Decision 32/2008. (III. 12.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking the prior constitutional review of an Act of Parliament adopted but not yet promulgated, the Constitutional Court – with concurring reasoning by *dr. András Holló, dr. István Kukorelli, dr. Péter Paczolay and dr. László Trócsányi* Judges of the Constitutional Court and with dissenting opinions by *dr. Bragyova* and *dr. Miklós Lévay* Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court establishes that Section 3 para. (2) and Section 3 para. (3) of the Agreement contained in Section 3 of the Act adopted on the session of the Parliament of the 11th of June, 2007 on the promulagation of the "Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway", as well as Section 4 of the Act in the part establishing the declaration made in Section 3 para. (4) of the Agreement are unconstitutional.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. The Parliament adopted an Act on its session of the 11th of June 2007 on the "promulagation of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway" (hereinafter: "Act"). On 12 June 2007, the Speaker of the Parliament sent the Act to the President of the Republic for promulgation, without a request of urgency. The President of the Republic, exercising his right granted under Article 26 para. (4) of the Constitution, submitted a petition on 27 June 2007 – with reference to Section 1 item a), Section 21 para. (1) item b), Section 35 and Section 36 of the Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), and acting within the relevant deadline – initiating a prior constitutional review of Article 3 paras (2) and (3) of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (hereinafter: "EUIN Agreement") to be promulgated by the Act, as well as of Section 4 of the Act on making a declaration about Article 3 para. (4) of the EUIN Agreement.

2. In his motion, the President of the Republic pointed out the following:

2.1. The EUIN Agreement is an international treaty the contracting parties of which are the European Union on the one hand and the Republic of Iceland and the Kingdom of Norway on the other hand. For the European Union, the legal basis of the EUIN Agreement are Articles 24 and 38 of the Treaty on the European Union (hereinafter: "Treaty"). However, according to Article 24 para. (5) of the Treaty, "no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure". Since, according to the reasoning of the Bill, the representative of the Republic of Hungary has made such a statement, the Hungarian rules on international treaties shall apply in the respect of the acknowledgement of the binding force of the EUIN Agreement and its incorporation into domestic law. This is the reason of the Parliament adopting

the Act, on the one hand providing an empowerment for acknowledging the binding force of the EUIN Agreement – as an international treaty – and on the other hand promulgating it in the Hungarian law.

2.2. Then the President of the Republic examined his own right of submitting a motion, and established that Section 36 para. (1) of ACC allows him to initiate the constitutional review of an international treaty prior to its ratification. Although the ACC does not specify the concept of ratification, Section 2 item f) of the Act L of 2005 on the procedure related to international treaties (hereinafter: AIT), following the treaty on the law of treaties, signed in Vienna on 23 May, 1969, and promulgated in the law-decree 12 of 1987, lists the ratification as one of the methods of acknowledging the binding force of international treaties. On the basis of Article 30/A para. (1) item b) of the Constitution, the President of the Republic shall acknowledge the binding force of an international treaty in the manner specified in Section 8 para. (2) of AIT. In the present case, where the promulgation of the international treaty is made in the form of an Act of Parliament, the President of the Republic shall – along with signing the Act – execute a deed on acknowledging the binding force of the treaty and he shall forthwith provide for exchanging or depositing the deed by way of the minister responsible for foreign affairs. Accordingly, Section 36 para. (1) of ACC allows the President of the Republic – as established in the Decision 7/2005. (III. 31.) AB regarding the participants of the procedure of concluding a treaty – to initiate prior to undertaking an obligation under international law, i.e. acknowledging the binding force of the EUIN Agreement, that the Constitutional Court review the constitutionality of those provisions of the international treaty in the respect of which the President of the Republic has constitutional concerns. (ABH 2005, 83, 86)

2.3. In the next part of the petition, the President of the Republic summarised the provisions of the EUIN Agreement in the respect of which he has constitutional concerns.

As established by the President of the Republic, the aim of the EUIN Agreement is to speed up and simplify surrender cases between the Member States of the EU and Iceland and Norway by applying an arrest warrant – to be issued by the issuing State – as contained in the annex of the EUIN Agreement. The judicial authority of the executing State shall decide on the surrender of the person arrested on the territory of the executing State, but surrender can only be refused in specific circumstances.

2.3.1. The President of the Republic held Article 3 para. (2) of the EUIN Agreement to be unconstitutional. As interpreted by the President of the Republic, according to the general rule in the relevant provision, the obligation of surrender is based on the condition of double criminality, but it does not require the conduct that forms the basis of the arrest warrant to be a criminal offence with the same constituent elements both in the law of the issuing State and the executing State.

2.3.2. The President of the Republic also raised concerns with regard to Article 3 para. (3) of the EUIN Agreement, as in the opinion of the President of the Republic it excludes the application of the requirement of double criminality in the case of certain criminal offences in particular in relation to terrorism and organised crime.

2.3.3. Article 3 para. (4) of the EUIN Agreement allows the contracting parties to make a statement on excluding the application of the condition of double criminality contained in Article 3 para. (2), with regard to certain groups of criminal offences and on further conditions. As interpreted by the President of the Republic, if a contracting party makes such a declaration, the judicial authorities of that State may not refuse the execution of the arrest warrant by referring to the fact that the conduct concerned is not a criminal offence under the State's own law. The petitioner refers to the statement made by the Republic of Hungary regarding Article 3 para. (4) of the EUIN Agreement, undertaking not to apply the requirement of double punishability in specific circumstances in the course of the surrender procedure. The President of the Republic initiated the constitutional review of the declaration, since it is essentially an undertaking under international law based on the EUIN Agreement and after its

publication in due form, it would result in an international contractual obligation of the Republic of Hungary.

2.4. The constitutional review of Article 3 paras (2) and (3) of the EUIN Agreement and of the declaration made in the respect of Article 3 para. (4) of it was initiated by the President of the Republic on the basis of Article 57 para. (4) of the Constitution, enshrining the principles of *nullum crimen sine lege* and *nulla poena sine lege* as fundamental rights. The petition explained the contents of the above principles as well as the main findings of the Decision 11/1992. (III. 5.) AB interpreting these principles. As explained in the petition: "Article 57 para. (4) of the Constitution shall be deemed to have been violated (…) by any statute empowering Hungarian authorities to perform any act aimed at enforcing liability under criminal law when the relevant conduct is not a criminal offence according to the law of Hungary at the time of committing it, or when it does not fulfil all the constituent elements of the criminal offence". In the opinion of the President of the Republic, the provisions affected by the petition and the declaration allow the enforcement of criminal liability in the case of such conducts, too.

2.5. The next part of the petition also refers to the potentially different interpretation and enforcement of Article 57 para. (4) of the Constitution in the scopes of application of Article 7 para. (1), Article 2/A and Article 6 para. (4) of the Constitution, but according to the President of the Republic, the challenged provisions do not fall into any of the above categories

2.6. In the last part of the petition, the President of the Republic summed up his statements and asked for the opinion of the Constitutional Court on the basis of Article 57 para. (4) of the Constitution about the constitutionality of Article 3 paras (2) and (3) of the EUIN Agreement and of the declaration made in the respect of Article 3 para. (4) of it.

II.

1. The relevant provisions of the Constitution taken into account when judging upon the petition:
"Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law."
"Article 57 (4) No one shall be declared guilty and subjected to punishment for an offence that was not a criminal offence under Hungarian law at the time such offence was committed."

2. The provisions of the Act affected by the petition are as follows:
"Section 3 The authentic text of the agreement in the Hungarian language is as follows:
(…)

Article 3
Scope

(…)
(2) Without prejudice to paragraphs (3) and (4), surrender shall be subject to the condition that the acts for which the arrest warrant has been issued constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.
(3) Subject to Articles 4, 5(1)(b) to (g), 6, 7 and 8, in no case shall a State refuse to execute an arrest warrant issued in relation to the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism and Articles 1, 2, 3 and 4 of the Framework Decision of 13 June 2002 on combating terrorism, illicit trafficking in narcotic drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking and rape, punishable by deprivation of liberty or a detention order of a maximum of at least 12

months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made with the further knowledge that his or her participation will contribute to the achievement of the organisation's criminal activities.

(4) Norway and Iceland, on the one hand, and the EU, on behalf of any of its Member States, on the other hand may make a declaration to the effect that, on the basis of reciprocity, the condition of double criminality referred to in paragraph (2) shall not be applied under the conditions set out hereafter. The following offences, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing State, shall, under the terms of this Agreement and without verification of the double criminality of the act, give rise to surrender pursuant to an arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

(…)

Article 4 The Republic of Hungary makes the following declarations to the Agreement:

To Article 3 para. (4):

The Republic of Hungary declares that it shall not apply the condition specified in Article 3 para. (2) in the case of the categories of criminal offences specified in Article 3 para. (4) if, according to the law of the issuing State, in the issuing State, the upper limit of the punishment is at least three years of imprisonment or a measure implying the deprivation of liberty, provided that the issuing State has made a similar declaration.

(…)"

III.

With regard to the petition, the Constitutional Court acts in its scope of competence specified in Section 1 item a) of ACC. According to Section 1 item a) of ACC, the competence of the Constitutional Court includes the ex ante examination for unconstitutionality of statutes adopted but not yet promulgated and of certain provisions of international treaties. Petitions aimed at such examination are to be submitted by an organ or person specified in Section 21 para. (1) of ACC – with due account to the differentiation regulated in Sections 35-36 of ACC. In the present case the Constitutional Court established that the President of the Republic had initiated the prior constitutional review of certain provisions of an Act of Parliament promulgating an international treaty in compliance with the rules specified in Section 36 para. (1) and Section 35 para. (1) of ACC.

