p. 69.

39 For the English text of the Constitution of ILO see, "The Constitution of the International Labour Organization", in *Basic Documents in International Law*, ed. I. Brownlie, 2nd edition p.45. Its Turkish translation appears in *Resmî Gazete* [Official Gazette], 16.2.1948, No. 6833, and in *Düstur*, tertip (impression) III, cilt (volume) 29, p. 778; *Düstur*, tertip III, cilt 3, p. 1054.

40 The European Social Charter, Directorate of Press and Information, Strasbourg, 1978; the official Turkish translation is reprinted in *Resmî Gazete*, 14 Ekim 1989.

41 The English text of the Charter is reprinted in Brownlie, *supra* note 39, pp. 1-31. Its official Turkish translation is reprinted in *Milletlerarası Hukuk ve Milletlerarası Teşkilatlar İle İlgili Temel Belgeler* [Basic Documents Concerning International Law and International Organizations], ed. Aslan Gündüz, 1987, p. 20ff.

42 The English text of the Declaration is reprinted in Brownlie's *Basic Documents in International Law*, 2nd edition. pp. 144-49. Its Turkish translation is reprinted in *Milletlerarası Hukuk ve Milletlerarası Teşkilatlar Hakkında Temel Belgeler* [Basic Documents Concerning International Law and International Organizations], ed. Aslan Gündüz, 1987, p. 201ff.

Political Rights and the International Covenant on Economic, Social and Cultural Rights⁴³ were adopted and opened for signature of states by the same body. Those conventions both define the rights and freedoms and provide for sanctions of some sort against potential violations.

Turkey is an original member of the United Nations and, consequently, is bound by the provisions of the Charter. Pursuant to Articles 55 and 56 of the Charter, it has to respect human rights. But those articles are not self-executory. They do not define human rights. They impose on the member states a duty to respect human rights, but it is a duty the scope and contents of which are not delineated.

That was why the Supreme Court of California was unable to give effect to those principles in a case which was based upon the latter.⁴⁴

That being the case, scope and limits of the obligations of the Turkish state arising from the Charter are not clear. They need to be supplemented by other means. Without that, the only clear obligation seems to be that gross violations of the Charter directed at a certain group of people or having their focus on a certain kind of activities are absolutely forbidden by the Charter.

The impact of the Universal Declaration on the national state is not easy to grasp. In particular, we notice a practice in this country to put on an equal footing the Declaration and the European Convention on Human Rights, which needs correction.

It should be clearly noted that the Declaration, as its name suggests, is not a treaty which commands the binding undertaking of states. In spite of the fact that it was adopted by an overwhelming majority of the General Assembly in 1948, no state dissenting and only 8 states abstaining, it is only a declaration. When states expressed themselves on its legal nature, they clearly indicated that it was not a treaty, and that it was not binding upon them. That conviction underlay the positive votes cast in its favor and they must be understood in that context.⁴⁵ The attempts on the part of some states to have the Declaration adopted as an authoritative interpretation of the Charter did not prevail.⁴⁶ The Declaration defines the rights and freedoms but it does

43 For the text of the Covenant see, *Human Rights, A Compilation of International Instruments* United Nations, 1988, pp. 7-43

44 See, *Sei Fujii V. California*, Supreme Court of California, reprinted in 19, *ILR* 312, 1952.

45 See, *Lauterpacht*, *supra* note 35, p. 392ff.

46 In particular, France and Belgium. See *Id.*, p. 402.

not impose any obligation on states to execute them. Therefore, the Declaration qua Declaration has no binding force. Its having been identified with the European Convention in practice goes too far beyond its real meaning.

Be that as it may, some provisions of the Declaration may be considered as binding in one of two ways: Firstly, some provisions have come to receive blessings of nations as customary rules. They are binding in that capacity. Secondly, many provisions of the Declaration have found their ways into constitutions of nations⁴⁷ and into the subsequent international conventions.⁴⁸ They have become binding in new contexts. When we say that the Declaration is not binding as such, we try to point to a misunderstanding. We are next to none to acknowledge and appreciate the tremendous influence which it has exercised over the subsequent national and international legislation. It is always possible to abrogate or to put an end to treaties, but the Declaration which is an embodiment of an eternal reality shall live as long as humanity exists and it shall remain a source of inspiration for all nations without exception.

The Council of Ministers of Turkey had the Declaration published in the Official Gazette in 1949 with the order that it be taught in schools and made known to the public. The acceptance of the Declaration was not subject to the same procedure as treaties, which was correct.⁴⁹

The Declaration has influenced the Turkish state not only in its enunciation of ordinary laws but also in its making of the Constitution and restructuring of the state mechanism.

1.3.2. Supranational European Supervision System and Restrictions on National Sovereignty

The restrictive influence of the European Convention on Human Rights upon the national sovereignty of the signatory states is more marked than that of other international instruments. The Convention, which was signed in 1950, is complemented by 9 protocols. Turkey adhered to it in 1954, and it

47 See, Gündüz, *supra* note 41, pp. 100-102.

48 *Id.*, pp. 201-202.

49 See, *Resmî Gazete* [Official Gazette] 27 May, 1949.

50 The Turkish translation of the Convention and its 8 protocols are reprinted in *Milletlerarası Hukuk ve Milletlerarası Teşkilatlar Hakkında Temel Metinler* [Basic Documents Concerning International Law and International Organizations], ed. Aslan Gündüz, 1987, p. 237ff.

has since become an important part of Turkish public law.⁵⁰ However, it is common knowledge that full application of the Conventional order can be realized only when the competence of the Commission under Article 25 and that of the Court under Article 46 have been accepted by the contracting states. Turkey has only recently accepted both the competence of the Commission to receive individual applications and the competence of the Court under Article 46.⁵¹ That is why the existence of the European-Convention-system, which is an integrated whole with its rules of conduct and its mechanism for the objective European supervision, has not yet been felt strongly enough in the Turkish legal system. That is why the dimension which the European Supervision system has obtained through the application and interpretation of the Convention is not fully perceived in Turkey.

Here, a word of explanation about the Convention itself would be useful. The Convention is applied and interpreted by its own organs. Though execution of the judgments of the Court or of the decisions of the Committee of Ministers requires cooperation of the signatory states, what was created in Strasbourg has eventually turned into an objective legal order. For that reason the European Convention is different from ordinary treaties which are based on mutual undertakings of the contracting parties. The Convention has created an objective order of obligations. Consequently, even if a state fails to fulfil its obligations arising from the Convention, the other contracting parties cannot reciprocate in the same way. They have to continue to apply the Convention as was amply stated in the case of Ireland vs. United Kingdom:

However, the Irish Government's argument prompts the Court to clarify the nature of the engagements placed under its supervision. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting parties. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement.⁵²

The protection of basic human rights is a part of common heritage of Western Europe. With the European Convention on Human rights it is enriched.

51 The Turkish declaration regarding the competence of the Court is to be valid for three years and renewable afterwards, See, *Resmî Gazete* 27 September, 1989, No. 20295.

52 Council of Europe, E.C.H.R., Case of Ireland vs. the United Kingdom, judgment, Strasbourg, 18 January 1978, paragr. 239.

Some even would go as far as to say that the European Convention is of constitutional character for the signatories, and that it has become the charter of the constitutions of liberal Western European states.⁵³ Attempts to protect human rights date as far back as about 200 years ago and characterize the European public law. That is why the respect for human rights, democracy and supremacy of rule of law, which are needed to make the former possible, are necessary conditions for membership of the Council of Europe and of the European Community respectively.

The European Community does not have its own catalogue of human rights and an enforcement mechanism. But in a joint declaration issued in 1977 by the Commission, the Council and the Parliament it was categorically stated that the Community would respect human rights.⁵⁴ Although the efforts of the Community to become a party to the European Convention have not met with success, the Court of Justice has always accepted the provisions of the Convention as being among the general principles of law and applied them wherever that was required in the cases it decided.⁵⁵

The Court of Justice applies the provisions of the European Convention to the disputes, on the other hand, in conjunction with the concepts and principles common to the constitutions of the member states. In other words, the provisions of the conventions and principles and concepts common to the constitutions of the member states are treated on an equal footing.⁵⁶

Besides, the Declaration of Human Rights⁵⁷ adopted by the European Parliament in 1989 both refers in its Preamble to the Convention and confirms it by declaring similar or identical rights and freedoms.

The Convention contains self-executing provisions and confers upon individuals rights and freedoms, as is clearly stated in Article 1:

The High Contracting Parties shall secure to everyone within

53 See, Bakır Çağlar, *Anayasa Billimi, Bir Çalışma Taslağı* [Constitutional Science, A Working Draft], BFS, 1989, p. 35.

54 See, *Official Journal* 1977, C 103/I; *European Community Bulletin* 3/1977, p. 5. The same declaration was later on adopted by the European Council. See, *European Community Bulletin*, 3/1978, p. 5.

55 See, Lasok-Bridge, *Law and Institutions of the European Communities*, 4th edition, p. 160.

56 See, *Id.*, p. 160ff.; Steiner, J., *Textbook on EEC Law*, 1988, pp. 41-42.

57 See, Declaration of Human Rights, Doc. A 2-3/89, Resolution, 12 April, 1989, in *Official Journal* No. 120/51.

their jurisdiction the rights and freedoms defined in Section I of this Convention. [emphasis added]

Hence, the words "shall secure" were substituted by the drafters of the Convention for the words "undertake to secure" in Article 1.⁵⁸

On the other hand, the obligation of the parties is not limited to giving effect to the rights and freedoms contained in the Convention. They also have to prevent violations of them at a lower level and remedy the results of violations if the latter have somehow occurred.⁵⁹ The order of objective obligations created by the Convention is maintained by the Strasbourg Institutions reviewing and supervising the application of the Convention in the signatory states, that is through European supervision.

1.3.2.1. Supervision by the Strasbourg Institutions of the Convention in Concrete and Abstract Terms

In order to better explain the objective order of obligations created by the Convention, it is both useful and necessary to examine the supervision by the Strasbourg Institutions of the application of the Convention in the signatory states.

