DECISION 7/2005 (III. 31.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking a prior constitutional examination of an Act of Parliament on the promulgation of an international treaty, adopted by the Parliament but not yet promulgated, and acting *ex officio* in the examination of an unconstitutional omission of legislative duty – with concurring reasoning by dr. Attila Harmathy, Judge of the Constitutional Court – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that the text "its provisions, however, shall be applicable as from 14 June 1998" in Section 3 para. (1) of the Act adopted by the Parliament at its session of 6 September 2004 on the promulgation of Montreal Protocol No. 4 signed in Montreal on 25 September 1975 on the amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and amended by the Protocol signed on 28 September 1955 in the Hague is unconstitutional.

2. Acting *ex officio*, the Constitutional Court holds that the failure of the Parliament to harmonise Law-Decree 27 of 1982 on the Procedure Related to International Treaties with the Constitution constitutes an unconstitutional omission of legislative duty. In order to terminate the unconstitutional situation, the complete revision of Law-Decree 27 of 1982 on the Procedure Related to International Treaties is necessary. Therefore the Constitutional Court calls upon the Parliament to comply with its legislative duty by 31 December 2005, in accordance with the provisions of the present Decision of the Constitutional Court.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. At its session of 6 September 2004, the Parliament adopted an Act (hereinafter: "Act") on the promulgation of Montreal Protocol No. 4 (hereinafter: "Montreal Protocol") signed in Montreal on 25 September 1975 on the amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and amended by the Protocol signed on 28 September 1955 in the Hague (hereinafter: "Warsaw Convention"). The President of the Republic did not sign the Act because of his concerns about the constitutionality of Section 3 para. (1) thereof, and – exercising the power vested with him in Article 26 para. (4) of the Constitution – initiated in his petition of 24 September 2004 a prior constitutional examination of the Act on the basis of Section 1 item a), Section 21 para. (1) item b) and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"). According to the challenged provision, the Act enters into force on the day of its promulgation, but its provisions are to be applied as from 14 June 1998. At the beginning of the petition, the President of the Republic examines his right to submit a petition, concluding that although according to Section 36 para. (1) of the ACC the President of the Republic may only initiate the prior constitutional examination of international treaties before their ratification, the President of the Republic has the right to refer any Act promulgating an international treaty – as a statute in domestic law – to the Constitutional Court for examination before promulgation. The President of the Republic refers to the statements included in Decision 4/1997 (I. 22.) AB of the Constitutional Court, furthermore to the fact that in the present case the subject of the constitutional examination is the provision of the promulgating Act on the commencement date of the application of the provisions of the Montreal Protocol promulgated in domestic law.

The President of the Republic underlines that the Montreal Protocol amending the promulgated international treaty is a so-called self-executing one that directly binds and entitles the subjects of private law after its promulgation. By ordering the retroactive application of the rules of the Montreal Protocol as from 1998, Section 3 para. (1) of the Act provides for an obligation for the subjects of law with retroactive force. Due to the amendments introduced by the Montreal Protocol, any or both of the parties – in the present

case basically the contracting party ordering the transportation of goods – involved in the legal relations concerned suffer(s) disadvantage in comparison with its/their previous situation. This violates the prohibition of retroactive legislation included in Section 12 para. (2) of Act XI of 1987 on Legislation (hereinafter: "AL"), concretising the principle of the rule of law guaranteed under Article 2 para. (1) of the Constitution. [Most recently: Decision 17/2004 (V. 25.) AB, ABK May 2004, 388]

2. The Constitutional Court has requested the relevant opinions of the Minister of Justice, the Minister of Economy and Transport and the Minister of Foreign Affairs.

II

1. In the present case, the Constitutional Court first had to determine the extent to which an Act promulgating an international treaty may be examined on the basis of a petition seeking a prior constitutional examination based on Article 26 para. (4) of the Constitution. Since the beginning of the operation of the Constitutional Court, there have been fourteen procedures of prior constitutional examination commenced on the basis of the petition of the President of the Republic. However, this is the first time that the President of the Republic initiates, on the basis of Article 26 para. (4) of the Constitution, the prior constitutional examination of a provision of an Act promulgating an international treaty.

2. According to Article 2 para. (1) of the Constitution, the Republic of Hungary is an independent democratic state under the rule of law. The constitutional principle of the rule of law means on the one hand the submission of the subjects of law to domestic law (the Constitution and constitutional statutes), and on the other hand the obligation to comply with the international law obligations undertaken by the State of Hungary. Article 7 para. (1) of the Constitution regulating the relation between provisions of domestic law and obligations undertaken under international law is a special constitutional provision as compared to Article 2 para. (1) of the Constitution. According to that provision, the legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law.
International customary law and the general principles of law are transformed into domestic law by the first part of the above provision. In the examination of an obligation under international law, it is the Constitutional Court that is in a position to decide whether it has

been incorporated into domestic law in line with the first part of Article 7 para. (1) of the Constitution. [Decision 53/1993 (X. 13.) AB, ABH 1993, 323]
The international obligations pertaining to carriage by air and constituting the subject of the present case cannot be regarded as generally recognized rules of international law. Therefore, the Montreal Protocol needs to be promulgated in a statute of an appropriate level in order to be applicable in domestic law. [Section 16 para. (1) of the AL]

