The Application of International Law as an Instrument of Interpretation in Hungary – the Practice of the Constitutional Court and Ordinary Courts in a Comparative Approach

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I. Application of international law in the practice of courts: duty or optional possibility?

The Hungarian legal system follows the dualist approach with transformation regarding the international treaties and certain decisions of international courts and other treaty bodies (hereinafter: treaties). The treaties are applicable after transformation, i.e. if they are promulgated and published in a Hungarian legal instrument (act of Parliament or decree of the Government).[1] Besides, a group of norms called "*generally recognized rules of international law*" is a part of the Hungarian legal system without any further transformation by general transformation ensured by the Basic Law (BL) itself.[2] It gives a monist feature to the Hungarian legal system, however, the content of the term "*generally recognized rules as international law*" covers the peremptory norms of international law (*ius cogens*), the general principles and customary international law.[3] Customary law and general principles take precedence over domestic laws, except for the BL and only *ius cogens* rules can prevail even over the BL.[4]

1 See Act L of 2005 on the procedure regarding international treaties

2 Constitutional Court Decision № 53/1993. (X.13.) ABH [1993] 327.

3 Molnár Tamás: *Relationship of International Law and the Hungarian Legal System 1985-2005*, in: Jakab András – Takács Péter – Tatham, Allan F. (eds.): The Transformation of the Hungarian Legal Order 1985–2005 Transition to the Rule of Law and Accession to the European Union. Kluwer Law International, Alphen aan den Rijn, 2007. 458.

4 For example see Constitutional Court Decision № 4/1997. (I. 22.) ABH [1997] 51; Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 237–238; Molnár 2007, 465; BLUTMAN, László: A nemzetközi jog használata az Alkotmány értelmezésénél [Using International Law to Interpret the Constitution] *Jogtudományi Közlöny*, 2009/7-8. 304.

In principle, these categories are mentioned in the BL as sources of international law to be applied; however in practice some other forms of sources appear as well: the decisions of international judicial organs and that of international organizations.

By the force of the constitution or by transformation, "*[i]n order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law*"[5]. The Constitutional Court has competence to decide whether the incorporation of an international norm was constitutional,[6] and ensure the harmony of the domestic and international law but the aim of the present paper is to highlight the role of international law in the legal practice.

It derives from constitutional obligation to ensure harmony thus any international norm implemented in domestic law shall appear by incorporating provisions in domestic law, in the hierarchy of norms. The Constitutional Court has a leading role in ensuring the harmony of domestic *legislation* and assumed international obligations due to its powers but the application of the sources of international law in the legal practice is a different aspect of harmony. Courts apply *the iura novit curia* principle, i.e. they are presumed to be aware of the content of every norm in the entire legal system – including the rules of international law but is the judge obliged to search for, invoke and apply the alleged international regulation binding on Hungary in every single case or can the judge trust the domestic legislation which is in fact already in harmony with international obligations? Is the judge obliged to know that a certain legal question is also regulated by international obligations and is it expected to always verify that, for example, an Act to be applied in the case is in total conformity with an international treaty which happens to be superior to domestic legislation except for the constitutional provisions? According to some points of view the judge is not obliged to do so, it is the duty of the legislator to elaborate that the international treaty conforms with the legislation and that of the Constitutional Court to verify if this legislation is in harmony to the assumed international obligations of Hungary.[7]

It is even more problematic in the question of legal practice related to treaty based provisions which are continuously interpreted by a judicial organ explicitly established for disputes arising from the convention

5 The Basic Law of Hungary (25 April 2011), Art. Q (2), see also Constitutional Court Decision № 7/2005. (III.31.) ABH [2005] 99-101.

6 See Act CLI of 2011 on the Constitutional Court, Arts. 23 (3)-(4); 24-25; 32.

7 See Csongrád County Court Decision № 14.K.21.445/2009/5.

itself. Certainly, the decision settling litigation is only binding for the parties; however the legal reasoning and the exploration of the content of a provision shall form the part of the convention itself.

Is the Hungarian judge obliged to follow the practice of the European Court of Human Rights [hereinafter: ECtHR] whether it develops the provisions of European Convention on Human Rights [hereinafter: ECHR][8] in a way that is different from the actual Hungarian legal practice or is it the task only for the legislative power to keep the legislation updated?

Article 13 (1) of Act L of 2005 on the procedure regarding treaties answered the question as it states that "*the previous decisions of the organ having jurisdiction over the disputes in relation to the treaty shall be considered in the course of the interpretation of the treaty*."