Under Article 24, every contracting state may lodge complaints with the Commission against any other contracting state which, in its opinion, has violated any provision of the Convention (interstate application procedure). In order to do so, it does not need to show that its rights or interests or those of its nationals have been affected by the violations.⁶⁰ Because what is at stake here is that the general or public order of Europe in which rights of the contracting states and individuals as recognized by the Convention should be protected, every contracting state has the right to see that the order is respected.⁶¹

More importantly, in order to initiate the inter-state application procedure, it is not necessary to wait for an implementing measure in violation of the Convention. Mere existence of a law which provides for or directs or authorizes

⁵⁸ Council of Europe, E.C.H.R., *Case of Ireland vs. United Kingdom*, Judgment, 18 January, 1978, p. 239.

⁵⁹ *Id.*

⁶⁰ See, Council of Europe, E.C.H.R. *Case of Ireland vs. United Kingdom*, judgment, Strasbourg, 18 January 1978, paragr. 240; *Case of Klass and Others*, judgement, Strasbourg, 6 September 1978, paragr. 33.

⁶¹ *Id.*

measures incompatible with the Convention would be enough for the initiation of the procedure, provided that the law in question is sufficiently clear and precise to make the violation immediately apparent.⁶² If those conditions exist, the Strasbourg Institutions may examine *in abstracto* the impugned law. But if they decide that the impugned law is not stated in sufficiently clear and precise terms to make a breach immediately appear, then they will examine *in concreto* the allegations of the claimant in order to see whether the concrete measures, taken pursuant to the law, in any way violate the Convention.⁶³

On the other hand, according to the case law established by the Strasbourg Institutions, it is always possible to take a decision on a question of whether a piece of legislation which directly affects a person without an implementing measure, is compatible with the Convention. Here, the reader should be referred, among others, to two cases:

In the case of *Klass and Others*, a claim by five German lawyers that Article 10, paragraph 2 of the German Constitution and the Act of 13 August 1968 on Restrictions on the Secrecy of Mail, Post and Communications enacted pursuant to the Constitution were contrary to Article 8 of the Convention was examined.

According to the said Act, state agents have the authority not only to have recourse to surveillance measures contemplated in the Act if, in their opinion, that is needed for the protection of national security and democratic order, but also they have the discretion whether to inform the subjects of the measures after the operation is terminated. Consequently, it would not be possible under the law in question to have the correctness of those administrative measures verified. But in the actual case it was not proved that the claimants had been subject to such measures. In fact, they could not have known it.⁶⁴

Referring to the case of *Ireland vs. United Kingdom*, the Court clearly stated that in order for individuals to petition the Commission there must be a violation of their guaranteed rights or they must have been adversely affected by the alleged violation, that individuals did not have an *actio popularis* available to them, that they could not, in principle, complain *in abstracto* against a legislation and that it must have been applied to their detriment.⁶⁵ However,

62 See, *Case of Ireland vs. United Kingdom*, *supra* note 60, paragr. 240.

63 *Id.*,

64 See, *supra* note 60.

65 See, *supra* note 60, paragr. 33-34.

the Court admitted that there might be situations where a legislation might adversely affect an individual before it is actually implemented.

Turning to the case of *Klass and Others*, the Court stressed that when a person was deprived of means of knowing whether a measure in violation of his rights was applied to him, the guarantee provided by the Convention would disappear. The German Act established a system whereby the privacy of a person could be violated without his knowing it. In that case, the Act affected the users or potential users of mail and telecommunication services. Consequently, it constituted a direct interference with the right to privacy of individuals guaranteed by Article 8 of the Convention.⁶⁶

In the *Marckx* case,⁶⁷ some provisions of the Belgian civil Code were subject of controversy. The applicant had given birth to a child (Paula) out of wedlock. The Belgian Civil Code then discriminated against such children. It restricted the right of the mother to leave her inheritance to her illegitimate child. Not recognizing any relations of kinship with other members of the family, it deprived such children of receiving any inheritance from their relatives. Thus, the Code was capable of directly affecting children and mothers falling in the above mentioned category. Paula was an illegitimate child under the Code, but she was not actually affected by the Code, because the latter had not been applied to her yet. No question yet arose of distribution of inheritance of her relatives.⁶⁸ The Belgian Government capitalized on that fact in an attempt to persuade the Court that Paula was not a victim in the sense of Article 25. But the Court refused to agree:

Article 25 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation if they run the risk of being directly affected by it. [emphasis added]⁶⁹

According to the Court, the applicants had not applied to the Court to examine in *abstracto* some provisions of the Belgian Civil Code. Rather, they had for their aim to complain against a legal situation which directly concerned them and which adversely affected non-married mothers and their illegitimate children.⁷⁰

66 *Id.*, paragr. 38.

67 See, Council of Europe E.C.H.R., *Marckx* case, judgment, Starsbourg, 13 June 1979.

68 *Id.*, paragr. 8-24.

69 *Id.*, paragr. 27.

70 *Id.*, paragr. 27.

In fact, the Court emphatically stated that Article 25 gave only to victims of violations of rights and freedoms the right to petition the Commission, that individuals did not have a kind of *actio popularis* to bring complaints before the Commission against what they believe to be violations of rights and freedoms of others. But, in its opinion, in the instant case, the mere existence of provisions of the Belgian Civil Code without an act of implementation could be a cause for the initiation of the individual application procedure.

The Court decided in the end that various provisions of the Belgian Civil Code were contrary to the Convention. For example, Article 334 making child-mother relationship dependent on the child being recognized by its mother. Article 756 giving no right to inheritance to an illegitimate child until it is recognized, and restricting the scope of that right even after recognition, and depriving it totally of the right to inheritance from other members of the family. The Court accepted a symbolic compensation claim of the applicants of one Belgian Franc. While the case was pending, Belgium had already submitted a draft bill to the Senate which would eliminate all discriminatory provisions in the Civil Code.

Through European Supervision under Article 25, many inconsistent laws of various member countries have been amended to bring them in line with the Convention. The following examples stand out among others:

In the *De Becker* case of 1962, the Commission decided that the Belgian Criminal Law under which the applicant was deprived not only of the right to practise journalism but also of the right to express himself on any subject in form of publication, for having collaborated with the enemy during World War II, was contrary to Article 10 of the Convention.⁷¹ The Belgian Government immediately had the law in question amended while the case was pending.

In the *Handyside* case of 1976, the Court found that judgment of Court of Appeal of the United Kingdom finding as contempt of court publication of a series of articles concerning the then burning issue of whether Thalidomide had any injurious effects on pregnant women, was contrary to Article 10 of the Convention.

Shortly after the judgment, the United Kingdom amended the law on the ba-

⁷¹ See, Beddard, Ralph, *Human Rights and Europe*, 2nd edition, p. 9.

sis of which the judgment had been delivered.⁷²

Again, after the Court had found that the British Act for Homosexual Offenses making private sexual intercourse between adult homosexuals punishable was contrary to Articles 8 and 14 of the Convention, the United Kingdom made such amendments to the Act in question as to make it compatible with the Convention.⁷³

In a case brought against the United Kingdom by a group of workers, who had been dismissed under the "closed shop system" in the UK, to challenge the compatibility of the Labour Law of 1974 Act permitting the above mentioned dismissals with the Convention, the Court granted the applicants' request that the Act was contrary to the right to freedom of thought, freedom of expression and freedom of association. Following the Court decision, the United Kingdom enacted the Employment Act 1982 to remedy the inconsistent situation.⁷⁴

In the Winterwerp case, brought against the Netherlands by a Dutch national, the latter complained that under Dutch law as a patient he did not have any right to be heard concerning his involuntary admission to a psychiatric hospital, extension of his stay therein and he lost administration of his possessions automatically. The Court decided that the complained acts breached Articles 5 and 6 of the Convention. Following the Court's judgment, the Netherlands introduced in 1980 new amendments to bring the legal situation in line with the standards of the Convention.⁷⁵

Following the Court's decision in the case of Engel and Others, which had been brought against the Netherlands on the ground that strict arrest of the applicant under the military disciplinary law and his trial by the Military Supreme Court in camera were contrary to Articles 5, 6 and 14 of the Conven-

72 See, Resolution (83) 2 concerning the judgments of the European Court of Human Rights of 26 April 1979 and 6 November 1980 in the Sunday Times case, in *Collection of Resolutions As Adopted by the Committee of Ministers in Application of Articles 32 and 54 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1959-1983* (hereinafter *Collection of Resolution 1959-1983*), pp. 122-23.

73 See, Resolution (83) 3 concerning the judgments of the European Court of Human Rights of 13 August 1981 and 18 October 1982 in the case of Young James and Webster, in *Collection of Resolutions: 1959-1983*, pp. 132-33.

75 See, Council of Europe, Committee of Ministers, Resolution DM (82) 2 concerning Human rights of 24 October 1979 in the case of Winterwerp, in *Collection of Resolutions: 1959-1983*, pp. 128-29.

tion, the Dutch Government caused the necessary amendments to be made to the laws and procedures concerned.⁷⁶

While those cases were pending, Sweden took appropriate measures not to cause similar complaints.⁷⁷

Similar proceedings were taken against the Swiss Government and upon judgments against that government, the necessary amendments were also made.⁷⁸

It is also clear that when the Strasbourg Institutions decided on payment of compensation by the defendant governments, the latter have always complied with the judgments.

1.3.2.2. The Legal Nature and Execution of Decisions of the Strasbourg Institutions

As the Court put it, a mechanism for international protection of human rights is of secondary importance as compared with protection afforded by national systems. The duty of protection of human rights rests with national authorities in general and with national courts in particular. Contributions of the Strasbourg Institutions begin when national remedies have been exhausted.⁷⁹ National authorities are much closer to the relevant facts and they are in a better position than the international judge to evaluate the controversy-generating facts. For that reason, they have discretion to qualify and evaluate the facts. The Strasbourg Institutions have the duty to see that national authorities act in accordance with the Convention. They are not substitutes for national authorities.⁸⁰ Neither can they play the part of a court of appeal or court of cassation. However, that does not mean that national authorities have unlimited discretionary power. On the contrary, they are subject to European supervision. They have the competence to say the last word as to

76 See, Council of Europe Committee of Ministers, Resolution (77) 10 concerning the judgments of the European Court of Human Rights of 8 June 1976 and 23 November 1976 in the case of Engel and others, in *Collection of Resolutions: 1959-1983*, pp. 112-14.