The President of the Republic filed his motion on the basis of Section 36 para. (1) of ACC. The Constitutional Court established that the EUIN Agreement is a treaty under international law. The fact that one of the contracting parties is the European Union does not make the EUIN Agreement a community legal norm as specified in Article 2/A of the Constitution, since it does not change any of the competencies of the European Union or of the European Community regulated in the so called founding and amending treaties, but it establishes obligations in the relations between the individual Member States and Iceland and Norway. Agreements of this nature are considered by the European Union itself as international treaties regulated by the rules of international law. Based on the above arguments, the Constitutional Court shared the view of the President of the Republic about the possibility in the present case of performing a constitutional review prior to concluding the international treaty, and indeed it is the last chance to do so as the binding force of the international treaty has not been acknowledged yet. According to the Constitutional Court, the fact that the Act contains at the same time the empowerment for ratification and the act of promulgation – complying witht the new practice introduced in Section 7 para. (2) and Section 10 para. (1) item a) of AIT – does not have any effect on the applicability of Section 36 of ACC.

IV

In the context of Article 57 para. (4) of the Constitution the Constitutional Court first points out the following:

Originally the principle of *nullum crimen sine lege* was designed to offer a guarantee regarding the State enforcing criminal liability against its citizens or a foreign citizen residing in the territory of the State if the conduct concerned was not a criminal offence according to the law of the State at the time of committing the act. However, with the development of international cooperation in combating crime and the emergence of the institution of extradition/surrender and with the setting up of international tribunals in the modern age, the principle of *nullum crimen sine lege* is to be examined in other contexts as well.

The constitutional problem raised in the petition is connected to the fact that the EUIN Agreement adopted a solution developed in the European cooperation of criminal and justice affairs, based on automatisms, significantly deferring from the traditional solutions of international law.

As far as the elements of contents of the surrender agreements are concerned – applying also to the surrender agreements concluded by the State of Hungary and reviewed by the Constitutional Court – in most cases, the states use the method of listing the criminal offences and of specifying the minimum term of imprisonment to be imposed for the listed offences, in order to attempt to limit the surrender cooperation to the criminal offences that are considered as such in the domestic law with a comparably similar potential punishment. The constitutional dogmatic methods applied by the states either connect this approach to the principle of *nullum crimen sine lege* (or to the extended interpretation of it) or to other constitutional guarantees of legality in criminal law.

The Constitutional Court shared the view taken in the petition – referring back to earlier decisions of the Constitutional Court – in the respect of the applicability of Article 57 para. (4) of the Constitution about all statutes in criminal law materially influencing the declaration of being guilty and the imposing of the punishment, thus it is a guarantee preventing any action under public authority aimed at the enforcement of criminal liability regarding persons falling under the scope of the Constitution of Hungary, if the conduct upon which the criminal liability is based is not a criminal offence according to the law of Hungary. In the present case, the fulfilment of this requirement can be examined on the basis of comparing Article 57 para. (4) of the Constitution and the provisions of the EUIN Agreement.

Nevertheless, it has been pointed out in the petition itself that Article 57 para. (4) of the Constitution should be interpreted in the context of Article 2 para. (1), Article 2/A para. (1), Article 6 para. (4) and Article 7 para. (1) of the Constitution.

V

To provide foundations for the examination of the constitutional problem raised in the petition, the Constitutional Court interpreted historically, logically and systematically the provision found in Article 57 para. (4) of the Constitution, paying special attention to establish the meaning of the term “under Hungarian law”.

1. Prior to the change of the political regime the Constitution did not contain the principle of *nullum crimen sine lege*, thus, at that time, only the general human rights clause (“the Republic of Hungary respects the human rights”), introduced into Article 54 para. (1) of the Constitution amended by Act I of 1972, could be interpreted as an indirect reference to a connecting principle. However, the principle of was not unknown in the law of Hungary: it was incorporated as a material provision in Section 2 of the Act IV of 1978 on the Criminal Code (hereinafter: CC). (“A criminal offence shall be adjudged in accordance with the law in force at the time of its perpetration. If, in accordance with the new Criminal Code in force at the time of the judgment of a conduct, the conduct is no longer a criminal offence or it is to be adjudged more leniently, then the new law shall apply; otherwise, the new Criminal Code has no retroactive force.”)

The principle of *nullum crimen sine lege* was raised to constitutional level by amending the Constitution with the Act XXXI of 1989. The incorporation of the *nullum crimen sine lege* principle into the Constitution had been initiated by the Government in office at that time, and the text proposed by the Government was modified in some respect in the course of the negotiations with the so called Opposition Roundtable. Reading through the records of those negotiations one may conclude that the negotiating parties at that time – and then the Parliament as the authority adopting the Constitution – tried to find a wording for Article 57 para. (4) of the Constitution to make it comply with the centuries old guarantee principle stating that for declaring someone’s guiltiness, the conduct committed by him should be one punishable by the law at the time of committing the offence. It can be established from the records, notwithstanding the words used, that the changes in the text reflected the intention to make the contents of the rule cover punishability both under Hungarian and international law.

Accordingly, it was the intention of the legislation establishing the provisions of the Constitution to have a regulation with the same content as found in the constitutions of the European states under the rule of law.

2. The Constitutional Court continued with overviewing the interpretation of the contents of the term "under Hungarian law" as found in the decisions of the Constitutional Court and as follows from them.

2.1. The Constitutional Court established that the relevant term first of all and naturally refers to Hungarian laws, especially the Criminal Code.

The Constitutional Court reminds that in the Decision 11/1992. (III. 5.) AB (ABH 1992, 77) the Court has already made a reference to quality criteria and the consonance with similar constitutional terms used in other European states. “The Constitutional Court interprets the principle of *nullum crimen et nulla poena sine lege* on the basis of the constitutional principle of the legality of criminal law. In connection with this task the Court has undertaken a comparative review of the constitutions of European constitutional democracies. The Court has concluded that these constitutions do not merely state that criminal offences must be prohibited only by statute, and the threat of punishment must likewise be determined by statute, but they require that criminal responsibility, sentencing and punishment must all be lawful and prescribed by the law. That is, they all do what Article 57 para. (4) of our Constitution prescribes.” (ABH 1992, 77, 86)

2.2. However, the words used also refer to the international treaties that have become part of the Hungarian law by way of promulgation, partly through the connecting regulation found in Article 7 para. (1) of the Constitution.

Several sections of the CC have been introduced into the Code as the result of obligations undertaken under international law, and even the application of some of them (apartheid in Section 157, the application of a weapon banned in an international treaty in Section 160/A, violating an international economic prohibition in Section 261/A) depends on the content of a separate provision under international law. For this purpose it is necessary to have the relevant treaty promulgated in Hungary. In the Decision 47/2000. (XII. 14.) AB, the Constitutional Court annulled Section 283/B of the CC, stressing that “the violation of the provisions of an international treaty not incorporated into a statute or not promulgated may not form the basis of criminal liability.” (ABH 2000, 377, 380)

2.3. In addition, the terminology concerned also means – with regard to Article 7 para. (1) of the Constitution – the acceptance of punishability on the basis of the universal international customary law.

The same interpretation was shared by the Constitutional Court in the Decision 2/1994. (I. 14.) AB in the respect of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. “The international law – incorporating the principle of *nullum crimen sine lege, nulla poena sine lege* as a crucial guarantee – allowed the application of retroactive legislation after World War II as an exemption from the generals rule. The related documents promulgated in the domestic law are the International Covenant on Civil and Political Rights and the European Convention on Human Rights. However, the Constitution does not contain any provision similar to the ones found in the Covenant and the Convention to allow any exemption to be made regarding the constitutional criminal law principle specified in Article 57 para. (4). Nevertheless, according to the Decision 53/1993. AB, Article 57 para. (4) and Article 7 para. (1) of the Constitution are to be interpreted with mutual regard to each other. »Alongside the unconditional applicability of the principle of *nullum crimen* to domestic law as guaranteed in Article 57, Article 7 para. (1) brings about the constitutional endorsement of rules of international criminal law pertaining to war crimes and crimes against humanity.« (V.2.p.)” (ABH 1994, 41, 53-54)

2.4. As pointed out by the Constitutional Court in the decisions adopted in the past years, the legal system of the European Union is an independent legal system despite of its origin in international law, thus the Constitutional Court considers the so called original law, i.e. „the founding and amending treaties of the European Union not to be international treaties despite of their contractual origin" (Decision 1053/E/2005. AB, ABH, 2006, 1824, 1828), and these „treaties as primary legislation and the Directive as secondary legislation are part of the domestic law as community law, as Hungary has been the member of the European Union since 1 May, 2004. As far as the competence of the Constitutional Court is concerned, community law does not qualify as international law under Article 7 para. (1)." [Decision 72/2006. (XII. 15.) AB, ABH 2006, 819, 861].

With regard to the above, the interpretation of Article 57 para. (4) of the Constitution in the context of Article 2/A para. (1) can be raised in the case of the applicability of a legal act, which has been adopted on the basis of the clause found in Article 2/A para. (1) – „to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union")" –, by exercising a competence through the institutions of the European Union. Within the European Union, this may happen in the case of cooperation in the so called justice and home affairs.

2.5. The Constitutional Court established that in the text of Article 57 para. (4) of the Constitution there is a logically closed system of legal acts under the concept of "Hungarian law" including the "original" Hungarian law, i.e. the Hungarian Criminal Code and the undertakings under international law promulgated as Hungarian statutes, establishing the punishability of certain acts in the given case, as well as the international customary law through adoption in the Constitution and the acts of the European Union establishing punishability and binding the State of Hungary as well.