It follows from the second part of Article 7 para. (1) of the Constitution that the harmony of an international obligation undertaken in any form (e.g. in an international treaty) with domestic law must be ensured. Finally it is the Constitutional Court that is to guarantee this by adopting decisions – binding on everyone – on the constitutionality of the international treaty to be concluded or already promulgated in a statute (and on the constitutionality of the promulgating statute), as well as on issues related to the international law obligation in terms of competence, authorisation and procedure. [Decision 4/1997 (I. 22.) AB, ABH 1997, 41]

On the other hand, the Constitutional Court evaluates the harmony of domestic law and international law in its competence of examining the violation of international treaties by statutes and other legal tools of State administration as well as the omission of a legislative duty resulting from an international treaty. [Section 1 item c) and Sections 44-47 of the ACC]
On one occasion, the Constitutional Court examined whether an Act adopted by the Parliament but not yet promulgated violated any international treaty that had become part of domestic law. [Decision 53/1993 (X. 13.) AB, ABH 1993, 323, 326]

3. According to Section 1 item a) of the ACC, the competence of the Constitutional Court covers the prior constitutional examination of the provisions of an international treaty. On the basis of Section 36 para. (1) of the ACC, such an examination may be initiated by the Parliament, the President of the Republic and the Government prior to the ratification – in the sense of the Vienna Convention on the Law of Treaties, signed on 23 May 1969 (hereinafter: "Vienna Convention") – of an international treaty falling within the competence of the Parliament. This competence serves the purpose of making it possible for the participants in the procedure of concluding a treaty to initiate – before undertaking an obligation under international law – on the basis of the Constitution the examination by the Constitutional Court of the international treaty to be concluded in respect of the provisions considered by them to raise constitutional concerns.

[According to Section 122 para. (3) of Parliamentary Resolution 46/1994 (IX. 30.) OGY on the Standing Orders of the Parliament of the Republic of Hungary (hereinafter: "Standing Orders"), the draft resolution on the ratification of an international treaty, on accession thereto or acceptance thereof, on the amendment of an international treaty, as well as on joining or quitting an international organisation is to be submitted by the Government. The Parliament must adopt a resolution on authorising the President of the Republic to acknowledge the binding force of an international treaty.]

4. When no constitutional concern is raised in advance about the content of the treaty, the Parliament adopts a resolution on approving the conclusion of an international treaty falling within its competence. By way of the approval, the Parliament obliges itself to adopt the statutes necessary for the enforcement of the international obligation undertaken. It promulgates the treaty in the form of an Act of Parliament, and it adopts the statutes necessary for the performance of the international law obligation if the international treaty demands further legislative steps. The performance of the international law obligation (the performance of the task of legislation when necessary) is a duty resulting from Article 2 para. (1) of the Constitution enshrining the rule of law including the bona fide performance of international law obligations, as well as from Article 7 para. (1) of the Constitution requiring the harmony of international law and domestic law, and this duty emerges as soon as the international treaty becomes binding on Hungary (under international law). Failure to act as required may result in the Constitutional Court establishing an unconstitutional omission of legislative duty. The Constitutional Court established an unconstitutional omission on the basis of the legislator's failure to perform a legislative duty resulting from an international treaty in force in Decision 16/1993 (III. 12.) AB (ABH 1993, 143, 154), Decision 45/2003 (IX. 26.) AB (ABH 2003, 474) and most recently in Decision 54/2004 (XII. 13.) AB (ABK December 2004, 960).

5. According to Section 16 of the AL, an international treaty containing a generally obligatory rule of conduct must be promulgated in a statute of a level corresponding to the content of the treaty. On the basis of Section 13 para. (1) of Law-Decree 27 of 1982 on the Procedure Related to International Treaties (hereinafter: "LD"), international treaties ratified by the Parliament must be promulgated in Acts of Parliament.
The Bill on the promulgation of an international treaty is submitted by the Government, and no relevant proposal for amendment may be made (Section 123 of the Standing Orders),

therefore at that time no parliamentary debate may take place concerning the content of the treaty, since by that time it has already been acknowledged by the Republic of Hungary as binding under international law. The mandatory elements of the promulgating Act of Parliament are currently defined in Section 14 para. (1) of the LD. According to it, in addition to announcing the promulgation of the treaty, the authentic text of the treaty in the Hungarian language or its official translation in the Hungarian language and the reservations and declarations made to the treaty by the Hungarian party, the promulgating Act of Parliament must contain the date of mutual notifications on fulfilment of the conditions required for entry into force (the place and date of exchanging or depositing the appropriate documents), the designation of the authority responsible for the implementation of the statute (treaty), and the date of entry into force of the promulgating Act and the treaty. According to Section 14 para. (1) item e) of the LD, the promulgating statute must also contain the date of commencing the application of the treaty if that date is different from that of the entry into force of the treaty.