77 See, Frowin, J.A. Villiger M.W., "Avrupa İnsan Hakları Raporu" in *Anayasa Yargısı (7 Avrupa Anayasa Mahkemeleri Konferansı)*, 27 Nisan 1987, Lizbon, pp. 207-27.

78 See, Council Europe, Committee of Ministers, Resolution DH (79) 7 human Rights Application No. 743/76; Herbert Eggs against Switzerland, in *Collection of Resolutions: 1959*, pp. 74-75.

79 See, Council of Europe, E.C.H.R., Handyside case, Judgement, Strasbourg, 7 December 1976, paragr. 48.

80 *Id.*

whether national legislation or national acts taken pursuant to the former accord with the provisions of the Convention. The Court stated that principle in the Handyside case in the following words:

Nevertheless, Article 10, paragraph 2, does not give the Contracting States an unlimited power of appreciation. The Court which, with the Commission, is responsible for ensuring the observance of those states' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of measure challenged and its "necessity", it covers not only the basic legislation but also the decision applying it, even one given by an independent court.⁸¹

As it can be seen from the quoted passage, decisions given by the Court do not invalidate by themselves inconsistent legislations. In the main, they are declaratory. They leave it to the national authorities to determine means whereby decisions of the Strasbourg Institutions would be executed. That is, they do not take effect directly in national systems, it is the latter which take measures for the execution of the decisions. But they have to take such measures, because the Committee of Ministers shall press for appropriate remedies until the decision in question is satisfied by national authorities. In order not to meet with sanctions which the Committee of Ministers may impose, and not to face a shameful position at international level, and upon constant demands on the part of individuals for observance of the Convention in national systems, the signatory states have learned to limit their sovereignties. Not only has the legislator to avoid passing inconsistent legislations, but also the executive has to refrain from taking measures in violation of the Convention. The European supervision thus understood extends even to emergency time decisions and policies.

1.3.2.3. New Arrangements Complementary to the European Supervision

The system established by the European Convention on Human Rights has for its object, as we have seen above, to guarantee political and civil

⁸¹ *Id.*, paragr. 49.

rights. On the other hand, the European Social Charter, which was adopted in 1965 and to which Turkey is also a party⁸², constitutes the social and economic counterpart of the European Convention. The Social Charter does not only regulate and guarantee a set of economic and social rights, but it also provides for a collective enforcement system for the implementation of the former.⁸³

It envisages a line of activities parallel to the general trend in the contemporary world by using the same methods as ILO uses and cooperates with the latter in the conduct of its activities.

On the other hand, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁸⁴, which was signed in 1987 and which Turkey was the first state to ratify, has given additional strength to the right guaranteed in Article 3 of the European Convention, and it provides for an additional supervision to be exercised over the signatory states for the purpose of the implementation of the said article.

All those developments have resulted in further restriction of the sovereignty of the state.

2. Substantial Restrictions in the Turkish Constitution and International Relations of Turkey

Restrictions in the Constitution on the power of the state to enter international relations and on the methods by which the state binds itself with international rules, need to be addressed carefully.

In other words we need to address such issues as whether the power of the

82 See, European Social Charter, Directorate of Press and Information, Strasbourg, 1978. Turkey has approved the Charter by the Law of 16 June 1989, No. 3581, which was published in *Resmî Gazete* 4 July 1989. The Law enables the Turkish Government to accept and to apply the Preamble, Articles 1, 12, 13, 16 and 19 in their entirety; Article 20 (1) (b) (according to Sections I, II, IV, V and its annex and Section II); Articles 9, 10, 11, 14, 17 and 18 in their entirety (pursuant to Article 20 (1) (c)); Article 4 (3) (5); Article 7; paragraphs (3), (4), (5), (6), (8) and (9). The Parliament has also given authority to the Council of Ministers to accept other Articles pursuant to Article 20 (3). See, *Resmî Gazete* 4 July 1989, No. 20215, p. 4. The Decree of Ratification was published in *Resmî Gazete* 14 October 1989.

83 See, Articles 21-29.

84 See, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 7 July 1987. Turkey ratified this Convention on 26 March 1988. See, *Resmî Gazete* 26 February 1988, No. 19737/m.

executive to make international agreements in cooperation with the legislative body is subject to any restrictions, or whether that power extends to the conclusion of international agreements whereby the sovereignty of states would be partly or wholly renounced or delegated.⁸⁵

Articles 6, 7, 8 and 9 of the Constitution⁸⁶ contain substantial restrictions on the power of the basic organs of the states to act on its behalf. According to Article 6,

(...) sovereignty is vested in the nation unreservedly. The Turkish nation shall exercise its sovereignty through competent bodies in accordance with principles laid down by the Constitution.

The exercise of sovereignty shall never be delegated to any single person, any single group or class. No person or body may

85 See generally, Doğan, İ., *Türk Anayasa Düzeninin Avrupa Toplulukları Hukuk Düzeni ile Bütünleşmesi Sorunu* [The Problem of Integration of the Turkish Constitutional Order into the European Communities' Legal Order], 1979; Arsava, F.A., *Avrupa Toplulukları Hukuku ve Bu Hukukun Ulusal Alanda Uygulanmasından Doğan Sorunlar* [The Law of the European Communities and Problems Arising out of Its Application in National Sphere], 1985.

86 The present Turkish Constitution was adopted in 1982. It is the fifth of a series of constitutions which Turkey has adopted since 1875 when the first constitution (the 1876 Constitution) was unwillingly accepted and promulgated by Sultan Abdulhermid of the Ottoman Empire. The 1876 Constitution remained in force until 1878 when it was suspended by the said Sultan for 39 years. The second constitution which partly amended the first one was issued in 1909 (the 1909 Constitution). But it was not fully applied because of political crises followed by the Balkan War and World War I. In 1921 when the Ottoman Empire virtually came to an end, the third constitution (the 1921 Constitution) was adopted in order to transform the then existing political regime into a republic on the one hand, and to get the country through the Liberation War which Turkey was fighting against aggressors on the other. The importance of the 1921 Constitution lies in the fact that it embodied for the first time the concept of national sovereignty. In 1924, one year after the Republic was formed, the fourth and the first full-fledged constitution (the 1924 Constitution) was adopted by the Turkish Grand National Assembly, which remained in force until 1960 when the military take-over took place. One year later, in 1961, the fifth constitution (the 1961 Constitution) was prepared by a constitutive assembly and approved by a referendum. However, it was actually a product of the military regime which a great portion of the nation was not happy with. It could not survive the 1980 military take-over. In 1982, the Constitution which is in force now (the 1982 Constitution) was prepared by a consultative assembly and adopted by a referendum. However, it is highly likely to be changed soon as some sections of the population are not happy with it either.

exercise a state authority which does not have its origin in the Constitution.

According to Article 7,

The legislative power is to be exercised by the Turkish Grand National Assembly on behalf of the Turkish nation. That power cannot be delegated.

Article 8 reads as follows,

Executive jurisdiction and function are to be exercised and carried out by the Head of the Republic and the Council of Ministers in accordance with the Constitution and laws.

Finally, Article 9 provides that,

Judicial power is to be exercised by independent courts on behalf of the Turkish nation.

Thus, the possessor of sovereignty is indicated in Article 6, and the ways in which such sovereignty is to be exercised are shown in the subsequent articles.

On the other hand, Article 15, which authorizes the government to suspend, with approval of the legislator, exercise of rights and freedoms as enshrined in the Constitution, stipulates clearly that such suspension shall not result in violation of obligations of Turkey resulting from international law.

Again, Article 16 provides that basic rights and freedoms of aliens may be restricted only in accordance with international law.

Article 42, providing that the medium of education in Turkish schools will be Turkish for Turkish citizens, reserves exceptions arising out of international agreements.

Article 90 particularly regulates the conclusion, form and effects of international agreements.

Finally, Article 92 indicates, among others, that the Turkish Grand National Assembly may declare war only where that is deemed to be legitimate by international law.

In order to grasp the constitutional order of international law, we need to interpret all the above-mentioned articles in close relation to each other.

2.1. The Constitution and General Arrangements Regarding International Public Order

The Constitution has struck a balance between the preservation of sovereignty as far as possible and the need to reduce, if not eliminate, all probabilities which would lead to conflicts with other states. Firstly, apart from Article 15, which gives a prominent place to international obligations of the state and on which we shall dwell below in detail⁸⁷, Article 16 is designed to prevent the state from incurring international responsibility by making restrictions of rights and freedoms of aliens dependent on their being in accordance with international law. Secondly, the Constitution gives its blessing by Article 42 to the still executory provisions of the Lausanne Treaty which concern rights and freedoms of minorities and thus, it intends to avoid likely frictions with the contracting states.⁸⁸ Thirdly, the Constitution refers the Turkish Grand National Assembly to international law for situations in which it may have to declare a legitimate war. It is common knowledge that today, under international law, use of force is prohibited except in cases where it is resorted to for self-defense and where that is required to comply with a decision of the United Nations.

The Constitution seems to have anticipated a very important potential problem by obliging the legislature to refer international law to determine whether it is legitimate to go to war in specific cases.

Likewise, it gives precedence to international agreements to which Turkey is a party, and according to which Turkey should send troops abroad or admit foreign troops into its territory. Thus, the Turkish Grand National Assembly will not need to decide on these issues on each and every specific occasion, as the government has the authority to act as required by the agreements in question.

However, the United Nations, of which Turkey is an original member, may take decisions under Chapter VII of the charter which would bind the member states, including of course Turkey. The Security Council may even decide to take enforcement measures, including the use of armed forces if and when it has decided that there was a breach of peace, a threat to peace, or an act of aggression.⁸⁹ It may ask the member states to impose an embargo on

87 1 See, *infra* sections 2., 2.3.1.1., 2.3.1.4.