3. Nevertheless, as pointed out by the Constitutional Court, there are many overlaps resulting from the recently experienced multiplication of the norms forming part of the above system: new international treaties and new legal acts of the European Union emerged, in many cases simply repeating the obligations under international law already accepted by the Hungarian State and promulgated in the Hungarian legal system, or the obligations regulated by the provisions on cooperation in the framework of the European Union.

There are more and more norms under international law and the European law accepted by the Hungarian State due to the intensifying cooperation between the States in the fields of criminal law and justice, and these norms need to comply with the requirements of the Hungarian Constitution, in particular the requirements of legality in criminal law, the paramount importance of which has been pointed out by the Constitutional Court in several decisions, emphasizing their constituent elements and the indispensable conditions for their fulfilment.

It follows from the Constitutional Court's practice on the legality of criminal law, that the constituent elements of a criminal offence can only be established in an Act of Parliament. The essence of a punishable conduct is determined in the general and specific parts of the CC and in the contents of the framework dispositions. Only an act specified in an Act of Parliament as a punishable conduct can be regarded as a criminal offence. Therefore the existence of constituent elements is essential to have an act considered as a criminal offence under Hungarian law.

VI

Then the Constitutional Court reviewed the precedents of concluding the EUIN Agreement. The Constitutional Court underlines the importance of the framework decision adopted by the Council of the European Union (hereinafter: "Council") on the European arrest warrant and the surrender procedures between Member States (Framework Decision 2002/584/IB, promulgated in the Official

Journal L 190, 18 July, 2002, p. 0001-0020, hereinafter: "Framework Decision"), as the basis of adopting the EUIN Agreement. Although the petition does not contain any request to review the Framework Decision, the Constitutional Court examined it as well, because of the strong connection between the two documents and the (often literally) similarity of the documents in the respect of the parts affected by the petition.

1. As pointed out by the Constitutional Court, today surrender is less and less suitable for using it as a tool in the fight against – organised – crime that has become of extraordinary extent, in particular in a borderless area as the European Union where the volume and the value of trust and cooperation between the States is so high – even in the legal sense – serving as the basis for several legal institutions as well.

This is why the Amsterdam Treaty introduced among the aims of the European Union the creation of the "area of freedom, security and justice", opening up the way for radical changes also in the field of the international cooperation in criminal affairs. As one of the very first steps of this process, the Tampere session of the European Council adopted a decision on the necessity of terminating the formal procedure of extradition between the Member States of the European Union, to be replaced by a procedure of swift surrender based on the principle of mutual recognition. According to this, the judicial authorities of all Member States must – under certain conditions – acknowledge the request sent by the designated judicial authority of another Member State asking for the surrender of a requested person. This legal solution opens up the territorial borders of criminal prosecution in Europe by making it easier to perform criminal prosecution and the administration of justice over the "borders" between the Member States.

The Council adopted the Framework Decision on 13 June, 2002 in order to implement this principle. The European arrest warrant – as a new legal institution – can be applied between the Members States of the European Union since 1 January, 2004, and in the case of Hungary it has been applicable since the date of Hungary's accession to the European Union, on the basis of Section 99 para. (1) of the Act CXXX of 2003 on the criminal cooperation with the Member States of the European Union (hereinafter: EUCC). According to the essence of the European arrest warrant, if a judicial authority of one of the Member States requests on the basis of a legal act issued by the authority the surrender of a person subject to a criminal procedure or already convicted, then this act is enforced all through the territory of the European Union and the person concerned is handed over to the relevant authority as soon as possible. In the new procedural system, the enforcement of the European arrest warrant is primarily based on the procedure between the judicial authorities and the levels of public administration and political decision making, applied in the classic extradition procedure, cease to exist.

Regarding the Republic of Hungary, EUCC is the statute containing the regulations on implementing the Framework Decision. The articles of EUCC are almost literally identical with the provisions of the Framework Decision.

2. The Constitutional Court also established that as early as in the preparation works of the Framework Decision, the European Commission, as one of the most important institutions in the European Union in the field of preparing decisions, envisaged a future agreement to be concluded with the Republic of Iceland and the Kingdom of Norway to extend the scope of the Framework Decision to these two States as well. This is based on the agreement concluded between Iceland, Norway and the Council on 17 May, 1999 on association with the implementation, application and development of the Schengen acquis (Official Journal L 176, 10 July, 1999, p. 36-52). However, it was decided later on that instead of extending the scope of the Framework Decision to these countries, an international treaty of the same content is to be concluded with them. In the course of this process, one of the main steps was the resolution of the Council of 27 June, 2006 about signing the Agreement the European

Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. This decision, together with the text of the EUIN Agreement, was published in all official languages of the European Union in the Official Journal of the European Union series L No. 292 on 21 October, 2006.

VII.

The requirements established by the Constitutional Court's practice regarding the legality of criminal law have already been referred to in point V/2 of the reasoning.

As held by the Constitutional Court, the text itself of the EUIN Agreement contained in Section 3 of the Act may lead to multiple interpretations in different cases. This is in particular applicable to the text "under the law of the executing State, whatever the constituent elements or however it is described" in Article 3 para. (2) of the EUIN Agreement, although the contents of this text – in the Act and only in the Act – is different than the Framework Decision because of the changed interpunction /*the translator's remark: in the official Hungarian translation of the Framework Decision, the words "whatever the constituent elements or however it is described" are between dashes "–"/*

At the time of formulating the EUIN Agreement the European Union applied the solution of literally transposing the specific provisions of the Framework Decision into the EUIN Agreement, thus the challenged text of Article 3 para. (4) of the EUIN Agreement is the same as the text of Section 2 para. (2) of the Framework Decision. Similarly, the challenged text of Article 3 para. (2) of the EUIN Agreement is the same as the text of the second part of Section 2 para. (4) of the Framework Decision

As noted by the Constitutional Court, at the time of formulating the provision under Article 3 para. (2), the legislation of the Union did not intend to explicitly exclude the possibility to refer to the principle of double criminality. The legislation aimed to maintain the right of the executing State to examine the existence of criminality according to the State's own law. However, it is undeniable that the Act – and only the Act – may indeed lead to an interpretation reflected in the petition because of not applying the dashes used in the Framework Decision.

As referred to by the President of the Republic as well, the Constitutional Court summarised in the Decision 11/1992. (III. 5.) AB, that "*nullum crimen sine lege* and *nulla poena sine lege* are fundamental constitutional principles whose legal content is determined by a number of criminal law provisions. Such a regulation is the Criminal Code's definitions of the elements of a criminal offence, the legal concepts of the penal system and punishment. The concept of a criminal offence, as well as the concept of punishment, is crucial from the perspective of determining individual criminal liability and accountability. The individual's constitutional rights and freedoms are affected not only by the elements of an offence and the sanctions of the criminal law, but also by the interconnected and closed system of regulation of criminal liability, punishability and determination of penalty. To summarize: the principles of *nullum crimen sine lege* and *nulla poena sine lege* are part of the constitutional principle of the legality of the criminal law (…)" (ABH 1992, 77, 86-87).

With regard to the above, the Constitutional Court established that the concerned part of Section 3 of the Act does not provide adequate guarantee for the full enforcement of the requirement specified in in Section 57 para. (4) of the Constitution, therefore it is unconstitutional.

VIII

The Constitutional Court also completed the examination of Article 3 para. (3) of the EUIN Agreement, as requested in the petition, and established the compatibility with the Hungarian legal provisions also in the respect of the types of criminal offences specified in Articles 1 and 2 of the Strasbourg Convention on the Supression of Terrorism (promulgated in the Act XCIII of 1997) refered

to in Article 3 para. (3) of the EUIN Agreement, and in Sections 1-4 of the Council's Framework Decision 2002/475/IB on combating terrorism.

In addition, the Constitutional Court established that in the basic cases of murder (Section 166 of CC), kidnapping (Section 175/A of CC), hostage-taking as a terrorist act (Section 261 of CC) and rape (Section 197 of CC) even the lowest imposable time of imprisonment is over one year. The same applies to certain forms of the criminal offences of abusing narcotic drugs. (Sections 282/A and 282/B of CC)

In the cases of grievous bodily injury (Section 170 of CC) and illegal restraint (Section 175 of CC) the lowest imposable time of imprisonment is not determined in the basic cases, but according to the general minimum specified in the General Part of the CC [Section 40 para. (2) of CC], the minimum terms of the imprisonment is at least two months. However, if the above conducts qualfy as terrorist acts [with account to Section 261 para. (9) of CC], they have to punished according to Section 261.

Article 3 para. (3) of the EUIN Agreement requires regarding the conducts falling under its scope that the upper limit of the applicable punishments should be more than one year. This requirement is fulfilled even in the cases of grievous bodily injury and illegal restraint, as the upper limit of imprisonment applicable in the case of such offences is three years. Moreover, the requirement is also met in the case of the above mentioned forms of the criminal offence of abusing narcotic drugs (Sections 282 and 282/C of CC) with upper limits of imprisonment of five and two years respectively.