The Constitutional Court *expressis verbis* emphasized the same thought related to ECtHR decisions when it expressed that obligation issues from the principle of pacta sunt servanda are to follow the Strasbourg practice and its level of fundamental rights protection.[9]

Legal acts shall be in compliance with the obligations stemming from international and Union law.[10] Hereby, it has to be noted that EU law is regarded as a separate legal system since the accession and it is governed by the principle of direct applicability and supremacy rules.[11]

The Constitutional Court declared that domestic law shall be made and interpreted in the view of international obligations no matter if the obligation issues from customary international law or incorporated in treaty.[12] Using international law as an interpretational tool is based on Article Q(2) of the Basic Law as regards binding sources. The problem arises in connection with non-binding sources of international law; however, the Constitutional Court noted that invoking them would

[8] Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], Rome, 4 September 1950, 213 U.N.T.S. 222.

[9] Constitutional Court Decision № 61/2011. (VII.13) Magyar Közlöny, 2011/80. 23046.

[10] Article 2(4) (c) of Act CXXX of 2010 on legislation

[11] Blutman László: *Milyen mértékben nemzetközi jog az Európai Unió joga a magyar alkotmányos gyakorlatban?* [To What Extent EU Law is Considered International Law in the Hungarian Constitutional Practice], in: Kovács, Péter (ed.): International Law – a quiet strength / Le droit international, une force tranquille (Miscellanea in memoriam Géza Herczegh). Pázmány Press, Budapest, 2011. 485-297.

[12] Constitutional Court Decision № 4/1997. (I.22.) ABH [1997] 41, 48-49.; Constitutional Court Decision № 380/B/2004. ABH [2007] 2438, Constitutional Court Decision № 61/2011. (VII.13.) ABH [2011] 320; Blutman László: *A nemzetközi jog használata az Alkotmány értelmezésénél* [Using International Law to Interpret the Constitution]. Jogtudományi Közlöny, 2009/7-8. 304.

help the positivist foundation of argumentation.[13] *Blutman* says that due to its independence, the Constitutional Court is free to choose its tools for the argumentation and interpretation. Only the validity, casualty and verifiability of conclusions form a limitation to the interpretation.[14] The aim is to elaborate a politically and ideologically neutral judgment. It can easily be achieved by considering the (non-binding) decisions of international organizations and interpretative solutions of judgments of third States courts.[15]

Obligation derived from BL means that the Hungarian State takes part in the community of nations and this participation is a constitutional order for domestic law.[16] The basis of international cooperation is formed by common principles and goals which are subtly affected by non-binding norms and expectations to ensure the peace and well-functioning of interactions. The State can avoid many of these norms but it cannot extricate herself from the whole system as it would mean isolation from the community.[17] Participation in the community of nations thus presumes the application of international norms containing social and moral standards as instruments for interpretation. This way the citation of non-binding international documents and foreign jurisprudence as a tool for interpretation of BL can be justified.[18]

According to *Blutman*, the main question is whether the BL creates the obligation to use or at least consider the application of these instruments as well. In his view the obligation of participation in international cooperation cannot transform those norms that are not undertaken explicitly by Hungary as it would be contrary to the principle of rule of law, legal certainty and the content of Article 7(1) as well.

13 Concurring opinion of Péter Kovács in Constitutional Court Decision № 41/2005. (X.27.) ABH [2005] 459; Blutman 2009, 302-303.

14 Concurring opinion of László Sólyom in Constitutional Court Decision № 23/1990. (X.31.) ABH [1990] 88, See Bragyova, András: *Az alkotmánybíráskodás elmélete* [The Theory of Constitutional Jurisprudence]. KJK – MTA, Budapest, 1994. 171; Kis János: *Az első magyar Alkotmánybíróság értelmezési gyakorlata* [The Practice of Interpretation of the first Hungarian Constitutional Court], in: A megtalált Alkotmány? INDOK, Budapest, 2000. 49; Blutman 2009, 303.

15 Constitutional Court Decision № 21/1996. (V. 17.) ABH [1996] 74. Sólyom László: *Az emberi jogok az Alkotmánybíróság újabb gyakorlatában* [Human Rights in the Recent Practice of the Constitutional Court]. Világosság 1993/1. 17-19, 28. Blutman 2009, 303.

16 Constitutional Court Decision № 53/1993. (X.13.) ABH [1993] 323; Constitutional Court Decision № 15/2004. (V. 14.) ABH [2004] 269.

17 Blutman 2009, 303.

18 Blutman 2009, 304.

However, non-binding norms might be taken into consideration for interpretation of norms that oblige the State.[19]

II. The role of international law in the practice of courts: what is the effect of invoking international legal norms in the reasoning of a judgment?

Three categories can be established to show the significance of the invoked international legal norm on the reasoning of a judgment.