88 See, *infra* section 2.3.1.4.

89 See, Article 39 of the Charter.

an aggressive or peace-breaking state, or even to use armed forces against it as was the case in the Gulf Conflict. The Council may take such decisions by a majority vote of member states, including permanent members. What is important is that the majority does not need to include the vote of the state against which such binding decisions or enforcement actions have been taken. Although the abuse of the veto power by the permanent member states, due to irreconcilable ideologic interests of the East and the West in the past, has prevented the Council to take binding decisions, it is a fact that such a legal power lies with the Council. And recent rapprochement between the permanent members may result in agreement between them in certain areas, which, in turn, will give the actual power which the Council needs to take such decisions.

It is a truism that such decisions of the Council may not be directly enforceable or may not take effect directly in national systems. Consequently, when faced with them, the member states-in our example Turkey - will have to take additional national measures to give effect to them. In other words, in order to comply with a decision of the Council to impose an embargo on an aggressive or peace-breaking state or to provide armed forces to the United Nations for the purpose of execution of enforcement measures against such a state, a member state - here Turkey - will take a national decision, be it an administrative or legislative one. But one should not lose sight of the fact that it is necessary for the member states to give effect to the binding decisions of the Council under Article 25 of the Charter. To the extent that Article 92 of the Turkish Constitution does not cover such situations, binding decisions to be taken by the Security Council may strain the constitutional order established by Articles 6, 7, 8 and 9 which would seem not to permit the transfer of sovereignty to international organizations.⁹⁰

2.2. The Constitution and International Arrangement Regarding Protection of Human Rights

The Constitution has adopted the principle of respect for human rights, which has already left its mark on our era, in conjunction with the adoption of measures necessary for the preservation of the democratic regime, and thus, has struck a fair balance between the two.

⁹⁰ See, *infra* section 2.3.

Article 2 of the Constitution, which enumerates the characteristics of the Republic, stipulates in express terms that the Republic of Turkey shall have respect for human rights. Article 15, which is fully borrowed from Article 15 of the European Convention, on the other hand, provides for provisional suspension of basic rights as enshrined in the Constitution during crises and emergencies but with the provision that international obligations arising out of international law shall remain intact. Then, the inescapable inference seems to be that the constitution which preserves intact international obligations in time of crises shall do the same *a fortiori* in the time of peace.⁹¹

If this interpretation is correct, then, as the term "international law" which is used in Article 15 involves both treaties and customary law, Article 15 shall comprise all the international obligations of Turkey in the field of human rights, including, in particular, those resulting from the Charter of the United Nations and the European Convention on Human Rights.

If our interpretation that the regime provided for by the Constitution concerning international obligations for the protection of human rights in the time of crises should be extended to peace time obligations of Turkey for the same purpose is correct, then, under the Turkish Constitution, rules and principles of international law concerning human rights in general and those of the European Convention in particular shall prevail over inconsistent national legislation. Consequently, treaties falling in this group are not subject to the regime which is established by Article 90 of the Constitution which reads that "treaties duly put into effect shall have the force of law", for they are superior to ordinary national legislation.

On the other hand, some provisions of the Constitution relating to human rights are either textually borrowed from or modelled on the European Convention.

91 Prof. Çağlar comments on Article 15 as follows:

The first problem to be addressed is the esoteric role of Article 15. According to the last paragraph of Article 90, treaties have the force of law, and resort to the Constitutional Court cannot be had against them on the ground that they are contrary to the Constitution. But one may infer from Article 15 which provides for suspension of exercise of basic rights and freedoms (in the times of crises) the principle of openness of the Constitution to international law or implied rule of conflict of laws. Thus, the courts will be able to interpret national legislations (statutes) in accordance with treaties. This analysis brings the '82 formula close to the German formula.

See, *Anayasa Billimi Bir Çalışma Taslağı* [Science of Constitution, A Working Draft], 1989, p. 50.

Having established that point, it would be timely to examine the position of some other provisions of the Constitution vis-a-vis the objective obligations regime established by the European Convention.

The backbone of the objective obligations regime is constituted by the European supervision, with its institutions and independent criteria. It is within the power of the Strasbourg Institutions to see that the Convention is applied in the same or similar way in the member states. In that respect, the latter have only a margin of appreciation which is subject to the European supervision.⁹²

Firstly, the rights and freedoms guaranteed by the Convention ought to be applied as they are understood by the Strasbourg Institutions and they may be restricted only to the extent which is necessary in a democratic society.

There must be a "pressing social need" to impose such a restriction and it must be proportional to the legitimate aim pursued.⁹³ It is the national authorities which will decide on whether there is a pressing social need for a particular restriction and on the nature of the restriction to satisfy such a need. That is within their discretion but subject to supervision of the Strasbourg Institutions.

We have already indicated above that the Strasbourg Institutions have the competence to examine, both in abstracto and in concreto, the compatibility of national regulations or administrative acts with the conventional order.

Now that Turkey has accepted the competence of the Commission to receive individual applications under Article 25 of the Convention, it is always possible for our laws and administrative actions (for example, national security investigations about would-be public officials) to be subject of European supervision.⁹⁴

Therefore, it is only normal that decisions taken within the collective en-

92 See, Council of Europe, E. C.H.R., *Handyside case*, judgment, Strasbourg, 7 December 1976, paragr. 48

93 See, Baddard, R., *Human Rights and Europe*, 2nd edition, pp. 120-22; *Handyside case*, supra note 92, paragr. 49; Council of Europe E. C.H.R., *Engel and Others*, judgment, 8 June 1976, paragr. 100; Council of Europe, E.C.H.R., *The Sunday Times Case*, judgment, 26 April 1979, paragr. 45-48; Council of Europe, E.C.H.R., *Case of Klass and Others*, judgment, 6 September 1978, paragr. 44-60.

94 For a judgment on this issue see, Council of Europe, E.C.H.R., *Leander case*, (10/1989/96/144), judgment, Strasbourg, 26 March 1987.

forcement system of the European Convention should have their restrictive and corrective effect on powers of legislative, executive and even judicial branches of this state to act. Because decisions of the Strasbourg Institutions will have for their object to determine whether a verdict of the national courts or the underlying legislation is compatible with the Convention, the final result may be that both the verdict and the underlying legislation contrast with the Convention. In the former case, a decision other than that of the national courts shall prevail, and in the latter case, the legislature will have to amend the impugned legislations. In other words, in the latter case, the decision of the relevant Strasbourg Institutions shall be given precedence and not the verdict of the national courts which is a statement of the legal reality in this nation. To put it more correctly, the legal reality will be stated, from now on, by the Strasbourg Institutions, so far as their jurisdiction goes. The Turkish Grand National Assembly, too, shall take into account the above-mentioned phenomenon when it legislates.

Let us make a further attempt to explain the European supervision by pointing to what we think to be some inconsistent concrete examples in our legal system:

According to Article 5 (3) of the Convention, a person who is detained or arrested must be promptly brought before a competent court. The word "promptly" is not defined in numerical terms in the Convention. In the case-law of the Commission, periods of detention or arrest up to 4 days in normal situations, and up to 5 days in exceptional cases, are said to satisfy the word "promptly".⁹⁵ In the case of *Brogan and Others*⁹⁶, the Commission said that a four or five-day period might be a bit extended in the case of terrorism. But the Court has laid down its own criteria for that purpose, and it decided in the same case that a period of four days and six hours detention was contrary to Article 5 (3) of the Convention.⁹⁷

According to the Court, the word "promptly" ought to be understood in the light of the purpose and objective of Article 5 which guarantees a basic right of the individual against arbitrariness of the state. Judicial control aims at reducing that arbitrariness to a minimum. Judicial control finds its meaningful purpose in the Preamble of the Convention and it has a very important place

95 See, Council of Europe, E.C.H.R., *Case of Brogan and Others* (10/1987/133/184/187) judgment, 29 November 1988, paragr. 57 and sources referred to therein.

96 See, *Case of Brogan and Others*, paragr. 58-62.

97 *Id.*, paragr. 62.

in the former.⁹⁸

Consequently, the Court said that the word "promptly" should be evaluated by reference to concrete circumstances of every individual case. However, it said, the importance to be attached to those circumstances must not be carried too far to damage the essence of the right guaranteed by the Convention.⁹⁹ On the other hand, the legality or otherwise of detention or arrest must be made not only in accordance with national law but also with the text of the Convention.¹⁰⁰ The Court in the end decided that the decision of the Irish court in the case of Brogan and Others was contrary to the Convention.

Again, the same article (Article 5) requires that even a lawfully detained or arrested person should be brought to trial within a reasonable time. In other words, a person who is arrested or detained, even when that is lawful, has the right to have charges against him verified and finally determined by a decision of a judicial body within a reasonable time. The reasonableness of length of such a pre-judgment detention or arrest is to be determined by the court according to the circumstances of each case.¹⁰¹

Cases arising out of the application of Article 5 are always likely to be brought against Turkey. Therefore, it would not be wrong to suggest that Turkish law, including Article 19 of the Constitution, should be so amended as to be in line with the rules of the Convention, as applied and interpreted by the Court.

Secondly, under the Convention everyone has the right to have civil or criminal charges against him decided by an impartial and independent court within a reasonable time. According to criteria established by the Strasbourg Institu-

98 *Id.*, paragr. 58.

99 *Ibid.*, paragr. 59-62.

100 *Id.*, paragr. 59.

101 The Commission decided in the Wernhoff case that in evaluation of reasonableness, the following should be taken into account:

- a) actual length of detention;
- b) relation of detention or arrest after conviction;
- c) effects of detention or arrest upon the accused;
- d) conduct of accused during the investigation;
- e) difficulties in attending the investigation;
- f) way in which the investigation is conducted;
- g) approach of judicial authorities to the case.

For details as to practise in the Neumester, Stogmuller, Winterwerp and Vagracy cases, see, Baddard, *supra* note 93, pp. 94-100.

tions¹⁰², the victims of unreasonably lengthy cases are to be compensated by the state in which such lengthy proceedings have taken place.