6. The right of the President of the Republic – granted in Article 26 para. (4) of the Constitution – to initiate the prior constitutional examination of the provisions of an Act of Parliament prior to its signature naturally applies to the challenged provisions of an Act of Parliament promulgating an international treaty. The date of entry into force of the promulgating Act (and of the commencement of the application of the international treaty) and the statutory provision specifying the authority responsible for implementation – as new normative provisions – may be subjected to a prior constitutional examination. As in the present case the President of the Republic challenges the Act promulgating the Montreal Protocol in respect of the provision on the date of entry into force of the promulgating Act and the date of commencing the application of the provisions of the international treaty in domestic law, the Constitutional Court has examined the content of the petition submitted by the President of the Republic in the framework of a prior constitutional examination.

III

1. The President of the Republic mentions in the petition that the Montreal Protocol is a so-called self-executing treaty that directly binds and entitles the subjects of private law. In the petition, the Montreal Protocol's Article II extending the scope of the Warsaw Convention to postal items in certain cases, Article III re-regulating documentation relating to cargo, Article

IV regulating the liability of the carrier, Article VII concerning liability for damages, and Article IX are named as self-executing provisions.

2. As a general rule, the parties bound by an international treaty are the states parties to the treaty. It is the duty of these states to ensure the implementation of the treaty. It is an issue of domestic law how implementation takes place in the given legal system, how the international law obligations are enforced: through an act of legislation or through judicial practice.
Individuals may claim rights directly on the basis of certain provisions of international treaties, more specifically, on domestic legal norms transforming international law obligations. In the case of such a self-executing treaty, the State undertakes to render the application of the treaty possible in domestic law, or at least not to exclude the possibility of the direct application of the provisions of the treaty in its legal system.
Whether an international treaty or a certain provision thereof is a self-executing one, i.e. whether it may be applied in national law without a specific implementing norm can be decided through interpretation. In some cases the states parties to an international treaty make a representation in the treaty about it being or not being a self-executive one, while in other cases it follows from the content or text of the treaty or from the provisions of the Constitution that a further internal legal act is necessary for the implementation of the transformed international treaty. There are cases where the legislator gives a clue for answering the question whether the treaty or a certain provision thereof may be directly applied in domestic law.

3. According to Section 16 of the AL, transformation, i.e. the promulgation of the treaty in a domestic statute, is necessary even in the case of a so-called self-executing treaty. If, after transformation, the international law obligation becomes part of domestic law without an explicit declaration either by the states parties or by the domestic legislator on the direct applicability of the treaty, those applying the law make a decision on the direct applicability of the given international law provision in the specific case concerned. The conditions of direct applicability are the exact definition of the subjects of private law addressed by the international treaty and the exact specification of the rights and obligations under the treaty, so that the treaty can be implemented without any further act of legislation in all states parties.

4. According to Section 3 para. (2) of the Act, the implementation of the Montreal Protocol shall be ensured by the Minister of Transport. This is not an automatic authorisation for

legislation, implementation can be ensured in other ways as well. (According to the detailed reasoning related to Section 3 of the Act, in the case concerned, such authorisation applies to the promulgation of the amended and consolidated text of the Warsaw Convention.) Besides, in the general reasoning of the Act the legislator explicitly requires that in the judicial practice the rules of the Warsaw Convention be applied instead of the provisions of the Civil Code in proceedings instituted in the subject of international carriage by air.
However, the courts have the final word in deciding whether in a given case the applicable international treaty or certain provisions thereof qualify as (a) self-executing one(s). According to the Hungarian judicial practice, the Warsaw Convention is directly applicable in lawsuits between subjects of private law. [The courts have applied the Warsaw Convention in civil proceedings in cases BH 1977. 436., BH 1982. 482., BH 1982. 531., BH 1983. 246., BH 1996. 332. and BH 1997. 197.] The Montreal Protocol has amended several provisions previously qualified by the courts as self-executing ones, such as Articles 18 and 22 of the Warsaw Convention.

IV

1. The Constitutional Court next examined the aspects of retroactive legislation. According to the petition of the President of the Republic, in particular the following provisions of the Montreal Protocol violate the prohibition of retroactive legislation. Article II of the Montreal Protocol, extending – in a certain respect – the scope of the Warsaw Convention to the transportation of postal items. Article III amending and detailing the rules of documentation relating to cargo. Article IV of the Montreal Protocol excluding the liability of the carrier in certain cases where the goods dispatched for carriage by air are destroyed, lost or damaged, and Article VII, which – in the opinion of the President of the Republic – "decreases the amount of liability for damages in respect of dispatched goods from CHF 250 per kg to 17 Special Drawing Rights per kg". Finally, Article IX of the Montreal Protocol regulating the liability of the carrier for damage caused intentionally or through the recklessness of the carrier in the case of transporting goods.

