

## **Judicial Dialogue or National Monologue? The International Law and Hungarian Courts\*\*\***

### **I Introduction**

The focus of this study is the application of international law by the Hungarian Constitutional Court and ordinary courts. The purpose of the paper is to reveal whether there is any judicial dialogue or just a national monologue in this field. To achieve this aim, after an overview of the constitutional and legal framework (II), the application of the international treaties (III), international customary law and other sources of international law (IV) will be analysed, and also the interpretation of domestic law in the light of international obligations will be investigated (V) with special regard to ‘judicial dialogue’ (VI).

The importance of the question is underpinned by the fact that the Hungarian constitutional system has been – again – in transition since 2010 and the common standards of the international community – such as rule of law, protection of fundamental rights and democracy – seem to be at risk because of the permanent revision and changes of legal norms, amendments to the constitution and legal uncertainty. However, it may be presupposed that the judicial practice on the application of international law and the judicial dialogue with international courts could balance the aforementioned process, if judges are aware of its significance and are open to international law. Common values of the European constitutional states governed by the rule of law are enshrined in international treaties – as the Hungarian Constitutional Court reaffirmed in 2012.<sup>1</sup> The ordinary courts should consider this statement.

### **II Constitutional Frameworks for the Application of International Law**

#### **1 Constitutional Regulation**

In Hungary a new constitution, the Fundamental Law of Hungary<sup>2</sup> (hereinafter: FL), was adopted on 25 April 2011 and came into force on 1 January 2012. The new constitution does not affect the scope of Hungary’s international commitments. However, there are permanent

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<sup>1</sup> Decision 45/2012. (XII. 29.) AB of the Constitutional Court of the Republic of Hungary (item IV.7), ABK January 2013, 2, 29.

<sup>2</sup> For the official English translation of the Fundamental Law (without amendments), see <<http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>> and for the consolidated version after the Fourth Amendment <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29016-e>> (accessed 24 June 2013)

modifications regarding the constitutional foundations and so a short overview might be reasonable.

The FL expresses *commitment to the international community and law* (Article Q) and also contains a *European clause* mandating cooperation in the EU (Article E).<sup>3</sup> The function and the purpose of these articles are similar to the corresponding rules of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31 December 2011; hereinafter: Constitution).<sup>4</sup>

Article Q (2)-(3) of the FL regulates the relation between international and domestic law. It maintains the principle of harmony, and in respect of the ‘generally recognised rules of international law’ it retains the monist concept.<sup>5</sup> This results in the customary international law, *ius cogens* and general principles of law recognised by civilised nations, being the ‘generally recognised rules of international law’ under the terminology of the FL,<sup>6</sup> having at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as part of the constitution;<sup>7</sup> or, moreover, *ius cogens* norms have priority over the constitution.<sup>8</sup> With regard to other sources of international law (i.e. sources other than ‘generally recognised rules,’ such as treaties, mandatory decisions of international organs and certain judgements of international courts), the FL supports the dualist model with transformation. It still does not express the priority of international law over domestic law.<sup>9</sup> The ‘harmony’ shall be ensured just with those international norms to which Hungary is obligated and so the instruments of international soft law (e.g. recommendations, declarations, final acts) are excluded from the scope of the harmony rule.<sup>10</sup> According to the detailed explanation of the FL, EU law also falls out of the scope of Article Q.<sup>11</sup>

To ensure ‘harmony’, the Constitutional Court, under Article 24(2) item f) of the FL, will continue to review the conflict between domestic legislation and international treaties in

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<sup>3</sup> See also Chronowski Nóra, ‘The new Hungarian Fundamental Law in the light of the European Union’s normative values’ [2012] (numéro spéciale 1) *Revue Est Europa* 111-142, 120-124.

<sup>4</sup> 1949. évi XX. törvény, *A Magyar Köztársaság Alkotmánya* (Act XX of 1949, The Constitution of the Republic of Hungary) ch I s 6 paras (1)-(2) and (4), s 7 para(1), s 2/A. On the relation of international law and Hungarian law (before FL), see Chronowski Nóra, Drinóczi Tímea, Ernszt Ildikó, ‘Hungary’ in Dinah Shelton (ed.), *International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (Oxford University Press 2011, Oxford, 259-287) 261-268.

<sup>5</sup> However, many scholars share the view that it means a general transformation rather than adoption, thus they maintain the dualist concept instead of monist. See e.g. Sulyok Gábor, ‘A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása’ (2012) 4 (1) *Jog Állam Politika* 17-60, 18ff.

<sup>6</sup> According the practice of the Constitutional Court the expression ‘generally recognized rules of international law’ used by the Constitution and also by the FL covers universal customary international law, peremptory norms (*ius cogens*) and general principles of law recognized by civilized nations. See Decision 30/1998. (VI. 25.) AB of the Constitutional Court of the Republic of Hungary, ABH 1998, 220.

<sup>7</sup> Jakab András, *A magyar jogrendszer szerkezete* (Dialóg Campus 2007, Budapest-Pécs) 160.

<sup>8</sup> The Constitutional Court of Hungary stated in Decision 45/2012. (XII. 29.) AB (n 1) on unconstitutionality of TP-FL (in item IV.7): ‘The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law.’

<sup>9</sup> FL Article Q(2). The Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law. Decision 53/1993. (X. 13.) AB of the Constitutional Court of the Republic of Hungary, ABH 1993, 323, 333.

<sup>10</sup> Molnár Tamás, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (Dialóg Campus – Dóm 2013, Budapest-Pécs) 62-63.