Under this practice, which aims at acceleration of the administration of justice, Turkey would not be immune from charges in individual cases arising from unreasonable delays in the administration of justice.

Thirdly, the supervision by the Strasbourg Institutions of the right of the signatory states to resort to Article 15 of the Convention to suspend temporarily the conventional regime, subject to some exceptions, may create problems for the signatories.

Although it is within the discretion of national authorities to decide whether there is an emergency situation, that discretion is fully subject to European supervision.¹⁰³

In face of the dimension which that supervision has recently taken through the case-law of the Strasbourg Institutions, a declaration by the Turkish Government of martial law or of public emergencies and its approval by the Turkish Grand National assembly cannot escape the scrutiny of the Strasbourg Institutions.

The emergency regime declared in 1967 by the Greek colonels' junta on the ground that there was a potential communist uprising was reviewed by the Commission and found not to satisfy the requirements of Article 15.¹⁰⁴

According to the criteria established by the Strasbourg Institutions, national authorities have discretion to take decisions in such situations, but that discretion is not unlimited; it is subject to European supervision. The national authorities ought to meet the following conditions in order to justify a proclamation of public emergency:

102 In evaluating whether a case was decided within reasonable time, the following has to be taken into account:

- a) complexity of the case;
- b) conduct of the defendant;
- c) conduct of judicial authorities.

See, among others, Capuano case (7/1986/105/153), judgment, 25 June 1987; Lechner and Hess case (11/1985/97/145) judgment, 23 April 1987; Bagetta case (3/1986/111/159) judgment, 25 June 1987.

103 See, Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, 1987, p. 307.

104 *Id.*, p. 125.

1. The emergency situation must either actually exist, or must be imminent.
2. Its consequences must extend to the nation as a whole.
3. It must jeopardize the organized life of the society.
4. The crisis or danger must be exceptional.
5. It must have taken such dimensions as not to be dealt with by the normal derogation clauses recognized by the Convention for the protection of public order, public health and national security.

The national authorities have the competence to decide whether those conditions exist before the state of emergency is proclaimed, but that competence is subject to European supervision.¹⁰⁵

The above-mentioned Greek emergency case, which was based on a probable communist insurrection, was not found to be persuasive. But in the Lawless case¹⁰⁶, which was based on facts covered by Article 15, the Court was able to lay down the criteria whereby the supervision could be done, although it came to the conclusion that the proclamation by the Irish Government of state of emergency was in accordance with the requirements of the Convention.

It had not been possible to overcome the terrorist activities and other related extraordinary events then sweeping that country through normal legal remedies, and the governmental authorities had to proclaim a state of emergency which was upheld by the Strasbourg Institutions.

It follows that if a state of emergency proclaimed by a contracting state is found not to meet the criteria laid down by the Court, then one of the following two things may happen:

- (1) Either the contracting state will have to terminate the state of emergency, in which case we have to admit that the national sovereignty of the state in question is diminished.
- (2) Or, the contracting state will withdraw from the Council of Europe, as did the Greek Junta in 1967.

¹⁰⁵ *Id.*, p. 124.

¹⁰⁶ *Lawless vs. Ireland (Merits)*, judgment, 1 July 1961. The applicant had been arrested without trial for 5 months at a time when the terrorist activities of I.R.A. were at their peak. That was surely contrary to Article 5 (3) of the Convention, but it could be justified under Article 15.

This possibility is applicable to all the members of the Council, which by definition includes Turkey. Turkey forms part of Europe and of the European public order. It has also declared its willingness to become further integrated into the European Community. Then, it follows that for Turkey withdrawal from the Council is out of question; it has to live up to the European standards.

Here, one might feel tempted to ask whether the present relation of Turkey with the European institutions as expressed above square with Articles 6, 7, 8 and 9 of its Constitution, to which question the following answer is in order to give: The Constitution covers in Article 15 the Convention system, and in its Preamble it accepts in express terms that Turkey is an honorable member of the international society with equal rights, and it enumerates in Article 2 respect for human rights among the qualifications of the Republic. The implication is that it has accepted such restrictions as are concomitant to equal membership of the international society.

Precedence given to international law under Article 15, special emphasis put on rights of aliens under Article 16, special importance attached to certain categories of treaties under Article 42 and clear and precise order given by article 92 to state bodies to comply with international law in cases of the use of force, are emphatically indicative of the fact that sovereignty is vested in the Turkish nation only within parameters of international law. However, it seems that the said articles cover only existing obligations of the state and they, as such, must be respected. In the above-mentioned articles of the Constitution, which relate to the regulation and use of state power, transfer of sovereignty to international organizations is not envisaged. When the 1982 Constitution was being prepared, the draft constitution of the then Consultative Assembly contained a provision which would have permitted transfer of sovereignty to international organizations, was later on deleted from the text.¹⁰⁷

2.3. The Turkish Constitution and Membership of Supranational organizations

In addition to the question of whether the Constitution meets the present needs of Turkey in its conduct of foreign relations, we need to answer another question: Is it possible for Turkey, under the present Constitution, to become a full member of the European Community, which exemplifies the

¹⁰⁷ See, *infra* section 2.3.

most advanced stage of institutionalized international cooperation?

In answering this question, it is always good to start from known factors and data: The EC is a supranational organization. It has its own legal order and its own institutions to secure compliance with that order. The Community Institutions may legislate not only for the member states but also for their citizens. The decision-making bodies of the Community enjoy and exercise the sovereignty transferred directly from the member states. The member states cannot exercise jurisdiction in areas where the Institutions are exclusively vested with such power, as was emphatically stated by the Court.¹⁰⁸ Therefore, the argument, voiced by a minority group¹⁰⁹, that the EC is not a supranational organization is not in full accordance with reality. Then, the question to be answered in the first place is whether it is possible under this Constitution to transfer sovereignty to such an organization. Secondly, the status of international law in the Turkish legal system should be addressed.

As we have indicated before, the Turkish Constitution does not contain any provision like Article 11 of the Italian Constitution¹¹⁰, or Article 24 of the German Constitution¹¹¹, or Article 28 of the Greek Constitution¹¹², whereby

108 See, *supra* section 1.2.2.

109 See, a statement made by a former Minister of Foreign Affairs in 1980 in the Assembly, during deliberations on a censure of motion levelled against him, in Millet Meclisi Tutanak Dergisi, Dönem 5, Toplantı 3, Cilt 16-1, Birleşim 128, Oturum 1, 3, 9, 1980, s. 829.

110 Article 11 of the Italian Constitution reads as follows: Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on condition of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it promotes and encourages international organizations having such ends in view. Reproduced in *Leading Cases*, p. 154.

111 Article 24 of the German Constitution reads as follows:

- (1) The Federation may, by legislation, transfer sovereign powers to intergovernmental institutions.
- (2) For maintenance of peace, the Federation may enter a system of mutual collective security; in doing so, it will consent to such limitation upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.

112 Article 28, paragr. 2, of the Greek Constitution reads: In order to serve an important national interest and to promote international cooperation with other states, powers provided for in the Constitution may be recognized by treaty or agreement (as appertaining) to organs of international organizations. A majority of three-fifths of the total number of members of Parliament shall be required to approve the act by which the treaty or agreement is sanctioned.

Reprinted in *Leading Cases*, p. 162.

sovereignty of those states could be transferred to international organizations. In the Draft Constitution prepared by the Consultative Assembly, at the end of an article stating that sovereignty was vested unreservedly in the nation was added a one-sentence provision: "The foregoing paragraph is without prejudice to provisions of treaties providing for membership to international organizations."¹¹³ In the subsequent deliberations of the Draft Constitution, that last paragraph was deleted for reasons which are not known. Whatever might have been the reason for such deletion, now the Constitution has Articles 6, 7, 8 and 9 which are not suitable for power-sharing with any external force, and consequently Turkey cannot become a member of the EC unless the constitution is amended to make the transfer of sovereignty legally possible.¹¹⁴ Those articles are basic pillars of the Constitution, and they are related clearly to the treaty-making power of the state. They restrict the power of the state to make treaties under Article 90.¹¹⁵ Treaties which can be concluded under Article 90 are those which can be concluded in accordance with the Constitution. Treaties made or to be made in violation of Articles 6, 7, 8 and 9 cannot be considered as being duly made under the Constitution.

Even if one accepts the view taken by some commentators, basing themselves on the last sentence of Article 90, that international agreements prevail over ordinary national legislation, under this Constitution there is no authority to conclude a treaty which would make Turkey a full member of the Community. Because the question of whether a treaty prevails over national legislation comes after the former has been concluded in accordance with the relevant provisions of the Constitution, and it is that possibility which Articles 6, 7, 8 and 9 of the Constitution are designed to prevent.

On the other hand, questions likely to arise with those fundamental rules aside, under Article 90, integration of the Turkish legal order into that of the Community would be considerably difficult. Firstly, there would be difficulties for direct application and direct effect of the Community Law within the national system. Secondly, treaties concluded under Article 90 would probably not have any superiority to ordinary domestic laws. In the immediately following paragraph we shall address those two issues.

113 For details see, Kabaalioglu, H., "Avrupa Topluluğu ve Topluluğa Katılmalar" [European Community and Accessions to It], in *Avrupa Ekonomik Topluluğu Birinci Eğitim Semineri* [First Training Seminar on European Economic Community], 6-15 June 1983, Istanbul, pp. 151-67.