International law has *constitutive* effect on the reasoning when it serves the basis for the judgment. For example in the *preliminary (ex ante)* norm control case of the *Law on Procedures Concerning Certain Crimes Committed during the 1956 Revolution* the Constitutional Court invoked customary international law to support the constitutionality of the non-application of statutory limitation in certain war crimes and crimes against humanity. The aim of the legislation was to make possible some form of 'historical justice' in order to prosecute Communist offenders for crimes against humanity. The committed crimes had happened decades before the adoption of this statute and thus it seemed to be contrary to the principle of *nullum crimen* sine lege and *nulla poena sine lege* which are basic principles of law incorporated not just in the Constitution but in international treaties to which Hungary had already been a party at that time.[20] The constitutionality of the provision referring to war crimes and crimes against humanity as defined by the Geneva Conventions of 1949 for the Protection of War Victims, was upheld. The Constitutional Court cited the *New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* of 1968 which declares that no statutory limitation shall apply to several categories of war crimes and crimes against humanity irrespective of the date of their commission.[21] By signing and ratifying this convention, Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and

[19] See concurring opinion of Péter Kovács in Decision № 45/2005. (XII.14.) ABH [2005] 569. Blutman 2009, 304.

[20] See Article 7 of ECHR and Article 15 of the International Covenant on Civil and Political Rights [ICCPR]. 19 December 1966, New York, 999 UNTS. 171.

[21] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. 26 November 1968, New York, 754 UNTS 73. [hereinafter: 1968 New York Convention] Article II.

crimes against humanity.[22] The Constitutional Court even highlighted the fact that the possibility of ignoring the principles of *nullum crimen* and *nulla poena sine lege* in the case of certain crimes committed during the communist era is based on customary international law thus the non-applicability of statutory limitations obliges Hungary without any conventional provisions.[23]

International law has *additional constitutive effect* when the international norm plays supplementary role in the reasoning with other national legislative acts in the same line, thus both the domestic and the international norm have significant effect. For example in 1990 the capital punishment was declared to be unconstitutional as it conflicted with the constitutional prohibition against any limitation on the essential content of the *right to life and to human dignity*. The content of this provision of the Constitution was interpreted by international obligations of Hungary incorporated in the relevant articles of the ICCPR[24] and the ECHR with its Protocol no. 6. dealing with the right to life.[25] As conclusion, capital punishment conflicts with provisions that declare that human life and human dignity form an inseparable unit, thus as having a greater value than other rights; and thus being an indivisible, absolute fundamental right limiting the punitive powers of the State. The above mentioned international norms clarified the provisions of the Constitution in the view of international obligations, thus they had a significant role in the final reasoning of the decision, but primarily it was based on the Constitution.[26]

International law has *supportive effect* in those cases whereby the reference to international legal instruments is to strengthen a decision based on domestic law. Recommendations of the Council of Europe are frequently invoked as relevant interpretation of the provisions of the ECHR. The Constitutional Court relies many times on these sources

22 See 1968 New York Convention, Article III-IV.

23 Constitutional Court Decision № 53/1993. (X.13.) ABH [1993] 323-338.

24 Article 6.1. of ICCPR declares that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life. Paragraph 6 of the same article states that nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

25 While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognized the legitimacy of capital punishment, Article 1 Protocol 6 ECHR adopted on 28 April 1983 provides that the death penalty shall be abolished. No one shall be condemned to such penalty or executed. Also, Article 22 of the Declaration on Fundamental Rights and Fundamental Freedoms, adopted by the European Parliament on 12 April 1989, declares the abolition of capital punishment. Constitutional Court Decision № 23/1990. (X.31.) ABH [1990] 102-103.

26 Constitutional Court Decision № 23/1990. (X.31.) ABH [1990] 94-145.

as guidance for the judgments and decisions of international judicial organs to support argumentation or to justify that the opinion of the Constitutional Court echoing in the reasoning is in accordance with international standards, with international obligations; thus recommendations are not constitutive sources of obligation.

III. The practice of application of different sources of international law

Below, the most commonly cited types of international norms are taken into account and the role they play in the reasoning is presented. Their succession expresses the frequency of their invocation.

1. Treaties as expressis verbis *assumed obligations*

It is a constitutional duty to incorporate treaties in domestic law; however there are cases that treaty based obligations are invoked beside domestic legislation. It rarely means that the assumed international obligation is not transformed into Hungarian law and domestic legislation is not in conformity with international ones. Treaties are often invoked to support reasoning based on domestic norms but it is quite rare that they have definitive or complementary effect on the reasoning. Moreover, when a treaty is a significant source of law it is usually accompanied by judicial decisions or decisions of the international organ that elaborated the convention. In such cases these international legal instruments serve as guidance for the interpretation of the cited provisions of the treaty.[27]

Due to its function, in the practice of the Constitutional Court the most frequently cited treaty is the ECHR as the level of the fundamental rights protection provided by the Constitutional Court in no case may be lower than the level of international protection. It follows from the principle of *pacta sunt servanda* that the Constitutional Court shall accept

[27] See Constitutional Court Decision № 166/2011. (XII.20.) AB, ABH [2011] 545, 557. The interpretation of an international treaty shall coincide with the official interpretation given by the organ established or authorized for this purpose. The Constitutional Court explained this point of view related to the documents of the Council of Europe in Constitutional Court Decision № 41/2012. (XII.6.) Magyar Közlöny 163/2012. 27392.

and apply the case law of the ECtHR even if it were not derived from its own previous practice.[28]

As for the practice of ordinary courts, the ECHR provisions together with the case law of ECtHR are also invoked, mainly with supportive effect.