2. According to Article 7 para. (1) of the Constitution, the legal system of the Republic of Hungary secures the harmony of domestic law with the obligations assumed under international law. If the statute promulgating an international treaty enters into force later than the international treaty itself, Article 2 para. (1) of the Constitution on the bona fide

performance of obligations assumed under international law and Article 7 para. (1) of the Constitution may be violated. The legislator must exercise particular circumspection when promulgating an (self-executing) international treaty reorganising the rights and obligations of the subjects of private law without any further act of legislation. In addition to Article 7 para. (1) of the Constitution, it must also comply with the constitutional requirements concerning legislation and stemming from Article 2 para. (1) of the Constitution: the prohibition of retroactive effect, the provision of due time for preparation and the requirements pertaining to the clarity of norms.

3. According to the practice of the Constitutional Court, the requirement of legal certainty as an element of the rule of law enshrined in Article 2 para. (1) of the Constitution is violated through the violation of the rule in Section 12 para. (2) of the AL according to which "no statute may provide for an obligation or declare the unlawfulness of any conduct as effective on any date preceding the promulgation of the statute". [Decision 34/1991 (VI. 15.) AB, ABH 1991, 170, 172] The same constitutional requirement applies to the restriction or withdrawal of rights. In the practice of the Constitutional Court, the retroactive effect of a statute is also established if the "statute has not been put into force retroactively, but its provisions – according to an explicit provision therein – are also applicable to the legal relations established before its entry into force". [Decision 57/1994 (XI. 17.) AB, ABH 1994, 316, 324] In a constitutional democracy it is part of citizens' freedom that their acts may only be limited by rules available to them in advance and adopted in compliance with the formalised rules of legislation. Consequently, the prohibition of retroactive legislation is violated when a statute promulgating an international treaty affecting – without any further act of legislation – the rights and obligations of persons subject to the law of the Republic of Hungary subsequently declares the unlawfulness of certain acts, defines obligations for the subjects of law and restricts rights.

4. According to Section 506 para. (1) of the Civil Code ("CC"), if a consignment is to be forwarded beyond the borders of the country, the provisions of Chapter XLI of the CC are only applicable if an international treaty, convention or rule does not provide otherwise. Furthermore, Section 506 para. (2) of the CC provides specifically in respect of the carriage contracts of air carriage companies that the provisions of the relevant Chapter of the CC are only applicable if an international treaty, convention or rule does not provide otherwise. According to Article 33 of the Warsaw Convention, nothing contained in the Warsaw

Convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of the Warsaw Convention. Thus, in the case of international carriage by air, the provisions of the Warsaw Convention are primarily applicable, and the peremptory provisions thereof must be complied with both by contracts of international carriage and carriers' regulations as standard terms and conditions.

The Montreal Protocol has amended several provisions of the Warsaw Convention. Since its entry into force (14 June 1998), the Protocol has been binding upon the State of Hungary under international law. As the international treaty – due to the lack of its promulgation – has not become part of the law of Hungary, it may not be automatically applied to contracts of air carriage in the case of which the place of dispatch or destination is within the territory of the Republic of Hungary or the aircraft makes a scheduled landing within the territory of the Republic of Hungary.

5. As according to Section 3 para. (1) of the Act promulgating the Montreal Protocol, the rules of the Protocol are to be applied from the date of its entry into force, in terms of content the Act establishes retroactive rules pertaining to relations under private law. This means that the rules of the Montreal Protocol are to be applied to legal relations already closed, and that these rules change the legal evaluation of open legal relations established on the basis of existing contracts of international carriage by air. Consequently, the Constitutional Court next sought to answer the question whether there is any provision among the rules to be applied retroactively that declares the unlawfulness of any act, defines any obligation or restricts any right subsequently.

On the basis of Article IV of the Montreal Protocol, the carrier is exempted from liability in the case of the occurrence of certain circumstances outside the scope of the carrier's activity. According to Article IV of the Montreal Protocol incorporating Article 18 paragraph 3, circumstances excluding the liability of the carrier are (a) inherent defect, quality or vice of the cargo; (b) defective packing of the cargo performed by a person other than the carrier or his servants or agents; (c) an act of war or an armed conflict; (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo. This Article narrows down the category of exemptions, as according to the Warsaw Convention, even in the case of the carriage of goods, the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (Article 20).

Article VIII, amending Article 24 of the Warsaw Convention, eliminates the carrier's liability for an unlimited amount of damages in the case of the carriage of goods. In the case of the carriage of goods, the liability of the carrier is limited by the Montreal Protocol to the amount of 17 Special Drawing Rights (SDR) per kilogram. According to Article IX amending Articles 25 and 25/A of the Warsaw Convention, this limit of financial liability applies even if it is proved that the damage resulted from an act of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

In the opinion of the Constitutional Court, Articles IV, VIII and IX of the Montreal Protocol re-regulating liability for damages subsequently result in an additional obligation – not existing previously on the basis of the Warsaw Convention – for either of the parties having concluded a contract on the international carriage of goods. The text in Section 3 para. (1) of the Act ordering the application of the Montreal Protocol as from 14 June 1998 violates Article 2 para. (1) of the Constitution, more specifically the prohibition of retroactive legislation, therefore it is unconstitutional. As the Constitutional Court has established a violation of Article 2 para. (1) of the Constitution due to the amendment of the rules on liability for damages, it has not examined the other Articles of the Protocol referred to by the President of the Republic.