114 Arsava, *supra* note 85, pp. 438-46; Doğan, *supra* note 85, p. 201ff.

115 Arsava, *supra* note 114, p. 438; Doğan, *supra* note 114, p. 201ff.

2.3.1. Application of International Law in the Turkish Legal System

2.3.1.1. Application of Customary International Law

The Constitution does not contain any general rule similar to Article 25 of the German Constitution¹¹⁶, or Article 11 of the Italian Constitution¹¹⁷, regarding the internal application of customary international law in national legal system. Only Articles 15, 16 and 92 make references to "international law" for the regulation of specific areas.¹¹⁸

According to Article 15, which is basically modelled on Article 15 of the European Convention, fundamental rights and freedoms which are guaranteed by the Constitution may be suspended during times of war, national mobilization, extraordinary events requiring proclamation of martial law, or public emergencies. However, that has to be temporary and is subject to the proviso that obligations of Turkey arising out of international law shall not be violated. As international law comprises both customary law and treaties, it consequently restricts the national power as far as the scope of those articles goes. More importantly that proviso reflects the general approach of the fathers of the Constitution to the question of how international relations should be conducted: If the Constitution orders all the governmental bodies to respect the obligations arising out of international law, even in times of war and crisis, one has to admit that the same order is *a fortiori* applicable in times of peace. Actually, some commentators who rely on that clause argue that the Constitution has implicitly adopted the superiority of international law over national law.¹¹⁹

116 Article 25 of the German Constitution reads:

The general rules of public international law are an integral part of Federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the Federal territory.

Reproduced in *Leading Cases*, p. 142.

117 Article 10 of the Italian Constitution reads:

"Italy's legal system conforms with the generally recognized principles of international law.", reproduced in *Leading Cases*, p. 153.

118 As to the application of customary international law in Turkish law, see, among others, Toluner, Sevin, *Milletlerarası Hukuk ile İç Hukuk Arasındaki İlişkiler* [Relations between International Law and National Law], 1972, p. 680ff.; Parzarca Hüseyin, *Uluslararası Hukuk Dersleri* [Courses on International Law], Vol. I, p. 22ff.

119 See, Çağlar, *supra* note 91.

Article 16 requires that any restriction of rights and freedoms of aliens ought to be in accordance with international law. In other words, it incorporates by reference relevant rules of international law into the national legal system. The word "international law" as used in this article, like Article 15, comprises both customary law and treaty law and restricts the power of the legislative body in the area of rights and freedoms of aliens.¹²⁰

Likewise, Article 92 limits the power of the legislature to declare war to the situation in which it is legitimate under international law to do so. The relevant rules of international law are incorporated by reference into the national legal system. Any declaration of war in violation of this article shall violate not only the Constitution but also international law.

Thus, it follows that customary rules of international law regarding fundamental rights and freedoms, rights of aliens, the use of force and declaration of war ought to be considered as having been incorporated by the Constitution into the Turkish legal system.¹²¹ But the question of whether customary rules other than those mentioned above have to be specifically transformed into the national legal system is not clear, as in the Constitution there are no clear terms to that effect. One may speculate on the basis of the above-mentioned specific references to customary rules, that the not-mentioned rules should be specifically transformed so that they could be applicable by the courts. However, it seems that such a view may not square with the whole structure and general approach of the Constitution towards international law. On the contrary, the Constitution orders the authorities, wherever required, to comply with international law. If the above-mentioned references to international law had not been made in the relevant articles of the Constitution, one might be misled to infer that the fathers of the Constitution did not close the door to infringements of international law in specific cases covered by the references in question. For example, Article 15 allows governmental authorities to suspend the fundamental freedoms and rights during times of war or crisis. If it had not made an exception to maintain the international obligations of the state, then the inference would have been that international obligations, too, could be suspended. The same is equally applicable to Articles 16 and 92. In short, the Constitution orders that the state bodies comply with the principle of *pacta sunt servanda*, wherever that is needed to be said.

¹²⁰ See, Pazarci, *supra* note 118, p. 23.

¹²¹ *Id.*, p. 22.

That is, in the specifically mentioned situations, the rule *pacta sunt servanda* becomes a rule of the Constitution.

In fact, the Turkish state would have to comply with the abovementioned rules of international law even without the constitutional references. What the Constitution did is to make it a constitutional duty for governmental authorities to respect those rules. Therefore, the immediate purpose of the Constitution is not to incorporate those rules into the national system so that they could be directly applied by the courts. Rather, it aims at bolstering up the strength of the rules and at preventing violations of them by the authorities, because in the Turkish legal system the transformation is not required for the application of international law in national law. Therefore, we do not agree with the view that rules of customary international law cannot be applied in the national legal system before they are transformed.¹²² Otherwise, one has to accept that the legislator or the courts do not need to take account of untransformed customary rules in their fields, which is not only unacceptable to an international lawyer, but also in sharp contrast with the general tendency of the Constitution to make sure that international obligations of the state are honored.

On the other hand, we know that the Turkish courts have always relied on customary law in their decisions, and there is no provision in the Constitution which would reverse the general practice.¹²³

In fact, if a constitutional authority is sought to justify our conclusion, one only has to look into Article 138 of the Constitution which states that the judges will give their decisions in accordance among others, with law which also includes international law.

The Court of Cassation (Yargıtay) often relied on customary law in its pre-1982 decisions. In particular, its decisions regarding accordance of jurisdictional immunities to foreign states or to foreign diplomats, are illustrative of this trend.¹²⁴

The fact that the Court also mentioned in those decisions the Decree of the Council of Ministers of 1931, which requires that foreign states should be ac-

122 *Id.*, p. 29.

123 For pre-1982 practice confirming this result see, Toluner, *supra* note 118, p. 695.

124 See, Gunduz, A., *Yabancı Devletin Yargı Bağışıklığı ve Milletlerarası Hukuk [Jurisdictional Immunities of Foreign States and International Law]*, 1985, pp. 297-301. Those decisions are specifically interpreted by Pazarca, *see, supra* note 118, pp. 23-29.

corded immunity before national courts, should not deviate from the strength of the basic practice.¹²⁵ Because the Decree is taken by the courts not as an independent source of law requiring non-exercise of jurisdiction, but rather it is taken as reflecting the view on immunity of a governmental authority - Ministry of Foreign Affairs - which is in a better position than the courts to follow international relations and as reflecting the then current situation in jurisdictional immunities issues. In fact, it is a constitutional right for all individuals in this country to go to a court to have charges against or controversies relating to them decided¹²⁶, and that right could not have been eliminated or restricted by a decree which is subordinate to the Constitution. On the contrary, while there is a rule of law under which individuals could sue, recognition of immunity of foreign states is nothing but a direct application of customary international law as against national law. Although in the pre-1982 cases, where immunity was accorded to foreign states, one may encounter the word "procedure" being used in aid of recognition of such immunities, until 1982 there had not been any provision of law, whether of procedural or otherwise, to exempt foreign states from jurisdiction.¹²⁷ It was only in 1982, when the subject was partly regulated by a provision in an Act, the basic aim of which is to regulate private international law issues.¹²⁸

In our opinion, even those customary rules of international law to which there is no reference in the Constitution, too, are directly applicable in the Turkish legal system without an act of transformation¹²⁹, subject to two conditions: Firstly, they must be self-executory; they should be clear, precise and unconditional; they should not address a political body. Secondly, the state must have accepted, or must be deemed to have accepted, the existence of those rules of international law of which there is a universal consensus that they are considered as having been accepted by the Turkish state, too. But any rule, to the emergence or application of which Turkey has opposed, will not be applicable to Turkey and consequently the courts are not competent to give effect to them without acting *ultra vires*.

125 For an opposite view, see, Pazarci, *id.* p. 29.

126 Article 36 of the 1982 Constitution recognizes, as did Article 31 of the 1961 Constitution, recognizes, as did Article 31 of the 1961 Constitution, that right very categorically. For an analysis of compatibility of pre-1982 practice with the Constitution, see, Gunduz, *supra* note 124, p. 303.

127 *Id.*, p. 303.

128 Act concerning private international law and procedural law, Article 33.

129 For a view confirming this line of thought in respect of the 1961 constitutional system, see, Toluner, *supra* note 118, p. 695.

However, it should be admitted that a state generally expresses its consent to an emergent or emerging customary rule of international law through internal acts, such as laws and regulation. That, in turn, serves as an act of transformation, although the intention may not be so.

In conclusion, international rules or obligations to which the Constitution refers are part of Turkish law by the force of the Constitution and they ought to be respected as such. As for rules of customary international law, which are not mentioned in the Constitution, there is a high likelihood that they would be received into the national law by legal rules of a lower order, either through incorporation or by reference. Even in cases where they are not so received, those rules of customary law to the emergence and application of which Turkey has not objected from the very beginning, ought to be applied in Turkish law, in the light of the favorable constitutional approach to international law and of the fact that no state can escape from its obligations by pleading its own inconsistent domestic rules. More importantly, the application of international law in Turkey is not made by any clear legal principle or rule dependent on the existence of an act of transformation.

2.3.1.2. Application and Effects of Treaties in the Turkish Legal System

The first sentence of the last paragraph of Article 90 of the Constitution specifies the conditions under which treaties would be applicable and they would take effect in the internal law, and determines the question of priority: "Treaties duly put into effect shall have the force of law."

Apparently, under Article 90, no act of transformation is required for the application of treaties in the national legal system. This may also seem to be the answer to the question of how treaties should take effect.¹³⁰ However, the reality is that things are not so simple as they might appear from the above-mentioned text. Firstly, even if it is conceded that treaties are directly applicable in the national law without any subsequent act of transformation, that would be the case only for self-executory treaties, for application of which no act of implementation is required. Treaties which address the legislative body and contain programs or policies rather than clear, precise and uncondi-

¹³⁰ See, Toluner, *supra* note 118, p. 570ff; Pazarcı, *Uluslararası Hukuk Dersleri*, I. Kitap, pp. 22-23; Arsava, *supra* note 85.

tional terms are not directly applicable without further acts for their implementation.¹³¹

Secondly, there seem to be some elements inherent in Article 90 which suggest that some sort of transformation is required by that article. In particular, where it is needed to have an enabling act of parliament for conclusion of a treaty, that act may be considered both as a basic component of the whole process for completion and expression of the consent of the state to be bound by the treaty and as transforming the latter into the national legal system, as is perhaps the case in Germany.¹³² Besides, all treaties whether or not they need any prior enabling act of parliament to become binding have yet to be ratified, under the Act No. 244, by a decree of the Council of Ministers (the so-called internal ratification). Thus, the decree serves, in a sense, as an act of transformation.¹³³ Actually, when the phrase "duly put into effect" as used in Article 90 is read together with Article 105, the suggestion is that there would be an act to be completed subsequent to passing of the enabling act of the parliament¹³⁴. Because a draft treaty negotiated by the government is not yet binding upon the state even after the enabling act of the parliament has become available, the government still has the discretion whether or not to bind itself by the treaty. In other words, the government has the last word to say as to whether it is in the interests of the nation to be bound by that treaty. If it considers it to be so, it will take that step by issuing the decree for internal ratification of the treaty as provided for by the Act No. 244.