The other types of cases that reveal the application of international law contains a foreign element. In such questions international law has a significant role in the reasoning of the judgment, definitive or at least complementary. These cases are related to double taxation,[29] the calculation of social allowances like old age pension[30] for those who lived a part of their life abroad – in a non-EU member State or before the accession of Hungary –, and for the most of the time litigation concerning the carriage of goods thus it has to be noted that beyond the human rights related issues, the most frequently cited international instrument, among other bilateral treaties in the subject,[31] is the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR).[32]

2. Decisions of international judicial organs

The decisions of the ECtHR as well as the decisions of the Court of Justice of the European Union (hereinafter: CJEU) are not considered as direct sources of international law, they are rather interpretations. In deci-

[28] Constitutional Court Decision № 61/2011. (VII.13.) AB, ABH [2011] 290, 321.

[29] See for example Agreement between the Republic of Croatia and the Republic of Hungary for the avoidance of double taxation with respect to taxes on income and on capital, Barcs, 30 August 1966 (promulgated by Act XVIII of 2000), in: Supreme Court Decision Kfv.I.35.460/2007/8 and Bács-Kiskun County Court Decision K.21.858/2006/17.

[30] See for example Agreement on social security between the Hungarian Republic and the Republic of Austria, 7 September, 1961 (promulgated by Decree-law № 5. of 1962), in: Supreme Court Decision MfvK.IV.10.206/2007/4, Budapest Metropolitan Court Decision Mfv/K. III.11.015/2006/5; Convention between the Hungarian People's Republic and Federal Republic of Germany on social security, 2 May, 1998 (promulgated by Act XXX of 2000), in: Győr-Moson-Sopron County Court Decision 9.K.27.302/2007/10.

[31] See for example Convention between the Government of the Hungarian People's Republic and the Government of the Socialist Republic of Romania on the *carriage* of persons and *goods. 9 February,* 1972 (promulgated by Council of Ministers Edict 6/1973. (II.7.), in: Supreme Court Decisions Kfv.I.35.063/2007/6 and Kfv.I.35.411/2006/5; Kfv.I.35.107//2007/5. Agreement between the Government of the Hungarian People's Republic and the Government of the People's Republic of Bulgaria on the *carriage* of persons and *goods, Budapest, 17 April 1989 (promulgated by Decree-law № 3 of 1990), in:* Supreme Court Decisions Kfv.I.35.103/2007/7

[32] See for example Supreme Court Decisions Kfv.I.35.259/2010/7.; Kfv.V.39.138/2010/7; Gfv. X.30.302/2009/4; Gfv.IX.30.095/2010/4; Gfv.X.30.186/2008/6; Gfv.X.30.239/2007/4; Gfv.X.30.342/2009/5.

sion 18/2004. (V.25.) the Constitutional Court declared that the jurisprudence of the ECtHR forms and obliges the Hungarian practice. This kind of obligation refers to the interpretation of the different provisions of the Convention and not to the judgment itself.[33] Despite this fact the, decision in 988/E/2000 highlights that the judgment of the International Court of Justice is neither a norm nor a treaty. It decides upon a unique legal dispute even if its statements have theoretical significance and become precedent.[34] Two years later the new act on the procedure regarding international treaties was adopted and it reformulates this opinion by stating that decisions are binding and shall be executed in Hungary if the state is a party to the settled dispute. This decision shall be promulgated with the appropriate application of the provisions regarding the promulgation of the treaties in the Official Gazette.[35] As for the form of promulgation, it is the form of the *compromis* that is determinative. It is to be noted that this obligation shall not refer to decisions in litigations when the other party to the dispute is a civilian and not a state just like in the case of the ECtHR.[36] In such cases only Article 13 (1) obliges Hungary to consider the decisions of the organ having jurisdiction over the disputes in relation to the treaty in the course of the interpretation of it. In this case the decision is not a source of law; however it can be a significant guidance for interpretation of treaty based obligations.[37]

Regarding the available decisions, ordinary courts, for the most of the time, invoke the practice of the ECtHR if the case before them concerns fundamental law issues to interpret domestic legal provisions correctly mainly in those cases when they are quite ambivalent or seem to be not in conformity with international obligations.[38] It is not rare that the ECtHR practice is invoked as it was discussed and analyzed in a Constitutional Court decision, and not the relevant decisions of the ECtHR are cited directly,[39] or only the *'practice of the European Court of Human Rights'* is in-

[33] Blutman 2009, 310.

[34] Constitutional Court Decision № 988/E/2000. ABH [2003] 1290.