Then the Constitutional Court examined the scope of the persons falling under Article 3 para. (3) and compared it to the conceptual system of the CC:

- according to Section 19 of CC, „offenders are the perpetrator and the coprincipal perpetrators (perpetrators), the abettor and the accessory (accomplices)";
- according to Section 20 para. (1) of CC, „perpetrator is a person who realizes the constituent elements of a criminal offence". As regulated in paragraph (2), „coprincipal perpetrators are the persons who jointly realize the constituent elements of an intentional criminal offence, being aware of each other's activities";
- according to Section 21 of CC, "(1) Abettor is a person who intentionally persuades another person to perpetrate a criminal offence. (2) Accessory is a person, who intentionally grants assistance for the perpetration of a criminal offence. (3) The penal sanction established for the perpetrators shall also be applied for the accomplices.";
- according to Section 137 para. (7) of CC, "a criminal conspiracy is deemed to have been formed when two or more persons are engaged in committing criminal offences in an organised manner, or they conspire to do so, and they attempt to commit a criminal offence at least once, however, a criminal organization has not been formed.";
- according to Section 137 para. (8) of CC, "criminal organization shall mean a collaborating group of three or more persons organised for a longer period of time, deliberately engaged in committing intentional criminal offences, which are punishable with five years of imprisonment or more."

At the same time, Article 3 para. (3) of the EUIN Agreement considers the persons who "contribute" to the commission of one of the above listed offences without actually taking part in the execution of the offence concerned, to be persons falling under the scope of surrender. Such a "contribution" must be an intentional one and it must be performed in the knowledge of the concerned person's participation "contributing" to realizing the criminal activities of the given organisation.

As underlined by the Constitutional Court, the term "contribution" used in the Hungarian text of Article 3 para. (3) of the EUIN Agreement is not necessarily identifiable in all cases with the concepts usded in the above cited provisions of the CC, in particular with "granting assistance".

In contrast with the method applied in the case of examining Article 3 para. (2), the Constitutional Court could not compare the text of Article 3 para. (3) with the Framework Decision as the latter does not contain such a provision.

Article 3 para. (3) of the EUIN Agreement contains a quite clear order (that is “in no case shall a State refuse” to execute an arrest warrant issued according to the above), therefore it is not acceptable on the basis of the constitutional criteria of the legality in criminal law to apply this order in the respect of perpetrators' conducts that allow for different interpretations and that are only ambiguously fitted into the conceptual system of the CC. This insecurity can by no means counterweighed by the references made in Article 3 para. (3) to Article 5 para. (1) items b)-g) and to Articles 6, 7, and 8, granting possibilities to refuse the execution for example on the basis of the perpetrator's age, the rule of *ne bis in idem re*, statute-barring and amnesty.

Accordingly, the Constitutional Court established that Section 3 of the Act – in this part as well – was unconstitutional because of being in conflict with Article 57 para. (4) of the Constitution and because of not meeting the requirement of the clarity of norms deducted from Article 2 para. (1) of the Constitution.

IX.

The Constitutional Court considered the fact that in the course of preparing the EUIN Agreement, closely following the wording of the Framework Decision, the relevant dispositions and punishments of the criminal codes of the two affected States had been checked and the EUIN Agreement was only signed by the European Union, Norway and Iceland after having their criminal codes amended. The process of harmonization was aimed at the potential elimination of those differences between the legal systems that hindered cooperation in the field of surrender. (However, the very provisions of Section 69A and 69B of the Lisbon Treaty also aim the further necessary deepening of the harmonisation with regard to statutory definitions in criminal law.)

In the European cooperation in criminal and justice affairs, trust in the legal system of the other cooperating State is a crucial regulation. This trust is not limited to the European Union (or to the States participating in the Schengen cooperation within the Union), but it is applicable in the respect of all States participating in the Schengen cooperation as full members, without regard to the fact whether those States are at the same time members of the European Union or not. Indeed, this rule has been announced in the context of the interpretation of the content of the principle of *ne bis in idem re* in the respect of Norway, in Section 30 of the preliminary ruling of the Court of Justice of the European Communities, passed on 9 March, 2006, in connection with the Leopold Henri Van Esbroeck case (affaire C-436/04).

Next the Constitutional Court examined the potential matching between the statutory definitions of the 32 criminal offences listed in Article 3 para. (4) of the EUIN Agreement and the CC of Hungary. The Constitutional Court established that the criminal offence of the illicit trafficking in hormonal substances and other growth promoters has no matching pair in the CC.

The amendment of the CC by Act LXXXVII of 1998 introduced Section 283/B containing the definition of a criminal offence called the “abuse of performance promoting substances or methods”. This offence was actually introduced into the CC for the implementation of the obligations resulting from the convention against the use of illegal performance promoting substances or methods, concluded in Strasbourg on 16 November, 1998 in the framework of the Council of Europe. Although this anti-doping convention had been a convention in force in the respect of Hungary since 1990, it has not been promulgated for a long time. In the Decision 47/2000. (XII. 14.) AB, the Constitutional Court annulled Section 283/B of the CC, stressing that “the violation of the provisions of an international treaty not incorporated into a statute or not promulgated may not form the basis of criminal liability.” (ABH 2000, 377, 380)

As pointed out by the Constitutional Court, the Parliament has not adopted since the year 2000 an independent and detailed definition under criminal law in the subject concerned, while the convention in question of the Council of Europe has become a part of the law of Hungary by way of promulgating

it in the Act LXXVIII of 2003. This fact, however, changed the legal coordinates fundamentally, as the situation challenged in the Decision 47/2000. (XII. 14.) AB of the Constitutional Court is not actual any more.

With regard to the above fact as well as to the Framework Decision and to EUCC implementing it, the Constitutional Court established that the waiver of the precondition of double criminality in the respect of the criminal offence of "illicit trafficking in hormonal substances and other growth promoters" is in conflict with Article 57 para. (4) of the Constitution. If the Republic of Hungary acknowledges the binding force of the EUIN Agreement, it implies an obligation of the Hungarian judicial authority to execute an arrest warrant based on the criminal offence of "illicit trafficking in hormonal substances and other growth promoters", as one of the offences listed in Article 3 para. (4), issued by a Norwegian or Icelandic judicial authority, if it refers to Hungary as the executing State, without regard to the fact that in the law of Hungary the act in question is not considered to be a criminal offence. According to the EUIN Agreement, as far as the criminal offences listed in Article 3 para. (4) are concerned, it is not possible to make any derogation or statement to exclude the binding force of the Agreement unilaterally, i.e. not on the basis of reciprocity.

By applying the principle of to the Act of Parliament adopted for the implementation of the EUIN Agreement, the Constitutional Court established that it actually contains a *crimen* not supported by any *lex* for the moment, i.e. the CC of Hungary does not contain a statutory definition on the illicit trafficking in hormonal substances and other growth promoters.

This is the point where the concerns of the President of the Republic are verified about the Act empowering the Hungarian authorities to implement actions aimed at establishing the criminality of and at punishing legal subjects falling under the scope of the Constitution of Hungary, even in the case of a conduct which is not a criminal offence according to the law of Hungary at the time of committing the offence.

Accordingly, the Constitutional Court establishes that – in the absence of a statutory definition to be found in the CC as a background regulation – Section 4 of the Act is unconstitutional in the part containing the declaration of the Republic of Hungary made to Article 3 para. (4) of the EUIN Agreement, because of undertaking the international obligation specified in Article 3 para. (4) of the EUIN Agreement regarding the illicit trafficking in hormonal substances and other growth promoters.

X

In the procedure, the Constitutional Court also examined the interpretation elaborated by the Court of Justice of the European Communities on 3 May, 2007 in the case C-303/05, in the procedure between Advocaten voor de Wereld VZW and Leden van de Ministerraad, in the judgement regarding the reference for a preliminary ruling submitted by the Constitutional Court of Belgium, as well as the interpretation presented in the preliminary ruling of 9 March, 2006 in connection with the case of Leopold Henri Van Esbroeck (affaire C-436/04). The Constitutional Court also overviewed the decisions related to certain questions of the Framework Decision related to the obligation of surrender, passed by the constitutional courts of France (*avis* of 26 September, 2002, n° 368.282), the Federal Republic of Germany (Case 2 BvR 2236/04, judgement of 18 July, 2005), the Czech Republic (decision of 3 May, 2006, no. Pl. ÚS 66/04), Poland (Case P 1/05, decision of 25 April, 2005), Cyprus (Case Ap. 294/2005, decision of 7 November, 2005), Slovenia (Case U-I-14/06, ruling of 22 June, 2006) and of Belgium (judgement of 10 October, 2007, no. 128/2007 in the Case Advocaten voor de Wereld VZW).

In addition, the Constitutional Court noted that on 15 January, 2008 the Court of Justice of the European Communities amended its rules of procedure – on the basis of the Council Decision 2008/79/EC, Euratom of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, in which the Council requested the Court to apply the emergency preliminary ruling procedure

in the cases implying the deprivation of liberty – introducing Article 23a allowing the rules of procedure to require an emergency procedure in the case of a reference for preliminary ruling regarding the area of freedom, security and justice (Official Journal of the European Union L 24, 29 January, 2008, p. 39-44, taking effect on 1 March, 2008.).

As noted by the Constitutional Court, this way the Metropolitan Court, designated by the State of Hungary as the judicial authority being the addressee of the arrest warrant, could receive an answer by short notice to any question that might arise regarding the interpretation of the European legal norm behind the arrest warrant. This also offers a guarantee to solve any potential debate between the judicial authorities of the so called requesting State and Hungary as the executing State. Moreover, it is a further guarantee in the respect of the requesting State and the executing State always construing the background norm according to the unified European interpretation.

XI.

1. In the present case the Constitutional Court examined the constitutionality of the Act's text. The fact that the Act is unconstitutional does not represent any value judgement about the elements of content of the EUIN Agreement, as it only means that the Act does not fit into the present constitutional framework.

While the procedure of the Constitutional Court has been under way, the Parliament of the Republic of Hungary adopted the Act CLXVII of 2007 on amending the Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter: AAC), and after AAC taking force the text of Article 57 para. (4) of the Constitution shall read as follows:

"No one shall be declared guilty and subjected to punishment for an offence that was not a criminal offence under Hungarian law or under the law of another State contributing to the creation of the area of freedom, security and law – in the scope determined by the legal acts of the European Union for the purpose of enforcing the the principle of the mutual recognition of decisions – at the time such offence was committed."