131 Some cases decided by American courts precisely confirm this point. In as early as 1829, Judge Marshall said in the *Foster V. Neilson* case that a treaty "is to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the term of the stipulation import a contract—when either of the parties engages to perform, a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become rule for the court: *Foster V. Neilson*, 1829, 2 Pet. 253, 314, L.Ed. 415 cited in *Sei Fujii V. California*, case (1952), reprinted in *Harris' Cases and Materials on International Law*, 3rd edition, pp. 76-77. The Supreme Court of California adopted the same view in the *Sei Fujii V. California* case, when it said,

In determining whether a treaty is self-executing, courts look to the intent of the signatory parties as manifested by the language of instrument, and if the instrument is uncertain, recourse may be had to the circumstance surrounding its execution. In order for a treaty to be operative without the aid of implementing legislation and to have the force and the effect of a statute it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the court.

Id., p. 77.

132 See, *Arsava supra* note 130, p. 437.

The decree, issuance of which requires an unanimity of all the ministers and participation and cooperation of the President¹³⁵ must be published in the Official Gazette and forms part of the requirement by Article 90 that treaties should be "duly put into effect". Besides, texts of treaties which have to be published in the Official Gazette under Article 90 and the Act No. 244, are appended to the text of the decree, when they are published. Additionally, a treaty enters into force, according to the Act No. 244, on the date which is fixed in the decree.¹³⁶ That procedure obviously sounds dualism.¹³⁷ In particular, in cases where an enabling act is not required for a treaty to be binding, ratification of the latter by a decree gives the latter a function of an act of transformation.

In fact, it is clear from the commentary on Act No. 244 that the latter was intended to have a function of transformation:

However, the same acts have to take the form of an internal act at the same time, so that they could take effect within the national legal system. That can be realized only by a decree, as is clear from a reading of Articles 97 and 98 of the Constitution [the 1961 Constitution].¹³⁸

Whatever meaning might be given to the relevant text of the Constitution, in face of Act No. 244, treaties either ought to be transformed into national law, or ought to be reproduced in the form of national legislation or ought to be, by reference, incorporated into the national system, so that they could be applicable and take effect. If that is the case, the present legal system will create difficulties when membership of Turkey to the EC has materialized.

133 See, Toluner, *supra* note 130, p. 578.

134 Under this article, transactions other than those which the President alone may effect are to be signed by the Prime Minister and relevant ministers alongside with the President, and the Prime Minister and the Minister concerned are responsible for such transactions.

135 Cf. Çelik, *supra* note 130, p. 198, note 151.

136 See, Act No. 244, Article 3.

137 See, Toluner, *supra* note 130, p. 578.

138 *Id.*, p. 573.

2.3.2. Legal Standing of International Law in the Turkish Legal System

2.3.2.1. Position of Customary Rules of International Law

The phrase "international law" as used in Articles 15, 16 and 92 comprising both treaties and customary rules of international law, rules of international law to which there is a reference in those articles have constitutional force vis-a-vis other rules.¹³⁹ Any act or transaction contrary to those articles would contravene the Constitution.

Article 16 and 92 apparently address the legislator, rather than other branches of the government, while Article 15 addresses all the branches of the government. Under the latter article there should not be any conflict in real terms between customary rules of international law and those of internal law, as Article 15 itself is designed to solve such conflicts in favor of international law.

In case of conflicts between national and international law arising in areas not covered by the Constitution, one should seek a solution similar to, if not identical with, those adopted in other major jurisdictions.

However, in such situations the judiciary and the legislature must be treated differently, as they have different functions. Whatever might be the requirements of the internal law, the legislature has to comply with international law, as a part of the state mechanism. But that must be understood with the qualification that emergence of a rule of international law alone may not abrogate an inconsistent internal rule. The legislature still may, in fact, pass legislations in breach of international law, if it takes the risk of putting the state under an international responsibility, and if the area in which it legislates is not covered by Articles 15, 16 and 92¹⁴⁰. However, that would go against the spirit, if not the actual wording, of the Constitution, for an instruction to public bodies to obey international law goes through almost the entire constitutional edifice.

As for the courts, they ought to give effect, as far as possible, to rules of customary international law, taking into account the fact that no state can relieve itself from its international obligations by relying on its own law, and that

139 See, Pazarıcı, *Uluslararası Hukuk Dersleri* [Courses on International Law] I, 1985, p. 32.

140 Kubalı arrives at a similar conclusion in his analysis of the 1961 constitutional system. See, *Anayasa Hukuku Dersleri - Genel Esaslar ve Siyasal Rejimler* [Courses on Constitutional Law - General Essentials and Political Regimes], 1971, p. 140.

the Constitution attaches a great importance to fulfillment by the governmental bodies of international obligations of the state.¹⁴¹ If in areas to which the rules of customary international law refer, there is not any inconsistent internal law, the courts will have an easy task of just applying international law.¹⁴² If, again, the rules of customary law are subsequent in time to internal rules, the courts should not be faced with any real difficulty when there is a conflict. However, if the intention of the legislature to pass a law in violation of international law is clear, and if it is not possible to reconcile both of them at the same time, the courts' task is to apply the subsequent legislation.¹⁴³ The courts do not have a legislative function in this country, especially when the will to the contrary of the legislator is obvious.

2.3.2.2. Status of Treaties in the Turkish Legal System

The only article of the Constitution which determines directly and in a general way the status of treaties vis-a-vis the national law is Article 90. But Articles 15, 16, 42 and 92 also provide for specific arrangements for well defined areas of international relations.

Therefore, it would be right to examine the status of treaties in domestic law of Turkey in the light of these two groups of articles.

The somewhat vague formula contained in the last paragraph of Article 90 reads as follows: "Treaties duly put into effect shall have the force of law. No proceedings can be instituted before the Constitutional Court to challenge the constitutionality of them."

Due to that vagueness, commentators have offered different views on the status of treaties. Those who make attempts to interpret the above-mentioned provisions have had to reconcile specific arrangements in Articles 15, 16, 42 and 92 with general arrangements of Article 90. On the other hand, the texts of Articles 16, 90 and 92 were borrowed verbatim from the 1961 Constitution.¹⁴⁴ Innovations of the 1982 Constitution, if any, should be sought in Articles 15 and 42.

141 *Id.*

142 Cf. Oliver - Leech - Sweeney, *The International Legal System*, 1973, p. 9ff.

143 Toluner arrives at the same conclusion in her analysis of the 1961 constitutional system. See, *supra* note 130.

144 Articles 19, 90 and 92 of the 1982 Constitution correspond respectively to Article 13, 65 and of 66 of the 1961 Constitution.

As it was stated before, Article 15 authorizes the government acting on approval of the T. G. N. A. to suspend temporarily basic rights and freedoms during times of emergencies, on the condition that obligations of Turkey arising from international law are not violated. As the phrase "international law", which is used in that article, comprises not only customary law but also treaties, obligations of Turkey arising out of treaties in the field of human rights are covered by the constitutional guarantee.¹⁴⁵

Article 42, while making the Turkish language the only and obligatory medium of teaching for Turkish citizens in Turkish schools, reserves intact the obligations of Turkey to the contrary as arising from treaties concluded in that field. Thus, it extends a constitutional guarantee to the provisions of the Lausanne Treaty concerning rights of minorities and consequently restricts the power of the legislator in that area.¹⁴⁶

On the other hand, Article 16, which was borrowed from Article 13 of the 1961 Constitution, follows the logic and requirements of Article 15 and has for its object to prevent conflicts with other states. In fact, the treatment of aliens in today's international law is seen to be only an aspect of protection of human rights. Even under Article 15 alone, aliens would benefit from protection of international law as a constitutional guarantee. Article 16, therefore, complements Article 15. These two articles, whether taken alone or together and however they might be understood, restrict the sovereignty of the state.

Article 92, which only repeats Article 66 of the 1961 Constitution, incorporates by reference rules of international law regarding the use of force, and this is nothing but acceptance of a restrictive influence of the rules of international law concerning the maintenance of the world public order. Obligations of Turkey falling into this category, even if they arise out of a treaty (for example, from the Charter of the United Nations or from the Briand-Kellog Pact of 1928) are not subject to Article 90 with respect to their legal effects. They are superior to ordinary laws. The same is applicable to those parts of Article 92 which relate to sending Turkish troops abroad or receiving foreign troops in the territory, probably taking into account special commitments of Turkey to NATO.

Having briefly touched on those specific provisions of the Constitution, now

145 See, Pazarci, *Uluslararası Hukuk Dersleri* [Courses on International Law] I, 1985, p. 22.

146 *Id.*, p. 23.

it is time to turn to Article 90 which regulates the position of treaties in general. As was stated above, Article 90 only repeats Article 65 of the 1961 Constitution. Therefore, comments previously made¹⁴⁷ regarding Article 65 are extremely useful for the interpretation and understanding of Article 90 as well. What makes Article 90 complicated are two sentences of the last paragraph of that article. The first sentence says that treaties duly put into effect have the force of law, and the second sentence complements it by saying that no proceedings can be instituted before the Constitutional Court to challenge the constitutionality of them. There is no further classification of the Constitution in that respect. Therefore, that paragraph is shrouded in ambiguity. Some commentators¹⁴⁸ who dwell on the first sentence, argue that under the Constitution treaties are equal to ordinary statutes. In case of conflict between the two, they propose that the conflict be solved by applying the rule *lex posteriori derogat priori*. This means that a legislation subsequent in time will abrogate an earlier inconsistent treaty and vice versa.