[35] Article 13 of the Act L of 2005 on the procedure regarding international treaties.

[36] See Molnár Tamás: *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* [Incorporation of international law into the Hungarian legal system], PhD dissertation, ELTE ÁJK, manuscript, Budapest, 2012. (Molnár 2012a) 206-210.

[37] See Budapest Metropolitan Court Decision 24.K.35.639/2006/25.

[38] See Supreme Court Kfv.VI.38.071/2010/4.; Kfv.II.38.073/2010/4.; Kfv.III.38.074/2010/4.; Kfv. 38075/2010/4.; Bfv.I.1.117/2008/6.; Budapest Regional Court of Appeal 5.Pf.20.738/2009/7.

[39] See for example Budapest Metropolitan Court 19.P. 23.191/2006./19.; Supreme Court Kfv. III.37.385/2008/4.szám.

voked without any exact decision to support the statement.[40] In such cases the significance of the invocation is questionable so as its positive effect on the reasoning. Such unsupported statement related to the point of view of the ECtHR rather weakens than strengthens the legal logic of the decision. The same problem occurs when imprecisely cited instruments appear in the legal reasoning[41] or statements are supported by phrases such as "according to the practice of the ECtHR" without mentioning at least one decision that contains the alleged argument.[42]

Concerning the legal effect of a decision of an international judicial body, recently, the reaction of the legislative power is to be worried about. As regards the *Fratanoló case*[43] the Parliament adopted a resolution declaring that the alleged provision of the Hungarian Criminal Code is correct and even if the ECHR stated otherwise, the Parliament does not agree with the opinion of the ECtHR.[44] This attitude of the Parliament does not impede ordinary courts to follow the ECtHR decision and on the same day of the adoption of the negative declaration of the Parliament, the Supreme Court rendered a Strasbourg-conform judgment and relieved the accused on the ground that in a similar case no crime had been

[40] See for example Court of Békés County 5. P. 20259/2008/7.; Budapest Metropolitan Court 20.Bf.6162/2009/2.

[41] See for example the renaming of the International Criminal Court to Tribunal, 10/2009. (II.13.) AB határozat. ABH 2009/3., p. 124; 11/2009. (II.13.) AB határozat. ABH 2009/3, p. 125; or the different naming of treaties related to the European Union. For example it is a common mistake to refer to the Lisbon Treaty when the cited article is definitely belongs to the consolidated version of the Treaty on the European Union or the Treaty on the Functioning of the European Union. See this comment in the dissenting opinion of András Bragyova in Constitutional Court Decisions № 143/2010. (VII.14.) ABH [2010] 717.

[42] For example see Constitutional Court Decisions № 14/2004. (V.7.) ABH [2004] 249-252; 57/2001. (XII.5.) ABH [2001] 496-498; 10/2007. (III.7.) ABH [2007] 215-217; 154/2008. (XII.17.) ABH [2008] 1211-1212; 60/2009. (V.28.) ABH [2009] 523, 97/2009. (X.16.) ABH [2009] 876, 30/1998. (VI.25.) ABH [1998] 220.

[43] See *Fratanoló v. Hungary*, Application no. 29459/10, Judgment of 3 November 2011.

[44] See Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szóló J/6853. számú jelentés (elfogadva az Országgyűlés 2012. július 2-i ülésnapján) [Report No. J/6852 of the Parliament on the execution of the judgment of the European Court of Human Rights in the case of *Fratanoló v. Hungary,* adopted on the session of 2 July, 2012] Az Emberi Jogok Európai Bíróságának a Fratanoló kontra Magyarország ügyben hozott ítélete végrehajtásával kapcsolatos kérdésekről szóló jelentés elfogadásáról szóló 58/2012. (VII.10.) OGY határozat [Resolution No. 58/2012. (VII. 10.) of the Parliament on the execution of the judgment of the European Court of Human Rights in the case of Fratanoló v. Hungary]. Molnár Tamás: *Két kevéssé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi büntetőbíróság döntései, valamint az egyoldalú állami aktusok esete a magyar jogrendszerrel* [The Place of Two Barely Known International Source of Law in Domestic Law: the Case of International Judicial Decisions and Unilateral State Acts with the Hungarian Legal System]. Közjogi Szemle, 2012/3. 1. (Molnár 2012b) 3.

committed in the view of the decision of the ECtHR.[45] It is rejoicing that the Constitutional Court has already ordered the Parliament to amend the Criminal Code and decriminalize the use of red star.[46]