6. During its procedure, the Constitutional Court has taken account of the fact that by way of Parliamentary Resolution 75/2004 (IX. 8.) OGY, the Parliament has approved accession to the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999. This Convention was promulgated in domestic law by Act VII of 2005. Among others, it unifies the provisions of the Warsaw Convention and the related documents, and in Article 55 it provides that the Convention prevails over any other rule on international carriage by air, including the Warsaw Convention and the related amending conventions (including Montreal Protocol No. 4). As the promulgating Act entered into force on 18 March 2005, the provisions of the Convention have been directly applicable in the law of Hungary since that date. This fact concerns the evaluation of the present case to the extent that in terms of content the provisions of the Protocol requested to be reviewed already form part of the Hungarian legal system. Accordingly, the Constitutional Court could only establish the violation of the prohibition of retroactive legislation in respect of the period between 14 June 1998 and 18 March 2005.

V

1. During the evaluation of the present case, the Constitutional Court considered it justified to examine the provisions of the LD regulating the procedures related to international treaties, in force without amendment since 26 November 1982 and adopted before the Constitution, which marked a turning point in the constitutional system of Hungary. Therefore the Constitutional Court – similarly to Decision 48/1993 (VII. 2.) AB – commenced a procedure *ex officio* for the examination of an unconstitutional omission, on the basis of Section 21 para. (7) of the ACC.

Article 2 para. (1), Article 7 para. (1), Article 19 para. (3) item f), Article 30/A para. (1) item b) and Article 35 para. (1) item j) of the Constitution contain provisions pertaining to the sources of international law, including international treaties. These constitutional rules are further detailed in the AL and the LD. Besides, the Republic of Hungary is a state party to the Vienna Convention promulgated in Law-Decree 12 of 1987.

It requires the joint interpretation of Article 19 para. (3) item f), Article 30/A para. (1) item b) and Article 35 para. (1) item j) of the Constitution to identify those entitled to conclude an international treaty on behalf of the Republic of Hungary. As the present case does not concern the Government's competence to conclude international treaties, the Constitutional Court has only examined the Parliament's right to conclude international treaties. According to Article 19 para. (3) item f) of the Constitution, the Parliament concludes international treaties of outstanding importance to the foreign relations of the Republic of Hungary. On the basis of Article 30/A para. (1) item b) of the Constitution, the President of the Republic concludes international treaties in the name of the Republic of Hungary; if the subject of the treaty falls within its legislative competence, prior ratification by the Parliament is necessary for conclusion of the treaty. Article 2/A para. (2) of the Constitution, providing that the Parliament ratifies the international treaties transferring competences to the bodies of the European Union, uses a third term for the same act of the Parliament approving the assumption of the obligations defined in the international treaty concerned in the case of a subject belonging to legislative competence.

One can establish upon the joint interpretation of Article 19 para. (3) item f) and Article 30/A para. (1) item b) of the Constitution that the Parliament authorises the President of the Republic to acknowledge the binding force of an international treaty. The verb "conclude" used in Article 30/A para. (1) item b) of the Constitution to describe the act of the President of

the Republic designates the act by which the President of the Republic assumes an international law obligation on behalf of the Republic of Hungary pursuant to Article 2 paragraph 1 subparagraph b) of the Vienna Convention.

According to Sections 6-8 of the LD pertaining to decisions on initiating, creating and concluding international treaties, the declaration of an intention to conclude an international treaty is subject to the decision of the Presidential Council and to prior authorisation by the Council of Ministers of the People's Republic of Hungary. The rules in the LD on concluding international treaties (Sections 9-10) violate the provisions of the Constitution on those entitled to conclude international treaties by making it possible to conclude an international treaty through ratification by the Parliament or the Presidential Council of the People's Republic of Hungary, through approval by the Council of Ministers, through a decision adopted by the Parliament, the Presidential Council or the Council of Ministers, through signature etc. (These provisions cannot be considered constitutional even if one applies the rules pertaining to the Presidential Council to the President of the Republic and the provisions mentioning the Council of Ministers to the Government, as appropriate.)
In addition, the LD endangers the enforcement of Article 7 para. (1) of the Constitution because its terminology is not in accordance with the Vienna Convention. For example, for the purposes of the LD the term "ratification" means an act in domestic law by which the Parliament consents to the given international treaty becoming binding upon the Republic of Hungary. However, under the Vienna Convention, "ratification" is a process resulting in the states acknowledging, at the level of international law, the binding force of international treaties upon themselves. The provisions of the LD on the promulgation of international treaties are also contrary to several provisions of the Constitution. For example, Section 13 para. (2) of the LD does not take into account the rule under Article 8 para. (2) of the Constitution providing that in the Republic of Hungary regulations pertaining to fundamental rights and duties must be determined in Acts of Parliament, and it does not consider, either, the constitutional provisions defining exclusive subjects of legislation the case of which generally obligatory rules of conduct may only be adopted by the Parliament.
Furthermore, Section 13 para. (4) of the LD is in conflict with Article 7 para. (1) of the Constitution guaranteeing the harmony of domestic law and international law, because it only allows the promulgation of an international treaty upon performance of the acts under international law necessary for entry into force (depositing the documents of ratification or exchanging diplomatic documents on the fulfilment of the conditions in domestic law