Thus the legislation establishing the provisions of the Constitution held it necessary – with *pro futuro* character – to have Article 57 of the Constitution amended. As taking force of the amendment was linked to the condition of the Lisbon Treaty taking force, the legislation considered the ratification period to be a reasonably short one: "This Act shall take force the same day as the Lisbon Treaty on the amendment of the Treaty on the European Union and the Treaty establishing the European Community, and it shall cease to have force the next day."

Thus when the amendment of the Constitution takes force, it will eliminate on the level of the Constitution the causes of the unconstitutionality established herein, and it will be able to equalize any discrepancy that might remain despite of the harmonisations and that might form a constitutional barrier of the cooperation regarding surrender in the relation of the requesting and the executing States, with due account to the wording of Article 57 para. (4) as presently in force and the resulting requirements on legality in criminal law as deducted by the Constitutional Court.

However, the amendment of the Constitution has not been taken force as the legislation delayed its taking effect, linking it to the Lisbon Treaty taking effect. According to the latter: "Article 6 (2) This Treaty shall enter into force on 1 January 2009, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step."

2. As the Constitutional Court acts at all times on the basis of the Constitution in force, it may not, in the course of a review of unconstitutionality, apply a regulation contained in an amendment of the Constitution not yet in force, elaborated by the legislation to solve a constitutional problem identified by it.

Therefore the Constitutional Court established, with account to points VII-VIII-IX, the unconstitutionality of the Act on the promulgation of the EUIN Agreement. Consequently, taking due account of Section 36 para. (2) of ACC, the EUIN Agreement may not be ratified, or in other words – according to the terms used in Sections 7 and 8 of AIT – the President of the Republic may not sign the deed acknowledging the binding force of this international treaty as long as AAC is not in force, or as long as the Parliament does not otherwise terminate the unconstitutionality prior to the above date.

The above alternativity is based on the theoretical possibilities that either the Lisbon Treaty's taking force might take more time than expected or the State of Hungary might become interested in putting the Act on the EUIN Agreement in force – based on the elimination of the unconstitutionality – earlier than the date envisaged in the Lisbon Treaty.

The Constitutional Court has ordered the publication of this Decision in the Hungarian Official Gazette in view of the establishment of unconstitutionality.

Budapest, 11 March 2008.

Dr. Mihály Bihari
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court, Rapporteur

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

Dr. Miklós Lévay
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Dr. László Trócsányi
Judge of the Constitutional Court

Concurring reasoning by *Dr. Péter Paczolay*, Judge of the Constitutional Court

I agree with the holdings of the decision, however I do not agree with parts V, VII, VIII and IX of the reasoning. In my opinion, there are reasons other than the ones found in the above mentioned parts of the reasoning justifying the establishment of the unconstitutionality of Article 3 paras (2) and (3) contained in Section 3 of the Act and of Section 4 of the Act in the part establishing the declaration under Article 3 para. (4) of the Agreement.

1. At present the cases of extradition between Hungary and Iceland or Norway are handled in accordance with the convention and protocols of the Council of Europe of 13 December, 1957 (Act XVIII of 1994 on the promulgation of the European extradition convention and its protocols signed in Paris on 13 December 1957, hereinafter: "convention on extradition"). According to Article 34 para. (1) item a), the Agreement shall replace the appropriate provisions of the convention on extradition.

The convention on extradition requires the examination of the double criminality of the conduct for which the extradition is requested [Article 2 para. (1)], allowing in Article 3 the requested party to

exercise sole discretion regarding the execution of the extradition request, and in Article 6 it allows the refusal of extraditing a person who is the citizen of the requested State.

As the essence of the Agreement to be promulgated with the Act reviewed in the present case, for the purpose of speeding up and simplifying the extradition cases, the Member States of the European Union as well as Iceland and Norway surrender to the authorities of the issuing foreign State the person caught by their authorities in their own territory, on the basis of an arrest warrant issued in the form specified in the annex of the Agreement – in the absence of any cause to refuse it. The judicial authority of the State executing the surrender shall decide on the surrender and it can only be refused under certain circumstances.

According to Article 3 para. (2) of the Agreement, as the general rule, the condition of double criminality is required for the application of the obligation of surrender. At the same time, however, this provision merely requires the conduct upon which the arrest warrant is based (i.e. the conduct suspected to be committed by a person residing in the territory of the executing State and requested by the authorities of the foreign State to surrender) to be a criminal offence under the law of both the issuing State and the executing State, without regard to their constituent elements and their qualification.

According to Article 3 para. (3) of the Agreement, in the case of certain criminal offences – connected to terrorism – the applicability of the requirement of double criminality is excluded.

Article 3 para (4) allows the contracting parties to make a declaration on excluding the application of the precondition of double criminality with regard to 32 types of criminal offences (categories of criminal offences) as listed in the Agreement.

If any of the contracting parties makes such a declaration, then the judicial authorities of that State may not refuse the execution of the arrest warrant merely on the ground of the affected conduct not being classified as a criminal offence under the national criminal laws of the State in question. If, according to the law of the requesting State, the conduct affected falls – in the opinion of the requesting State – under the constituent elements of an offence listed on the list of 32 crimes, then the surrender is to be executed.

In Section 4 of the Act on the promulgation of the Agreement, the State of Hungary made a declaration excluding the applicability of the condition of double criminality with regard to the 32 types of criminal offences.

The Constitutional Court had to form an opinion – on the basis of the petition filed by the President of the Republic – in the question whether the rules on restricting and excluding the application of the condition of double criminality were in conflict with Article 57 para. (4) of the Constitution.

2. By way of the Act promulgating the Agreement, the Parliament grants an authorization to acknowledge the binding force of the Agreement – as an international treaty entered between the European Union, the Republic of Iceland and the Kingdom of Norway, at the same time promulgating this international treaty in the Hungarian law. The EUIN Agreement is an international treaty the contracting parties of which are the European Union on the one hand and the Republic of Iceland and the Kingdom of Norway on the other hand.

The Agreement is not a founding treaty specified in Article 2/A of the Constitution and it is not a so called secondary legislation based on the founding treaties.

At the same time, it is an undertaking under international law, an international treaty between the contracting parties; according to the consolidated version of the Treaty on the European Union and the Treaty establishing the European Community (TEC), it falls into the pillar III [Article 34 para. (2) item d), Article 38] where the procedural rules of pillar II (Article 24) are to be applied.

In line with Article 24 para. (1) of TEC, if it is necessary to conclude agreements with one or more States for the implementation of this title, the Council may authorise the presidium to start negotiations for this purpose, with the assistance of the Committee if appropriate. Such agreements are to be

concluded by the Council on the basis of the presidium's recommendation. As stated in paragraph (5), the agreement shall not be binding in the respect of any Member State the representative of which declares in the Council that the agreement must comply with its own constitutional procedural requirements; other members of the Council may, however, agree on the provisional applicability of the agreement.

In the present case, as found in the reasoning of the Bill, the representative of the State of Hungary declared in the Council that the Agreement must comply with its own constitutional procedural requirements, i.e. the Agreement shall only bind the State of Hungary after having completed the necessary constitutional procedural requirements.

The own constitutional procedural requirements are, in the present, the ones related to international treaties.

According to Section 7 para. (2) of the Act L of 2005 on the procedure related to international treaties (hereinafter: AIT), "the authorization for the acknowledgement of the binding force of an international treaty can be found in the Act of Parliament or the government decree promulgating the international treaty (hereinafter: promulgating statute)".

As regulated in the Act of Parliament under review: "Section 1 By virtue of the present Act, the Parliament grants authorization to acknowledge the binding force of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (hereinafter: "Agreement")."

According to Section 8 para. (3) of the AIT, "If the President of the Republic holds the international treaty mentioned in paragraph (1) of some of its provisions to be unconstitutional, it may initiate the prior constitutional review of the international treaty in compliance with the Act XXXII of 1989 on the Constitutional Court."

The President of the Republic has turned to the Constitutional Court on the basis of the above concerns and regulations. Both Article 24 para. 5 of TEC and Section 7 and Section 8 para. (3) allow this to be done.

3. The principle of *nullum crimen* means in general, historically and traditionally that only conducts declared in the law as criminal conducts can be regarded as such. Thus merely it establishes – in the terminology of criminal law – a requirement related to criminality: the conducts to be punished must be listed in Acts of Parliament. However, Article 57 para. (4) of the Constitution requires more than that. Therefore the Constitutional Court should interpret this constitutional rule on the basis of the text of the norm and not on the ground of the provisions of criminal law, the historical interpretations of the *nullum crimen* principle or the similar rules of foreign constitutions – formulated differently –, but it must establish what the *nullum crimen* principle of the Hungarian Constitution means in the application of Article 57 para. (4) of the Hungarian Constitution.

In the course of forming an opinion, also in the present case, the Constitutional Court is bound to its former practice, in the absence of any reason to reach a different conclusion.