Concerning the practice of international judicial decisions, the ECtHR is the most frequently cited, however, it happens that in the reasoning that decisions of the ECHR are cited and invoked which are indirectly connected to the case, and sometimes the foreign names of these decisions are even misspelled. The famous *Babus case* of the Regional Court of Appeal is the example of the significance of ECtHR judgments in the interpretation and clarification of the Hungarian legal practice, and at the same time it serves as an anti-example for the application of international law as well: the decoration of reasoning with irrelevant and incorrectly cited decisions of the ECtHR.[47] In this case the application of international judicial decisions is beyond the scope of domestic norms. The interpretation and application of the benchmark of 'good faith' established by the ECtHR is far beyond the provisions of the Hungarian Criminal Code concerning defamation and libel and the dogmatic frames and basics. Thus, the applications of ECtHR decisions to support the argumentation related to the meaning of *bona fides* in the case of a journalist called Babus directly conflicted with the relevant decision of the Constitutional Court [36/1994. (VI.24.)] echoing the Hungarian constitutional practice.[48]

The practice of ordinary courts is confused and confusing at the same time. There are examples of the complete rejection of the application of ECtHR judgments referred to by the plaintiff for the reason that "*the Hungarian judiciary does not apply a precedent system of the ECtHR*" [49] and the invocation and application of the Strasbourg practice with a significant effect on the reasoning can also be seen.[50]

45 Curia Bfv.III.570 2012/2; Molnár 2012b, 3.

46 See Constitutional Court Decision № 4/2013 (II.21.) ABH [2013] 188-211.

47 Budapest-Capital Regional Court of Appeal Decision 3.Bhar.341/2009/6. Koltay András: *A Fővárosi Ítélőtábla határozata Babus Endre újságíró rágalmazási ügyében* [Budapest-Capital Regional Court of Appeal Judgment of the Defamation case of the Journalist Endre Babus. JeMa, 2010/3. 35.

48 Szomora, Zsolt: *Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn, Grundrechtsbeeinflusste Widersprüche im ungarischen Strafrecht*. Zeitschrift für Internationale Strafrechtsdogmatik, Ausgabe 1/2001. p. 33; Koltay 2013, 36.

49 See for example Decision of Budapest Metropolitan Court 20. Kpk.45.434/2003/2; Pécs Regional Court of Appeal Decision Bfv.III.570/2012/2. Molnár 2012a, 210.

50 See for example Decision of the Budapest-Capital Regional Court of Appeal 5.Pf.20.736/2010/6.

3. Decision of international organizations

As regards binding resolutions of international organizations, the BL does not contain any provisions; however there are many international organizations that make binding decisions, the UN Security Council [hereinafter: SC] is a well-known example of this.[51] As for the transformation of this latter the Hungarian practice is incoherent, confusing and contradictory. Sometimes they are promulgated by government decrees or regulations and very rarely by acts.[52] Sometimes they do not even appear in the Hungarian legal system such as many of the resolutions concerning sanctions against Iraq, Angola, Sierra Leone and Afghanistan,[53] and it happens quite often that they are published in the form of a Foreign Office circular (*külügyminiszteri tájékoztató*). This latter solution is a monist technique thus this kind of publication of resolutions is absolutely contrary to the provisions concerning Hungarian legal order and legal certainty.[54] In legal practice it causes problems in determining the applicable law. For example, during the years of Yugoslav disturbances the SC embargoed the State. In Hungarian territory, a smuggler was arrested and condemned for violation of it but at second instance the judgment was modified and he was allowed to go free. In fact the embargo was suspended for a while but at the time of the crime it was in force again.[55] The former resolution suspending the embargo was promulgated late, so at the time of the trial of the second instance the judge could only rely on the Foreign Office

[51] There are other international organizations that make binding decisions like the North Atlantic Treaty Organization, the International Civil Aviation Organization, the World Health Organization and some regional fishing organizations. Decisions of the WTO Dispute Settlement Body and Council of ICAO belong to this category, as well as those rare judgments of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) that resolve the disputes of states. Molnár Tamás – Sulyok Gábor – Jakab András: *Nemzetközi jog és belső jog; jogalkotási törvény* [International Law and Domestic Law; Act on Legislation], in: Jakab András (ed.): Az Alkotmány kommentárja, I. kötet, Századvég Kiadó, Budapest, 2009. 411.

[52] Security Council Resolutions and the Hungarian legal system are discussed in details in: Molnár Tamás: *Mit kezd a magyar jog az ENSZ Biztonsági Tanácsának kötelező erejű határozataival? (az utóbbiak beépülése és helye a belső jogban)* [What does the Hungarian Law do with Binding Resolutions of Security Council? (transformation and place of Security Council Resolutions in domestic law)], Grotius, 2011. http://www.grotius.hu/publ/displ.asp?id=JTIYVQ (accessed on: 18.11.2012)

[53] UN S/Res. 864 (1993), 1127 (1997), 1173 (1998) and 1221 (1999) concerning Iraq; UN S/Res. 1132 (1999) concerning Angola and UN S/Res. 1267 (1999) concerning Sierra Leone.

[54] Molnár – Sulyok – Jakab 2009, 412.