A more tenable view¹⁴⁹, which takes into account the need to carry out international obligations and requirements of the principle of division of powers within the state, adopts the above-mentioned view but on the condition that the treaty must be continued to be applied as long as it is not clear that it was the intention of the legislator to breach the treaty. In other words, as long as it is possible to reconcile the texts of both instruments in one way or another, the treaty ought to be applied. That view also accords with the practices of the U.S.A. and the U.K.

According to some other commentators who have expressed themselves on Article 65, it is possible to make one of the two interpretations of the article as it is not clear and precise. It may be argued that treaties prevail over national legislation or that they are equal.¹⁵⁰

147 As to the meaning of Article 65 of the 1961 Constitution, see, Meray, *Devletler Hukukuna Giriş* [Introduction to International Law], vol. I, 1969, p. 189ff. Çelik, *Milletlerarası Hukuk* [International Law], Book I, 1987, p. 104ff; Toluner, *supra* note 130, p. 589; Kubalı, *Anayasa Hukuku (Genel Esaslar ve Siyasal Rejimler)* [Courses on Constitutional Law (General Essentials and Political Regimes)], 1971, p. 141; Akipek, O.I., *Devletler Hukuku* [International Law], Book I, 2nd edition, pp. 27-28.

148 Meray suggests a solution on the basis of the *lex posterior* or *lex specialis* rule. See, *supra* note 147, p. 32; see also, Kubalı *supra* note 147, p. 145.

149 Toluner, *supra* note 147, p. 595; Balta, T.B., "Avrupa İnsan Hakları Sözleşmesi ve Türkiye" (European Convention on Human Rights and Turkey), in *Türkiye'de İnsan Hakları Armağanı*, Ankara, 1970, p. 278.

150 Çelik, *Milletlerarası Hukuk* [International Law], I, 1980, p. 209, note 159.

Those who are impressed by the second sentence of the last paragraph of Article 90 argue that, under the said article, ways and means of challenging constitutionality of treaties before the Constitutional Court are fully closed and consequently it is possible in the real world to conclude treaties contrary to the Constitution, which means nothing but acceptance of supremacy of treaties over national legislation. Actually, they continue, the Constitution has favored a monist approach. International treaties, whether concluded before or after conclusion of a national legislation, always prevail over the latter.¹⁵¹

On the other hand, some commentators, who have studied Article 90 of the 1982 Constitution in close relation to Articles 15, 16, 42 and 92, also disagree on the status of treaties in the Turkish legal system. According to one view, treaties covered by those articles have the force of the Constitution. Consequently, parliament cannot pass legislation contrary to them and they prevail over existing inconsistent legislations. Other treaties are, on the other hand, subject to Article 90. They have the force of law. In case of a conflict between the two, the principle *lex posteriori derogat priori* applies.¹⁵²

Some other commentators consider that the Constitution adopts an implied rule of conflict of laws according to which international law is given precedence over inconsistent national law.¹⁵³ In their view, treaties are different from ordinary legislations. They ought to be treated and with the Constitution.¹⁵⁴ In fact, the Constitution has adopted the monist theory. Legislations even when they are subsequent in time cannot abrogate an earlier treaty. The latter ought to be given precedence.¹⁵⁵

The question of whether the meaning of the above-mentioned articles referring to specific treaty areas affects the status of treaties under Article 90, seems to be rather complicated. It is not easy to reach clear-cut conclusions. However, it seems that it would not be a good interpretation to rely on Arti-

151 Akipek, *supra* note 147, pp. 27-28; Kubalı, *supra* note 147, p. 141.

152 Pazarıcı, *supra* note 145, p. 31.

153 Çağlar, *Anayasa Bilimi: Bir Çalışma Taslağı* [Science of Constitution: A Working Draft], 1989, p. 50.

154 Soysal, M., "Anayasaya Uygunluk Denetimi ve Uluslararası Sözleşmeler" [Constitutional Review and International Agreements], in *Anayasa Yargısı* (Anayasa Mahkemesinin 23. Kuruluş Yıldönümü Nedeniyle Düzenlenen Sempozyumda Sunulan Bildiriler), Ankara 1986, pp. 5-17.

155 Gölcüklü, F., "Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı" [European Convention on Human Rights and the Individual Right to Petition], in *İnsan Hakları Yılı* [Human Rights Yearbook], 1988-1989, vols. 10-11, pp. 3-7.

cles 15, 16, 42 and 92 to prove that Article 90 gives precedence to treaties over national legislation. Even one might say that such an interpretation may lead to an opposite result. If the fathers of the Constitution had wanted treaties to prevail, they could have said so in express terms. From Articles 15, 16, 42 and 92 that result cannot be secured implicitly. In those articles questions of extreme importance are regulated. The fathers of the Constitution were more careful and meticulous about the implementation of international obligations referred to in those articles. If Article 90 was capable of giving precedence to international treaties, the fathers of the Constitution would not have felt obliged to stress the importance of those obligations in Articles 15, 16, 42 and 92. Rather, the formula of Article 90, which holds treaties equal to ordinary legislation, and the feeling of responsibility to uphold international obligations were the basic reasons for which specific arrangements were accepted for certain obligations. In particular, one cannot fail to think that if Article 90 had given precedence to treaties, there would have been no need to have Article 42 which gives constitutional power to certain kinds of treaties.

That interpretation leads us to this: Article 90 defines the status of treaties which are not specifically mentioned in other articles of the Constitution. To such treaties Article 90 gives the force of law. Under that article the legislator still has the actual opportunity to pass legislations inconsistent with existing treaties. The fact that the last sentence of that article prohibits any proceedings from being instituted before the Constitutional Court to challenge the constitutionality of treaties, does not change the legal status of such treaties. Rather, it reflects a concern that amendment or termination of international treaties completed under international law should be left to the normal procedure under international law, rather than to a national body, and that the stability of international relations of the state should be maintained. Article 90 is, on the other hand, in full accordance with the principle of the division of powers within the state.

As to the jurisdiction of courts, it would seem that the courts do not have the competence under the Constitution to declare void any earlier treaty when it is found contrary to a subsequent legislation on the ground that Article 90 gives an equal status to treaties with legislation, in particular, when one considers the utmost care which is exhibited in Articles 15, 16, 42 and 92 of the Constitution for carrying out of international obligations of Turkey.

156 See, Danıştay Kararı, Esas No. 1988; K. No. 1989/4, in *Resmî Gazete* 9 Şubat 1990, Sayı 20428 [Official Gazette, 9 February 1990, No. 20428].

In fact, the courts may only suspend a treaty for its application in a specific case, because a treaty can be terminated only in accordance with international law and not by a national court. Even if a state is not able to implement a treaty because of its own difficulties resulting from its legal system, it shall yet remain responsible internationally. It cannot relieve itself of that responsibility by a subsequent legislation. We do not think that Constitution means of contrary. If the intention of the legislator to violate an existing treaty by a subsequent legislation is not clear and precise, in case of a conflict between an earlier treaty and an inconsistent legislation, the latter ought to be interpreted in accordance with the treaty, and the treaty ought to be given precedence, as is done in some other nations.

As a matter of fact, some court decisions are indicative of the fact that treaties are actually given precedence over national legislation. For example: The State Council (the highest administrative court) has apparently given precedence to an ILO treaty over a subsequent legislation in a case¹⁵⁶ brought against the University of Dokuz Eylül by a teaching member of Muğla Management High School, a sub-division of Faculty of Economics and Administrative Sciences of the same university, the applicant having been dismissed by the martial law authorities after the 1982 military take-over under Article 2 of the Act No. 1402 as amended in 1980 by Act No. 2766 which is to the following effect:

Martial law commanders have the authority, as long as the martial law regime is in effect, to dismiss or re-appoint or to transfer any civil servant whose continued employment, in the same status or in any status, in their opinion, is inimical to national security or public order, and other public authorities which employ such civil servants will immediately execute the orders of the relevant martial law commanders. Civil servants thus dismissed shall not be eligible for re-employment even after the martial law regime is terminated.

After the 1980 military take-over, a long martial law regime was proclaimed and some university professors were removed from their positions under the above-mentioned act. Later on, the martial law regime was terminated and the extraordinary powers of the martial law commanders ceased to exist. Some previously dismissed professors applied to their universities for reinstatement, which was rejected. Thereupon, they brought actions for annulment of the decisions before administrative courts.

Applicants argued that the provision of Act No. 1402 depriving them of pub-

lic service forever was, among others, against the Constitution. The cases being rejected by local administrative court, they appealed to the State Council. It was there that the case took a different turning. The Fifth Chamber of the Council, which is in charge of handling such cases, delivered different and contradictory judgments, which required Consolidation of opinions and jurisprudence on the subject. The Council for consolidation of Jurisprudence convened to put a uniform and binding construction on the said article of Act No. 1402. In the end, the Council decided for the applicants on the ground, among others, that dismissal of the applicants was contrary to the ILO Convention No. 111, Article 1 (a), regarding non-discrimination, the Convention having been ratified by Turkey in 1966.

The Council also found that the prohibitory provision was contrary to Article 5 of the Universal Declaration of Human Rights and to Article 3 of the European Convention on Human Rights, as it downgraded the applicants even below the ex-convicts who could become re-eligible for public service when their punishment was pardoned.

The Universal Declaration being adopted in 1948, Turkey being a party to the European Convention since 1954 and to the ILO Convention No. 111 since 1966, it is remarkable that the Council gave preference to an interpretation upholding treaties or the Declaration over subsequent national legislation.

One might have a reservation as to whether the Council could rightly put ILO-Convention and the Universal Declaration in their perspectives. It is also true that the question before the Council was to adopt one of the two interpretations of Act No. 1402 and not to choose between a treaty and an inconsistent subsequent act, but the judgment reveals the approach of the Council to international obligations which is remarkable. However, it is not crystal-clear that other courts, or even the State Council itself, will follow the same line. One has yet to see the future practice in order to give a sounder view on this aspect.

If this interpretation is correct, upon accession of Turkey to the European Community, the Turkish courts will be bound to treat European Community Law which would mostly fall within ambit of Article 90 as having force of domestic law and being equal to it, which would, in some cases at least, engage responsibility of the state.