Article 57 para. (4) of the Constitution means more than the traditional requirement on having a regulation on the level of the Act of Parliament as the Constitution not only requires that only conducts specified as criminal offences under Hungarian law can be punished, but it also provides that a person can only be "held guilty" on the basis of the law in force "at the time of perpetrating the conduct": i.e., according to the Constitution, that the law in force at the time of perpetration – and not at any other time – can and must be taken into account when establishing not only the criminality of the conduct but also the punishability (declaring guilty) of the concrete person. Therefore the interpretation based on the text of the Constitution is broader than the historical *nullum crimen* principle: in addition to the statutory constituent elements found in the special part of the CC (describing the conduct to be punished), the general conditions of criminality – either of substantive or of procedural nature – are

“fixed” at the time of perpetrating the offence. According to the practice of the Constitutional Court, one of these conditions is the question of statute-barring (which is, in the terminology of criminal law, a condition independent from the issue of criminality), regulated in the national laws partly as an institution of substantive law and party as one of procedural law. As established in the Decision 11/1992. (III. 5.) AB of the Constitutional Court [11/1992. (III. 5.) AB, ABH 1992, p. 77, 84 and fol.], reviewing the unconstitutionality of the Act of Parliament restarting the statute of limitation from 2 May, 1990 of certain punishable conducts not prosecuted due to political reasons: “according to the Constitution: »No one shall be declared guilty and subjected to punishment...«. Thus, the issue is not simply that the State prescribes by statute the criminal offences and their punishment, but that the individual has the right to be subjected exclusively to lawful judgment ("declared guilty") and that his/her punishment be prescribed by law ("infliction of punishment"). […] *Nullum crimen sine lege* and *nulla poena sine lege* are fundamental constitutional principles whose legal content is determined by a number of criminal law provisions. […] Such a regulation is the Criminal Code's definitions of the elements of a criminal offence, the legal concepts of the penal system and punishment. […] The individual's constitutional rights and freedoms are affected not only by the elements of an offence and the sanctions of the criminal law, but also by the interconnected and closed system of regulation of criminal liability, punishability and determination of penalty. Modification of every regulation of criminal liability fundamentally and directly affects the individual's freedom and constitutional position.”

Article 57 para. (4) of the Constitution, as a constitutional principle listed among the fundamental rights cannot be interpreted narrowly. Article 57 para. (4) of the Constitution enforces in the field of criminal law a requirement rooted in the rule of law regulated in Article 2 para. (1) of the Constitution. In addition to substantive criminal law, this rule is to be followed with regard to all regulations aimed at establishing the guiltiness and the punishability of persons who are subjects of fundamental rights, and also the ones directly and causally allowing the enforcement of criminal liability of the affected person. Article 57 para. (4) of the Constitution declares the principles of *nullum crimen* and *nulla poena sine lege* explicitly with regard to the Hungarian law. On the basis of the Hungarian Constitution, criminal liability can be enforced if the conduct to be punished is a punishable offence according to Hungarian law at the time of perpetrating it and the perpetrator is a punishable person according to Hungarian law.

Article 57 para. (4) of the Constitution prohibits any act of the Hungarian public authorities aimed at enforcing the criminal liability of persons falling under the territorial scope of the Hungarian Constitution without the conduct to be punished being a criminal offence under Hungarian law and without complying with all the statutory constituent elements specified in the Hungarian law.

4. Certain provisions of the Act promulgating the Agreement [Article 3 para. (3) of the Agreement in the wording of Section 3 of the Act and Section 4 of the Act on Article 3 para. (4) of the Agreement] exclude the possibility of the application of the condition on double criminality in the relation of the contracting parties.

It is necessary, therefore, to examine what the excluding of the application of the condition on double criminality means in the light of Article 57 para. (4) of the Constitution.

The question of the requirement of double criminality arises if the authorities of a State suspect a person residing in the territory of another State to have committed a conduct.

According to the requirement of double criminality, the executing judicial authority of a State shall only execute the extradition request issued by another State with regard to a specific criminal offence, if the conduct in question is a criminal offence – i.e. a (punishable) conduct to be punished – under the law of the executing State.

The principle of double criminality means that a State can only lend its public authority to another State for the purpose of enforcing criminal liability against a person on the condition of the conduct being punishable under its own law as well, i.e. if the conduct concerned is to be punished according to

both States – at least as far as the constituent elements and not the names of the criminal offences are concerned. In the extradition procedure, the extraditing State is expected to asses by way of examining the conduct it the light of its own law whether it should give assistance to enforce the criminal liability of the person to be extradited in the State requesting extradition.

In general, the extradition agreements apply public order clauses to grant a unilateral right of discretion for the extraditing State, i.e. they offer freedom to exercise the refusal of extradition. Although the application of the principle of double criminality might be overshadowed by the application of the public order clause granting a discretional right to refuse extradition, the principle of double criminality is usually and traditionally enforced in the extradition agreements. The reason of it is the following: for the extradition it is necessary to examine whether the conduct, on the basis of which the person to be extradited is charged, is an "extradition offence" or not, i.e. whether it is identical with any of the punishable conducts listed in the extradition agreement; the only way to perform such an examination is to apply to the conduct concerned one of the statutory definitions of a criminal offence, classified as an extradition offence according to the agreement, as regulated in the national criminal code of the extraditing State. This examination is performed by both States independently, on the basis of their own laws.

Although one may assume that the failure or the restriction to apply the relevant principle might in itself not violate the historical and traditional *nullum crimen* rule, since in the State requesting the extradition the requirement of "lawful sentencing" is to be enforced according to the law of the requesting State, the practice of the European Court of Human Rights allows us to conclude that the extradition, i.e. merely sending back the person into a State where he or she is charged with committing a punishable offence can be regarded as the violation of a fundamental right. In the Soering v. United Kingdom case (7 July, 1989), extraditing a person to the United States was deemed to be in conflict with the convention (due to the violation of Article 3 on the prohibition of torture and cruel, inhuman or humiliating treatment) as the person concered faced the possibility of capital punishment because of the charged conduct (murder), and in the State concerned (Virgina) convicted persons have to wait a long time for the execution of the punishment because of the obligatory legal remedy procedure. The same principle was followed in the case Jabari v. Turkey (11 July, 2000) when the asylum seekers were saved from being sent back to a country where their life was in danger. The lesson to learn from these cases is that the public authority act of extradition (surrender) may in itself violate a fundamental right even if the concrete and direct violation of the right is performed not by the extraditing (surrendering) State but by the State requesting extradition.

Another question to be reviewed separately is whether the bypassing of the application of the principle of double criminality is compatible with Article 57 para. (4) of the Constitution as the constitutional provision is different than the historical *nullum crimen* rule interpreted narrowly.

5. The conduct is the central element of both Article 57 para. (4) of the Constitution – which is, according to the petition of the President of the Republic, the concretization in the field of criminal justice of the principle of the rule of law found in Article 2 para. (1) of the Constitution – and the principle of double criminality applied in the extradition agreements.

Examining the condition of double criminality means that there is an *act*, a conduct because of which the extraditing State shall cooperate in enforcing the criminal liability of a person, provided that the act, conduct concerned – i.e. the historical facts of the case – qualify as a criminal offence also according to the law of the extraditing State (in the case concerned, *according to the Hungarian law*). Article 57 para. (4) of the Constitution prohibits the Hungarian State to hand over any person standing under its territorial jurisdiction to a criminal procedure leading to the declaration of guiltiness, because of a conduct which is not a criminal offence under Hungarian law.

Therefore Section 3 of the Act in the respect of Article 3 para. (3) of the Agreement, as well as Section 4 of the Act regarding the declaration made to Article 3 para. (4) of the Agreement are in

conflict with Article 57 para. (4) of the Constitution as these provisions of the Agreement exclude the possibility of assessing the double criminality of the conduct.

The requesting authorities of the Republic of Iceland or the Kingdom of Norway could only identify a conduct as one falling under Article 3 para. (3), i.e. the list of 32 criminal offences, if the foreign judicial authority applies the criminal offences specified its own criminal code as an intermediary tool to assess the conduct, thus the 32 types of criminal offences should be identifiable with statutory definitions in the national criminal code, as this is the only way to verify a conduct's compliance with the constituent elements of a criminal offence (i.e. that it is against the law in the formal sense, violating the national CC, and it is punishable). However, in the CC, there can be more than one statutory definition of criminal offence belonging to some of the types (categories) of criminal offences. Nevertheless, these statutory definitions of criminal offences in the national CC of another State are alien laws not to be considered as "Hungarian law" for the purpose of the application of Article 57 para. (4) of the Constitution.

6. The other challenged provision of the Act promulgating the Agreement [Section 3 of the Act on Article 3 para. (2) of the Agreement] restricts the applicability of the condition of double criminality in the relation of the parties.

The fact that Article 3 para. (2) of the Agreement maintains the principle of double criminality with the modification of considering this requirement to be met without regard to the constituent elements in the case of criminal offences classified as such under the law of both the issuing and the executing States, results in allowing the issuing State to use its own criminal code independently from the law of the extraditing State, in referring to a criminal offence that qualifies as an extradition offence according to its own criminal code.

Article 57 para. (4) of the Constitution does not all the Hungarian State to hand over the requested person to another State without assessing the person's conduct on the basis of the statutory constituent elements in the Hungarian law with regard to the criminality and the punishability of the conduct. Therefore Article 3 para. (2) of the Agreement as contained in Section 3 of the Act promulgating the Agreement is in conflict with Article 57 para. (4) of the Constitution, as this provision of the Agreement can be interpreted as a restriction of assessing the double criminality of the conduct.

7. Certain exemptions regarding the enforcement of Article 57 para. (4) of the Constitution can only be made on the basis of other specific regulations of the Constitution [the first clause of Article 7 para. (1) (the generally recognised principles of international law), Article 2/A (exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the founding treaties)]. In the present case, the above mentioned provisions of the Constitution are not applicable. Article 3 paras (2) and (3) of the Agreement contained in Section 3 of the Act and Section 4 of the Act – in the part establishing the declaration under Article 3 para. (4) of the Agreement – do not implement the generally recognised principles of international law. Similarly, the Agreement is not considered to be part of the European Union's law binding Hungary, as, in fact, the present procedure is just about whether the Republic of Hungary can acknowledge the binding force of the Agreement in the respect of Hungary.