[55] See UN S/Res. 757 (1992), 760 (1992) and 820 (1993) providing for sanctions against Yugoslavia; UN S/Res. 1022 (1995) suspending the embargo and 1074 (1996) providing for the embargo again.

informant providing for the suspension. It resulted that the committed act was not qualified at the time of the appellate procedure despite the fact that in that time Yugoslavia was embargoed again as the latter resolution providing for it was not promulgated in time.[56]

As for non-binding decisions of international organizations, many resolutions and recommendations of the *Parliamentary Assembly*, the *Committee of Ministers* or the European Commission for Democracy through Law – better known as the *Venice Commission* – are cited to interpret and clarify treaty based obligations thus generally they are invoked in the company of treaty articles and ECtHR judgments and for the most of the time they are to support the argumentation based on domestic law. In these cases the used terms and phrases such as '*Parliamentary Assembly also urges*' or '*the opinion of the Constitutional Court is in accordance with…*' reveals this purpose of citation.[57] The same can be said of the decisions of the United Nations and its specialized agencies and the communications of the institutions of the EU. For instance when the Constitutional Court had to decide upon a case in which the rights of homosexual people were concerned, the Court invoked many international instruments to evidence the conformity of domestic law with international standards.[58]

It is rare but unique that these instruments form the integral part of the reasoning and the formation of the final decision; however in such cases they are always accompanied by treaty based provision and judicial practice to replace and complement the lack of constitutional practice related to fundamental rights.[59]

Regarding the available decisions, ordinary courts rarely invoke non-binding instruments of international law and even in these tiny amount of cases these instruments are invoked only by referring to Constitutional Court decisions that analyses or refer to them therefore there is no practice of direct citation of non-binding international legal instruments.[60]

[56] Court of Bács Kiskun County I. Bf. 657/1997, BH 1998/409. See Schiffner Imola: *Nemzetközi jog a magyar bíróságok gyakorlatában* [International Law in the Practice of Hungarian Courts], Acta Universitatis Szegediensis - Acta Juridica et Politica Publicationes Doctorandorum Juridicorum, tom. 4 fasc. 14. (2004) 464-465.

[57] *For example see,* Constitutional Court Decisions № 14/2004. (V.7.) ABH [2004] 249-252; 57/2001. (XII.5.) ABH [2001] 496-498.; 10/2007. (III.7.) ABH [2007] 215-217; 154/2008. (XII.17.) ABH [2008] 1211-1212; 60/2009. (V.28.) ABH [2009] 523., 97/2009. (X.16.) ABH [2009] 876, 30/1998. (VI.25.) ABH [1998] 220.

[58] See Constitutional Court Decision № 37/2002. (IX.4.) ABH [2002] 240.

[59] See Constitutional Court Decisions № 18/2004. (V.25.) ABH [2004] 306, and 40/2005. (X.19.) ABH [2005] 446.

[60] See for example, Supreme Court Kfv.IV.37.138/2010/4.; Metropolitan Court of Budapest 19.P.24.473/2007/17.

4. References to customary international law

The terminology 'customary international law' is not used either in the text of the Basic Law nor in that of the Constitution, it is covered by the term '*generally recognized rules of international law*'.[61] It is generally transformed into the domestic legal system by Article Q (3) of the BL and cannot derogate the provisions of the BL. As for general transformation of customary international law through the Constitution, Molnár states that the reasoning is logically inaccurate: '*incorporating customary international law into the internal legal order with transformation technique is conceptually impossible, since the domestic legislature has no 'written customary law' to transpose. A broad inexact norm, which often requires interpretation in international adjudication to determine its precise content, cannot be transformed.*'[62] For instance Article 57 of the Constitution which guarantees the principle of *nullum crimen sine lege* gains its absolute effectiveness through international criminal provisions transformed by Article 7 (1).[63] According to constitutional judge Péter Kovács the question of technical solution that transforms international rules can be debated, but the fact that the principle of pacta *sunt servanda* obliges Hungary cannot be questionable.[64]

Generally, the Constitutional Court refers to *customary international* in the form of its codified version. Sometimes the Constitutional Court only adds the information that the cited norm is a *generally recognized rule of international* law but it relies its argumentation on the treaty provision that involves the customary international law in question.[65] There is no sharp separation among the generally recognized rules of international law thus, for instance, in decision 32/2008. (III.12.) the principles of *nullum crimen sine lege* and *nulla poena sine lege* are declared as f*undamental principles of international law*;[66] or the principle of pacta *sunt servanda* is referred as *ius cogens* and customary international law as well.[67]

The practice of the Hungarian Constitutional Court includes only a small number of cases in which customary international law appears. These cases refer to the principle of *nullum crimen sine lege* and the rule

61 Constitutional Court Decision № 30/1998. (VI.25.) ABH [1998] 220; in decision 823/B/2003 the Constitutional Court did not share this view.