necessary for the entry into force of the treaty). On the basis of Section 13 para. (4) of the LD, in many cases (mainly in the case of bilateral treaties), the promulgating statute cannot be adopted in the period between the performance of the acts under international law necessary for the entry into force of the international treaty and the date of entry into force of the international treaty, and this may result in the delayed performance of the treaty binding upon the Republic of Hungary under international law.
It can be established that several rules of the LD on promulgating and publishing international treaties cause unresolvable difficulties of interpretation for the addressees of the LD, and in some cases compliance with the rules of the LD on the procedure of concluding international treaties may result in a violation of the Constitution.

2. In Decision 2/1993 (I. 22.) AB, the Constitutional Court established an unconstitutional omission as the Parliament had failed to harmonise Act XVII of 1989 – then in force – on popular referenda with the Constitution in force. In Decision 52/1997 (X. 14.) AB, the Constitutional Court again established an omission in relation to the same Act. In Decision 49/1996 (X. 25.) AB, the Constitutional Court established an unconstitutional omission due to the outdated regulation of the legal status of Government members, because the Parliament had failed to meet its legislative duty defined in Article 39 para. (2) of the Constitution.
Similarly to the above Decisions, in the present case the Constitutional Court has also established – due to unconstitutional provisions adopted prior to the Constitution – an unconstitutional omission *ex officio* on the basis of Section 21 para. (7) of the ACC, within its competence defined in Section 1 item e) of the ACC. In the opinion of the Constitutional Court, the complete revision of the provisions of the LD is necessary in order to fully terminate the unconstitutional situation. Therefore the Constitutional Court has obliged the Parliament to comply with its legislative duty by 31 December 2005, in accordance with the provisions of the present Decision of the Constitutional Court.

The Constitutional Court has published this Decision in the Official Gazette (*Magyar Közlöny*) in view of the establishment of unconstitutionality.

Budapest, 29 March 2005

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court, Rapporteur

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Concurring reasoning by Dr. Attila Harmathy, Judge of the Constitutional Court

I accept the holdings of the Decision, but in my opinion the proper reasoning is as follows:

I

At its session of 6 September 2004, the Parliament adopted an Act (hereinafter: "Act") on the promulgation of the Protocol (hereinafter: "Montreal Protocol") signed in Montreal on 25 September 1975 on the amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and amended by the Protocol signed on 28 September 1955 in the Hague (hereinafter: "Warsaw Convention"). Before signing the Act, the President of the Republic forwarded it to the Constitutional Court with reference to Article 26 para. (4) of the Constitution.

In the opinion of the President of the Republic, the principle of the rule of law guaranteed in Article 2 para. (1) of the Constitution is violated by the provision in Section 3 para. (1) of the Act according to which the Act enters into force on the day of its promulgation but its provisions are to be applied as from 14 June 1998.

II

1. The fundamental task of the Constitutional Court is defined in Article 32/A para. (1) of the Constitution, which declares that the Constitutional Court is to review the constitutionality of statutes. This provision of the Constitution is the basis of the definition of the Constitutional Court's competence in Section 1 of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"). According to Section 1 of the ACC, the competence of the Constitutional Court includes – among others – the prior constitutional examination of the provisions of statutes adopted but not yet promulgated and of international treaties, as well as the posterior constitutional examination of statutes [Section 1 items a) and b)]. Prior constitutional examination may be initiated by the President of the Republic pursuant to Article 26 para. (4) of the Constitution, while a posterior examination may be initiated by anyone [Section 21 para. (2) of the ACC].

A constitutional examination may also be performed in relation to statutes promulgating international treaties [Decision 30/1990 (XII. 15.) AB, ABH 1990, 128, 132, Decision 4/1997 (I. 22.) AB, ABH 1997, 41]. The conclusion of international treaties is also supervised in terms of compliance with the rules of the Constitution: compliance with the constitutional limits of entitlement to conclude treaties is examined by the Constitutional Court during both prior and posterior constitutional examinations (Decision 1154/B/1995 AB, ABH 2001, 824, 826-827).