The provisions of the Act, challenged in the petition of the President of the Republic, should have been established unconstitutional on the basis of the above arguments.

Budapest, 11 March 2008.

Dr. Péter Paczolay
Judge of the Constitutional Court

I second the above concurring reasoning:

Dr. András Holló
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. László Trócsányi
Judge of the Constitutional Court

Dissenting opinion by *Dr. András Bragyova,* Judge of the Constitutional Court

I agree with neither the holdings nor the reasoning of the majority decision, as, on the basis of the petition, I do not consider the Act promulgating the EUIN Agreement (hereinafter: EUIN) to be unconstitutional.

1. I do not agree with the fundamental reasoning found in the petition (and the majority decision accepting the arguments of the petition) about the unconstitutionality of the EUIN Agreement on the basis of the *nullum crimen sine lege* principle granted in Article 57 para. (4) of the Constitution, due to not applying double criminality as the condition of extradition (surrender). According to this approach, the international obligation undertaken in the respect of executing the arrest warrant would be unconstitutional if it also covered conducts not punishable – or not punishable on exactly the same conditions – under the law of Hungary. The latter affects the 32 criminal offences listed in Article 3 of EUIN, being identical with Article 3 of the Framework Decision of the EU on the European arrest warrant.

According to the majority reasoning and the decision, it follows from the principle of *nullum crimen sine lege* that the extradition – or its simplified form introduced in th system of the EUIN and in particular of the European arrest warrant – can only be held to be constitutional if the conduct of the perpetrator to be extradited is a criminal offence under the law of the surrendering (extraditing) State as well. This is actually the requirement of double criminality applied traditionally – but not without exemptions – in the law on extraditions. Accepting the majority opinion would mean that all extradition (surrender) agreements or statutes not containing the rule of double criminality are in violation of Article 57 para. (4) of the Constitution. This would, however, question the constitutionality of the European arrest warrant as well.

In my view, the principle of *nullum crimen* is not connected conceptually to the requirement of double criminality. It is not by mere coincidence that all through the long history of the principle of *nullum crimen,* it's relation to the requirement of double criminality and to extradition as such has never been mentioned. Although from the 19th century the latter principle has been traditionally accepted in extradition law based on an agreement or declared unilaterally in own legislation, it has not been – and it could not have been for conceptual reasons – connected to the principle of *nullum crimen.* On the other hand, it has been a customary – frequent but not constitutionally obligatory – clause serving the purpose of saving the State from the obligation of extraditing a person on the basis of a conduct not condemnable – or even being honourable – according to the State's own value standards. Extradition (with or without an agreement) is the question of political trust between the States requesting and executing the extradition, as it depends on whether they consider each other's legal systems, including the criminal jurisdictions, as ones deserving cooperation. This is often a question of political assessment, based on the image developed on the operation of the other State, as reflected in the extradition policy of the cold war era. As the trust between the members of the European Union and the closely cooperating States belonging to the Schengen system (such as Iceland and Norway) is well

founded and complete, it is justified to simplify the extradition procedure to surrender procedure by way removing from the system the political assessment.

The essence of the extradition (and the substantially similar surrender) procedure is quite different than the principle of *nullum crimen, nulla poena sine lege.* The extradition procedure is not about making a decision on the guiltiness of the person to be extradited (and on "imposing a punishment" on him/her), but it is aimed at deciding whether the exercising of the punitive power can be assigned on the authorities of another State in the respect of a person standing under the jurisdiction of the extraditing (surrendering) state. The surrender is practically excluded when, according to the own law of the executing State, the case falls under it's criminal jurisdiction [Article 5 para. (1) item g) subparagraph i) of EUIN].

2. The extradition decision is, in general – but not in the case of the EUIN Agreement connected to the system of the European arrest warrant –, not merely a judicial decision on applying the law, as it is similar to the measures on the deprivation of liberty not deciding on the merits of the case passed in a criminal procedure. Extradition, at the same time, can also be interpreted – in the law of most States and in my opinion, too – as an administrative procedure in which the State assesses whether to extradict or not a person to another State. Thus extradition is an administrative decision passed by the minister or, in our case, the prosecutor general (see Act XXXVIII of 1996 on international legal aid in criminal law). The legality of the decision may be the subject of judicial review. However, the review can only be aimed at examining the legality of the administrative act and not the guiltiness of the perpetrator. The purpose of extradition is – as follows from the concept of it – to make a State hand over a person, residing at the moment on the territory of this State, who previously committed a criminal offence on the territory of another State, to the State requesting extradition, in order to allow the courts of the State concerned to exercise criminal justice over the person in question, if the former State does not reserve the right to do so. It means that rather than exercising punitive power in the form of assessing the perpetrated conduct under criminal law, extradition is merely a – kind of – administrative procedure aimed at assisting the performance of criminal jurisdiction in the State requesting extradition, and as such, it is actually a qualified case of legal aid between States, where not information but the person who committed the offence is being extradited/handed over. Legal aid is a form of solidarity manifested between States. In this case, solidarity means that the State handles a conduct violating the law of another State as if its own law has been violated, thus not examining punishability under its own law in the case of the criminal offences directly affecting the standards of common values. Let me note that actually it is the legal aid character of the extradition what often makes it a sensitive political, diplomatic affair.

Thus, as I explained above, although the procedure of extradition-surrender does affect questions related to criminal law, it is not a criminal procedure in the narrow sense as it is aimed neither at establishing the guiltiness of the perpetrator (accused, charged person), nor at imposing a punishment; it only aims to make a decision about the existence of the conditions of extradition, including the causes of exclusion as well. The basic precondition of completing an extradition procedure is the existence of a "suspicion" established at least in the form of of a judicial ruling (or even a judgement of final force) in a criminal procedure under way in another State. Accordingly, an extradition procedure can never be ended with sentencing, including the imposing of a punishment. Rather than being a punishment – as pretrial detention or pressing charges are not punishments either –, extradition is an assistance in (or the allowing of) the criminal procedure of another State. In the case of extradition-surrender, the basic criminal procedure is always the criminal procedure of the other State as the decision on the merits of the case under criminal law are to be passed there.

3. Another reason of the non-applicability of Article 57 para. (4) of the Constitution is the fact that it is only about the conditions of applying the Hungarian substantive criminal law. Statutes of limitation –

even if we consider it to be a procedural rule, which is debated – is the precondition of “imposing a punishment”, i.e. of punishability. [See.: Decision 11/1992. (III. 5.) AB, Lex Zétényi-Takács, ABH 1992, 77, 94] This is why the clause on a criminal offence "under Hungrian law" in Article 57 para. (4) is not relevant at all, as extradition is not about handing over a person charged with “a criminal offence under Hungarian law”. On the contrary: it is a precondition of the extradition that the extradition offence should be an offence not according to the Hungarian law but under the law of the State requesting extradition (issuing the arrest warrant regulated in the EUIN Agreement). The principle of *nullum crimen sine lege* regulates the temporal applicability of substantive criminal law and it specifies that a criminal offence according to the law of Hungary is an offence declared to be a criminal offence by the law (Act of Parliament) of Hungary. On the other hand, it is the precondition of extradition-surrender that the conduct should be punishable under another legal system (in our case of Norway or Iceland) and this fact is to be established by a judicial decision – in the case of an accused person, too. The extradition offence may not be a criminal offence under Hungarian law (only in exceptional cases: e.g. when the offence was perpetrated on the territory of both States at the same time or in a continuous manner) as it would exclude the possibility if extradition or surrender and a Hungarian criminal procedure should be performed instead. This is why Article 57 para. (4) is not applicable at all to extradition.

Moreover, the rule of double criminality does not follow from the principle of *nullum crimen sine lege* as the two principles use quite different concepts of a criminal offence. To apply the principle of *nullum crimen,* it is necessary to have a concrete conduct (historical facts of the case) and a norm of criminal law in force (applicable) regarding the conduct at the time of judging upon it. The principle of *nullum crimen sine lege* is always to be interpreted *in concreto* – in the relation of a specific conduct and the applicable criminal laws. *Nullum crimen* requires the examination of each and every condition of the punishability of individual acts (or omissions) on the basis of the norms of a legal system. On the other hand, double criminality is not about the relation of the historical facts of a case and the applicable criminal law; it requires the comparison of criminal norms (in particular the statutory definitions of criminal offences) in the laws of the State requesting extradition and the executing State. Thus the application of the rule of double criminality uses the standard of the criminality of certain types of conducts. As double criminality compares *in abstracto* the statutory definitions of criminal offences, it requires the comparison of the rules of criminal law to be applied to specific types of conducts. This comparison is not about comparing a perpetrated (committed) conduct – the historical facts of a case – with a norm of criminal law: it compares norms of criminal law to each other, as it examines whether a certain type of conduct – e.g. possessing a small amount of narcotic drugs – is a criminal conduct or not according to the criminal codes of States A and B. If the answer is yes, then the precondition of double criminality is fulfilled, and if the answer is no, then it is not. Consequently, the rule of *nullum crimen* is about a concrete act and all the applicable provisions under criminal law affecting the enforcement of criminal liability, while the principle of double criminality requires the comparison of abstract types of criminal offences (definitions of criminal offences, abstract constitutent elements).