62 Molnár 2007, 458.

63 Constitutional Court Decision № 2/1994. (I.14.) ABH [1994] 41.

64 Dissenting opinion of Péter Kovács: Constitutional Court Decision № 95/2009. (X.16.) ABH [2009] 863.

65 See Constitutional Court Decision № 53/1993 (X.13) ABH [1993] 327.

66 Constitutional Court Decision № 32/2008. (III.12.) ABH [2008] 334.

67 Constitutional Court Decision № 4/1997. (I.2.) ABH [1997] 41, 52.

that war crimes and crimes against humanity shall be punished without statutory limitation is declared to be *ius cogens*. It is to be noted, that the principle of *nullum crimen sine lege* also constitutes customary international law.[68]

In decision 53/1993. (X.13.) the Constitutional Court pursued a preliminary norm control[69] concerning modification of the Criminal Code and its conformity with international norms relating to prescription of crimes regulated by common Article 2 and 3 of the Geneva Conventions. Concerning these kinds of crimes against humanity and war crimes, the Constitutional Court derives the legal basis for punishability without time limit from the fact that they are considered *ius cogens* as they threaten the whole humankind.

In decision 32/2008. (III.12.), for instance, the argumentation of the Constitutional Court concerning criminality of war crimes and crimes against humanity prescribed by the universal principle of international customary law is declared to be effective in domestic law through the provisions of Article 7(1) of the Constitution. Detailed obligation issued from this norm is analyzed and interpreted in the view of the principle of *nullum crimen sine lege* which is declared in the ECHR and that of the ICCPR but the provision of these conventions contain exceptions which allow the retroactive effect of the customary norm of criminality of war crimes and crimes against humanity. These sources of international law means international legal obligations to be taken into account as Article 57(4) of the Constitution declaring the *principle of nullum crimen sine lege* in domestic law does not allow any exceptions.[70]

Concerning the practice of ordinary courts only domestic customary law is applied except for the nine 'volley trial cases'.[71] The Parliament ad-

[68] See Constitutional Court Decision № 53/1993 (X.13) ABH [1993] 327.

[69] Article 23 of the BL (1) Based on a petition containing an explicit request submitted by an authorized person pursuant to Article 6 (2) and (4) of the Basic Law, the Constitutional Court shall, in accordance with Article 24 (2) a) of the Basic Law, examine for conformity with the Basic Law the provisions of adopted but not yet promulgated Acts referred to in the petition.

[70] Constitutional Court Decision № 2/1994. (I. 14.) ABH [1994] 41; 53-54; See analysis of the decision: Bodnár László: *Igazságtétel – most már kizárólag a nemzetközi jog alapján?* [Justice – on the basis of only international law by now?] *Acta Universitatis Szegediensis - Acta Juridica et Politica*, Tom. 53. Fasc. (1998) 6. 77-84.

[71] The term refers to the prosecutions of barrages against unarmed civilians but it became used in connection with the prosecution of all criminal acts committed in the period of the 1956 revolution, thus including such crimes as extrajudicial executions. Hoffmann, Tamás: *Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts - The Hungarian Jurisprudence on the 1956 Volley Cases'*, in: Manacorda, Stefano - Nieto, Adán (eds): Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters

opted a statute in 1993 on the procedure to follow in case of certain crimes committed during the 1956 war of independence and revolution that made possible the punishment of crimes against humanity and war crimes without statutory limitation. Decision 53/1993. (X.13.) of the Constitutional Court stated that the principle of *nullum crimen sine lege* is not to be applied in such cases as the non-application of statutory limitation for the above mentioned crimes is the order of international customary law and *ius cogens*.[72] Although the Act of 1993 was declared to be unconstitutional and annulled in 1996[73] for other reasons but the volley trials were judged in the view of the statements of the 1993 decision of the Constitutional Court, thus the courts applied customary international norms while delivering the judgments in these cases.[74]

IV. Conclusion

The paper aims to present the Hungarian judicial practice in light of the application of international law. It makes comparisons between the practice of the Constitutional Court as the guardian of the Basic Law and that of ordinary courts that stand for the classical judiciary. The powers and functions of both are different and thus their practice is different in the application of international law and the significance of these sources of law in the reasoning, they also share common features. It is the efficiency and effective application of the available international instruments that can be questioned as it is a common problem for both the Constitutional Court and the ordinary courts.

in International Military Interventions, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2009. 736.

72 Constitutional Court Decision № 53/1993 (X.13.) ABH [1993] 332.

73 Constitutional Court Decision № 36/1996 (IX.4.) ABH [1996] 117-121.

74 See for example Supreme Court Bfv.X.1.055/2008/5. Bodnár 1998, 77-84; Hoffmann Tamás: *A nemzetközi szokásjog szerepe a magyar büntetőbíróságok gyakorlatának tükrében* [The Role of International Customary Law in the Practice of the Hungarian Criminal Courts] Jogelméleti Szemle, 2011/4. http://jesz.ajk.elte.hu/hoffmann48.html (accessed on 17.04.2013).