2. Article 2 para. (1) of the Constitution states that the Republic of Hungary is an independent, democratic state under the rule of law. The requirement of legal certainty follows from the principle of the rule of law. Legal certainty means – among others – that statutes may not define obligations for the subjects of law for a period preceding their promulgation, they may not qualify any lawful act as unlawful with retroactive effect, and they may not establish any liability with retroactive effect. Any statute violating this requirement is unconstitutional [Decision 25/1992 (IV.30.) AB, ABH 1992, 131, 132].

3. The unconstitutionality of a statute establishing liability with retroactive effect is based on the violation of the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution. In such a case, the unconstitutionality is not based on the rule in question containing a provision differing from Section 12 para. (2) of Act XI of 1987 on Legislation (hereinafter: "AL"), which defines the principle that no statute may provide for an obligation

or declare the unlawfulness of any conduct for any period preceding the promulgation of the statute. It is clearly expressed in several Decisions of the Constitutional Court that in the examination of unconstitutionality the decision is based on the provisions of the Constitution and the principles defined in the Constitution, and the expression of these rules and principles in the AL only has secondary importance in comparison to the relevant provisions of the Constitution [Decision 7/1992 (I. 30.) AB, ABH 1992, 45, 48]. The principle of the rule of law enshrined in Article 2 of the Constitution includes the requirements of legal certainty and the accessibility of statutes independently of the rule in the AL [Decision 28/1992 (IV. 30.) AB, ABH 1992, 155, 156-157; Decision 365/B/1998 AB, ABH 1998, 850, 851]. The AL has no special position in the hierarchy of statutes in comparison to other Acts of Parliament. Therefore the Constitutional Court does not establish the unconstitutionality of any statutory provision merely on the basis of it deviating from the rules of the AL (Decision 1131/B/1993 AB, ABH 1994, 645, 646). For example, it established the constitutionality of the local governments' right to levy taxes on the basis of the provisions of the Act on Local Taxes, in spite of that Act deviating from the rules of the AL (Decision 187/B/1991 AB, ABH 1993, 548, 549).

In view of the above, the text providing for retroactive effect in Section 3 para. (1) of the Act is to be examined on the basis of the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution.

4. The Warsaw Convention was incorporated into Hungarian law by Act XXVIII of 1936. Based on the authorisation granted in Section 3 of that Act, Decree 42.481. K. K. M. of 1940 issued by the Hungarian Royal Minister of Trade and Transport extended the application of the rules of the Warsaw Convention to domestic carriage by air as well.

According to Section 95 of Law-Decree 11 of 1960 on the Entry into Force and Implementation of the Civil Code, the civil law statutes adopted before 1945 were repealed with the exceptions listed in the Annex to the Law-Decree. As provided in point 3 of the Annex, the conventions in force in the field of civil law remained in force. Thus the Warsaw Convention also remained in force. Point 1 of the Annex also kept in force Decree 42.481/1940. K. K. M. extending the application of the Warsaw Convention to domestic carriage by air. According to Section 506 of Act IV of 1959 on the Civil Code (hereinafter: "CC"), in respect of the forwarding of consignments beyond the borders of the country and in respect of the carriage contracts of air carriage companies, the provisions of the international treaty are applicable, and the provisions of the CC on carriage contracts only apply if the

international treaty does not provide otherwise. With regard to the transportation of persons – save if provided otherwise in a statute – the rules on professional services apply as appropriate.

According to Article 1 para. (1) of the Warsaw Convention, it applies to all international carriage of persons, luggage or goods. The Warsaw Convention was amended in 1955, and the Hague Protocol containing the amendment was promulgated and published in Law-Decree 19 of 1964. Decree K.K.M. of 1940 extending the application of the rules of the Warsaw Convention to domestic carriage by air was repealed by Section 47 of Government Decree 22/1965 (XI. 14.) Korm. on the Regulations of Carriage by Air. Section 1 of Government Decree 26/1999 (II. 12.) Korm. on the Regulations of Carriage by Air provides that the provisions of the CC shall apply to carriage by air with the deviations and amendments contained in the Decree, however, in respect of international carriage the Decree shall only apply if no international treaty provides otherwise. Section 1 of Government Decree 25/1999 (II. 12.) Korm. on the Regulations of the Carriage of Persons by Air has similar content.

Thus, according to the Hungarian regulations in force the provisions of the Warsaw Convention are to be applied to the international carriage of persons and goods by air.

5. With regard to several issues, the Montreal Convention contains provisions different from those of the Warsaw Convention. Among these, several new rules on carriers' liability are particularly important (in Articles 9, 18, 22 and 24).

As a result of Section 3 para. (1) of the Act providing that its provisions are applicable as from 14 June 1998, in respect of the contractual relations – either fulfilled or not since 14 June 1998 – of carriage by air established before the promulgation of the Act, the liability of the carrier would be regulated by rules other than the ones applicable at the time of concluding the contract.

The modification of the rules of liability with retroactive effect in Section 3 para. (1) of the Act is contrary to the principle of the rule of law established in Article 2 para. (1) of the Constitution.