4. Let me note in addition that the principle of *nullum crimen* would not be injured upon if the principle of *nullum crimen* was enforced in the law of the State requesting extradition, as it would exclude to “declare the perpetrator guilty and to impose on him/her a punishment” on the basis of a criminal offence which was not a criminal offence at the place and the time of perpetrating it. (Article 69 of the Constitution of Iceland and Article 96 of the Constitution of Norway as well as Article 7 of the European Convention on Human Rights – to which both States are signatores together with all the Member States of the EU – require the obligatory application of the *nullum crimen* principle). As the extradition (surrender according to the EUIN Agreement) is *per definitionem* not the handing over of a perpetrator of a criminal offence under Hungarian law, no criminal procedure under Hungarian law

could be started against the person to be extradited (even if the statutory definitions regarding the offence are exactly the same in the criminal codes of the States requesting and executing the extradition). If, according to the law of Hungary, the conditions of punishability are complied with, then a Hungarian criminal procedure is to be started instead of executing extradition (surrender).

Based on the above, in the present case, Article 57 para. (4) of the Constitution is not applicable, as

(1) according to the law of Hungary (Sections 3-4 of the CC), the relevant criminal offence is not to be judged upon on the basis of Hungarian law, thus

(2) it is not about "declaring guilty" and "imposing a punishment".

The petition requests the establishment of the unconstitutionality of the EUIN Agreement only on the basis of Article 57 para. (4) of the Constitution. As I explained above, there is no ground to establish the above, although I do not contest that there are constitutional rules that could be used as constitutional standards of regulating extradition, but the principle of *nullum crimen sine lege* is not one of them. As extradition implies removing, expelling the extradited/surrendered person from the territory of the extraditing State, the constitutionality of the legal institution of extradition can also be examined in this aspect as well. First it must be examined whether extradition is allowed or not [see Article 69 para. (1) of the Constitution]. Two questions may arise here: asylum and the prohibition to extradict own citizens (this is the problem encountered in Germany and Poland with regard to the European arrest warrant, see the decision 2 BvR 2236/04 of the *Bundesverfassungsgericht* of 15 July 2005 and the decision of the Constitutional Court of Poland passed on 27 April 2005 on Section 607t. § para. (1) of the Act of criminal procedure of 1997). Also the right to fair trial, the threat of capital punishment, equality and many others could be used as constitutional standards.

However, as the explicit restraints I mentioned above – asylum, the prohibition of extraditing own citizens, and the constitutional rule restricting the extradition of foreigners – cannot be found in the petition, the Constitutional Court could not form any opinion about them.

5. Let me note finally that on the basis of the request for preliminary ruling submitted by the Belgian *Arbitragehof* in the case C-303/05 of *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad*, the European Court of Justice has already reviewed – among others – the question of cancelling the examination of double criminality and the Court concluded that it was not in conflict with the principle of the legality of criminal offences and punishments (*nullum crimen, nulla poena sine lege*) (Sections 44-61).

Budapest, 11 March 2008.

Dr. András Bragyova
Judge of the Constitutional Court

Dissenting opinion by *Dr. Miklós Lévay* Judge of the Constitutional Court

I do not agree with the holdings of the decision in the respect of establishing the unconstitutionality of Article 3 para. (2) of the Agreement and the connected reasoning. In my opinion, Article 3 para. (2) of the Agreement as contained in Section 3 of the Act is not unconstitutional and it does not violate the constitutional principles of the legality of criminal law enshrined in Article 57 para. (4) of the Constitution.

1.1. The contents of Article 3 para. (2) of the Agreement is clear. The essence of it is as follows: double criminality is a precondition of executing surrender on the basis of an arrest warrant according to the Agreement. This condition does not apply to Article 3 para. (3), and, on the basis of making a

declaration, the application of the condition may be neglected in the case of the criminal offences listed in Article 3 para. (4). Beyond doubt, although the formulation of the text of Article 3 para. (2) of the Agreement is different than the text of Section 2 para. (4) of the Framework Decision, the contents of the relevant provisions are the same. It is clear from the text of Article 3 para. (2) of the Agreement that as a precondition of the obligation of surrender, the conduct, the arrest warrant is based upon, should be a criminal offence under both the State issuing the warrant and the executing State. Therefore the provision is not unconstitutional.

1.2. Neither is Article 3 para. (2) unconstitutional due to the text „under the law of the executing State, whatever the constituent elements or however it is described". The process of preparing the Schengen Agreement, the relations between Iceland, Norway and the European Union in the field of judicial cooperation in police and criminal affairs in the framework of the Schengen Agreement, the participation of the two countries in the agreements serving the purpose of international cooperation, and certain provisions of the Agreement offer satisfactory guarantees for the enforcement of the principles of *nullum crimen sine lege* and *nulla poena sine lege* enshrined in Article 57 para (4) of the Constitution.

1.2.1. As established in the majority decision, "in the course of preparing the EUIN Agreement (…) the relevant dispositions and punishments of the criminal codes of the two affected States had been checked and the EUIN Agreement was only signed by the European Union, Norway and Iceland after having their criminal codes amended. The process of harmonization was aimed at the potential elimination of those differences between the legal systems that hindered cooperation in the field of surrender."

1.2.2. Iceland and Norway joined on 25 March, 2001 the Convention, within the European Union, implementing the Schengen Agreement (hereinafter: CISA). As stated by the Court of Justice of the European Communities – also cited in the majority decision - in Article 30 of the judgement passed on 9 March, 2006 in the case Leopold Henri Van Esbroeck (C-436/04): „There is a necessary implication in the *ne bis in idem* principle, enshrined in Article 54 of CISA, that the Contracting States have mutual trust in their criminal justice systems …" The principles of double criminality and *ne bis in idem* are legal institutions mutually complementing each other. Indeed, the prohibition of *ne bis in idem* can prevent the actual punishing of the perpetrator in both States on the basis of the requirement of double criminality, i.e. it is the guarantee of fair trial. As stated in the preamble of the Agreement, „(…) »the Contracting Parties« (…) EXPRESSING their mutual confidence in the structure and functioning of their legal systems and in the ability of all Contracting Parties to guarantee a fair trial (...)." Hungary joined the Schengen Agreement on 21 December, 2007.

1.2.3. Norway and Iceland are parties to the European Extradition Agreement as the mother agreement of the Agreement, and to the European Convention on the Suppression of Terrorism.

According to Article 1 para. (3) of the Agreement, „This Agreement shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the European Convention on Human Rights, or, in case of execution by the judicial authority of a Member State, of the principles referred to in Article 6 of the Treaty on European Union."

1.2.4. The following provisions in particular guarantee the enforcement of the condition of double criminality specified in Article 3 para. (2):

– Article 5 (1) States can establish an obligation or an option for the executing judicial authority to refuse to execute the arrest warrant in the following cases: „a) if, in one of the cases referred to in

Article 3(2), the act on which the arrest warrant is based does not constitute an offence under the law of the executing State; (…)"

- Declaration by the Republic of Hungary made to Article 5 of the Agreement and contained in Section 4 of the Act promulgating the Agreement: "The Republic of Hungary represents that the executing judicial authority of the State shall obligatorily refuse the execution of the arrest warrant in the cases specified in Article 5 para. (1) items a), b), c), d), e) and f)."

– Article 36: „Any dispute between either Iceland or Norway and a Member State of the European Union regarding the interpretation or the application of this Agreement may be referred by a party to the dispute to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months."

– Article 37: „The Contracting Parties, in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions of this Agreement, shall keep under constant review the development of the case law of the Court of Justice of the European Communities, as well as the development of the case law of the competent courts of Iceland and Norway relating to these provisions and to those of similar surrender instruments. To this end a mechanism shall be set up to ensure regular mutual transmission of such case law."

1.2.5. - Declaration by the Republic of Hungary made to Article 9 of the Agreement and contained in Section 4 of the Act promulgating the Agreement: „In the Republic of Hungary, the Metropolitan Court shall have exclusive jurisdiction on executing the arrest warrant."

The competent national judge shall in each case examine the requirement of double criminality independently; he/she shall pass a final decision on the surrender, and he/she may refuse to execute the arrest warrant in the case of the lack of double criminality.

1.3. The above guarantees are sufficient to secure the enforcement of the requirements specified in Article 57 para. (4) of the Constitution, in the case under Article 3 para. (2) of the Agreement.

2. Regarding the enforcement of the legality of criminal law in the case of international criminal cooperations applying the condition of double criminality – such as the EUIN Agreement –, Article 57 para. (4) of the Constitution does not require the conduct for which the arrest warrant is issued to be a criminal offence with the same statutory constituent elements under the law of the issuing State and the executing State. The decisive factor is to have constituent elements in the criminal code of the executing State under which the perpetrator's conduct can be drawn.

As underlined in the majority decision, "it has been pointed out in the petition itself that Article 57 para. (4) of the Constitution should be interpreted in the context of Article 2 para. (1), Article 2/A para. (1), Article 6 para. (4) and Article 7 para. (1) of the Constitution." In my opinion, this is an important element of the case, as in the course of interpreting Article 57 para. (4) of the Constitution with due account to Article 6 para. (4) and Article 7 para. (1) of the Constitution, the Constitutional Court could have declared that in the international criminal cooperation the condition of double criminality does not require to have the same legal description or to apply a strict interpretation of the identity of constituent elements. All we need is to have identical conducts, as the requirement of double criminality, enforced in the international criminal cooperation, – essentially – does not necessarily require the identical qualification of the legal facts or the protected legal subject being identical.

3. In other respects, I agree with the holdings of the decision and the connected parts of the reasoning [the parts related to Article 3 para. (3) of the Agreement, Section 4 of the Act, and the declaration made to Article 3 para. (4) of the Agreement].

Budapest, 11 March 2008.

Dr. Miklós Lévay
Judge of the Constitutional Court

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