III

1. According to the data communicated by the Minister of Foreign Affairs of the Republic of Hungary, Hungary signed the Montreal Protocol on 29 June 1987 and deposited the document

of ratification – in line with the agreement – at the Government of Poland on 30 June 1987. The Montreal Protocol entered into force on 14 June 1998.

Section 3 para. (1) of the Act clearly aligns the commencement date of the application of the Montreal Protocol in Hungary with the entry into force of the Protocol, with consideration to the fact that the international treaty has been signed on behalf of Hungary.

2. Article 7 para. (1) of the Constitution declares the following principle:

"The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law." With regard to Article 7 para. (1) of the Constitution, Decision 53/1993 (X. 13.) AB established fundamental principles. As established by that Decision upon the examination of the international law rules on war crimes and crimes against humanity, on the basis of Article 7 para. (1) of the Constitution, the generally recognised rules of international law are part of Hungarian law, too. Here, however, not all rules of international law are to be taken into account, but only the fundamental principles thereof, such as certain provisions included in the United Nations Charter and the Geneva Conventions. Other rules of international law only become part of domestic law through promulgation, but in the course of promulgation and harmonisation, the features of both international law and domestic law must be taken into consideration (ABH 1993, 323, 327). This principle was reinforced in Decision 4/1997 (I. 22.) AB, stressing that domestic law, international law and the Constitution must be examined together and with consideration to their interconnections, and harmony must be ensured among international law obligations, the Constitution and domestic law as a whole (ABH 1997, 41, 48-49).

In the examination of the harmony of international law obligations and domestic law, the Constitutional Court does not compare statutes on specific issues with international treaties: it rather considers all provisions of the legal system pertaining to the subject in order to draw conclusions. This is shown for example in Decision 2181/B/1991 AB (ABH 1999, 447, 452-453), Decision 1042/B/1997 AB (ABH 1998, 785, 790-797) and Decision 95/B/2001 AB (ABH 2003, 1327, 1339-1345).

During the interpretation of Article 7 para. (1) of the Constitution, it must be taken into account that some international treaties result in an obligation to take implementing measures rather than in an obligation to legislate, and not all international treaties are promulgated in the form of a statute. Therefore, the harmony between international law obligations and

domestic law is realised indirectly rather than through the adoption of a single statute (Decision 988/E/2000 AB, ABH 2003, 1281, 1288-1290). Consequently, the Constitutional Court did not establish an unconstitutional omission of legislative duty in a case where the obligation of adopting a specific statute could be deduced from the international treaty but the principle defined in the international treaty was enforced even without such a specific statute due to the rules of the Constitution and criminal law (Decision 33/E/2000 AB, ABH 2001, 1103, 11041106).

With regard to the harmony between international law and domestic law, the Constitutional Court also examines the discretionary possibilities of the states parties to the treaty, i.e. whether it is indeed a forcing necessity to enact a specific legal solution on the basis of the treaty concerned. In the case concerned, in Decision 936/D/1997 AB, the answer to this question was no (ABH 1999, 615, 618-619).

In harmonising international law, the Constitution and domestic law as a whole, it is especially important to take note of Decision 30/1998 (VI. 25.) AB establishing that "the Parliament must not violate Articles 2(1) and (2) of the Constitution by the adoption or promulgation of international treaties" (ABH 1998, 220, 234). Based on all the above, an unconditional obligation to incorporate international treaties into domestic law without any modifications – on the basis of the obligation assumed under international law – cannot be deduced from Article 7 para. (1) of the Constitution: it must be examined whether the assumed obligation and incorporation into domestic law violates the rules of the Constitution. Reference to Article 7 of the Constitutional Court does not justify the acknowledgement of the constitutionality of a statute promulgating an international treaty and violating the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution. In the present case, another reason for the unjustifiability of ordering the retroactive application of the rules of the Montreal Protocol – promulgated in 2005 – as from 14 June 1998 with Article 7 para. (1) of the Constitution is the fact that the retroactive effect does not originate from the international treaty but it is caused by the lack of promulgation of the Montreal Protocol in June 1998. In view of the above, the text in Section 3 para. (1) of the Act ordering application as from 14 June 1998 is unconstitutional.

IV

With regard to the issues related to international law obligations, Law-Decree 27 of 1982 on the Procedure Related to International Treaties (hereinafter: "LD") is still applicable, as it has not been repealed. The LD was adopted prior to the change of the political regime. Since 1982, the rules of the Constitution have fundamentally changed. In the democratic system, the competences of State organs performing the tasks related to international treaties are different than they were in 1982, and the whole of State life has changed. The provisions of the LD are not in harmony with the new rules of the Constitution.

In view of the above, in accordance with the practice established in Decision 2/1993 (I. 22.) AB (ABH 1993, 33, 39), based on the authorisation granted under Section 21 para. (7) of the ACC, the Constitutional Court has established – acting *ex officio* – an unconstitutional omission manifested in the failure of the Parliament to harmonise the LD with the Constitution in force.

Budapest, 29 March 2005

Dr. Attila Harmathy
Judge of the Constitutional Court