<sup>11</sup> See more about Article Q of the FL in Molnár Tamás, ‘Az új Alaptörvény rendelkezései a nemzetközi jog és a belső jog viszonyáról’ in Drinóczi Tímea, Jakab András (eds), *Alkotmányozás Magyarországon 2010-2011* (PPKE JÁK – PTE ÁJK 2013, Budapest – Pécs, 83-91), and Sulyok (n 5) 17-60.

the future, but the FL neither regulates who may initiate this procedure nor refers to the possibility of ex officio revision. This is defined in the cardinal act on the Constitutional Court.<sup>12</sup> It is not clear, either, how ‘harmony’ shall be ensured if a domestic legal act violates one of the ‘generally recognised rules of international law;’, hence – as hitherto – it can be answered by constitutional interpretation. The annulment of any domestic legislation breaching an international treaty is optional under Article 24(3) item c) of the FL, which weakens the existence of the strict legal hierarchy of international law and domestic law in order to ensure the harmony between them. In the light of the constitutional obligation to ensure harmony, any international norms implemented in domestic law will take the incorporating provision’s place in the hierarchy of norms. Hence, deriving purely from the requirement of harmony, international treaties shall be placed below the constitution and above all ‘secondary legal sources’ (laws as well as other forms of state administration). However, the FL itself does not clarify the rank of norms derived from international law in the Hungarian hierarchy of legal norms, and the related rules are scattered: the relevant acts of Parliament are the Act on procedure related to international agreements and the Act on the Constitutional Court.

Article E(1), as the basis of *European and Union cooperation*, essentially follows the Section 6(4) of the Constitution word for word<sup>13</sup> and so the frame of interpretation remains unchanged;<sup>14</sup> this objective expresses the commitment to each kind of European (international or supranational) cooperation. Article E paragraphs (2) and (4), with some simplification, adopts the rules of Section 2/A of the Constitution. Article E contains only one new rule compared to Section 2/A of the Constitution: in its paragraph (3), it states that ‘[t]he law of the European Union may stipulate a generally binding rule of conduct’. From the domestic legal viewpoint, the grounds for the constitutional validity of Union law become clearer than it used to be; however, this paragraph still does not solve the problem of application primacy, i.e. that the domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the compliance of domestic with Union law still stems from EU Treaties (i.e., asking for preliminary ruling), and not from the constitution itself. As such, the position of international law in the domestic legal system is still better defined under Article Q of the FL by the harmony requirement than the constitutional rank of Union law.

## 2 Instability of the Constitutional Foundations

Beyond the direct rules of Articles B and I, with respect to Articles Q and E of the FL, international agreements also continue to oblige Hungary to respect, protect and uphold the rule of law, democracy and fundamental rights. These obligations thus stem from the constitution itself, and set such requirements which broach no exceptions. The European constitutions also contain similar provisions on international law with the same functions, reaffirming the existence of multilevel and parallel constitutionalism in the European legal area. As such, these kinds of constitutional provisions inherently commit and restrain the

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<sup>12</sup> According to Act CLI of 2011 on the Constitutional Court (*2011. évi CLI. törvény az Alkotmánybíróságról*), the revision either takes place ex officio, or upon the initiation of one-fourth of the MPs, the Government, the president of the Supreme Court, the Supreme Prosecutor, the Commissioner for Fundamental Rights, or the judge of any court of law if in a given case s/he shall apply a domestic legislative act conflicting with an international treaty.

<sup>13</sup> See also Bragyova András, ‘No New(s), Good News? The Fundamental Law and the European law’ in Tóth Gábor Attila (ed), *Constitution for a Disunited Nation* (CEU Press 2012, Budapest-New York, 335-358) 335-338.

<sup>14</sup> See also Blutman László, Chronowski Nóra, ‘Hungarian Constitutional Court: Keeping Aloof from European Union Law’ (2011) 5 (3) *International Constitutional Law* 329-348.

national governments for and by international and common European values.<sup>15</sup> Several provisions of the FL, however, can also be interpreted as permitting exceptions to the aforementioned European requirements – pertaining to democracy, the rule of law and the protection of fundamental rights – and as such they could come into conflict with international commitments. The permanent amendments of the FL have also been widening the gap between international and Hungarian constitutional values. It is impossible to assess every amendment under the framework of this study, but it is worth mentioning that the erosive process had started with the Transitional Provisions of the FL (hereinafter: TP-FL) that were adopted by the Parliament on 30 December 2011, and came into force on 1 January 2012.<sup>16</sup>

The TP-FL served the coming into force of the new constitution. However, regarding its content, the TP-FL was in fact an amendment to it, as about half of its rules were not transitional at all, and some of them undermined the principles and provisions of the FL. It was an extremely alarming issue, concerning the basic principles of the FL, that the TP-FL has overruled important statements of the Constitutional Court on the right to the independent and impartial judge<sup>17</sup> and undermined the provisions of the FL on judicial independence, the separation of church and state, division of powers, independence of the Central Bank, etc.<sup>18</sup> The Ombudsman requested the Constitutional Court to examine whether the Transitional Provisions comply with the requirements of the rule of law laid down in the FL. After the Ombudsman's initiative, the Parliament adopted the First Amendment to the FL, clarifying that the Transitional Provisions are part of the FL. By this amendment the governing majority intended to avoid the constitutional review of the TP-FL, confirming its constitutional rank.<sup>19</sup> Despite this, the Constitutional Court ruled on the Ombudsman's petition, declaring that all those provisions of the TP-FL are invalid, which did not have a transitional character.<sup>20</sup> As a response, the governing majority adopted the Fourth Amendment<sup>21</sup> of the FL, which

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<sup>15</sup> Tom Ginsburg, Svitlana Chernykh, Zachary Elkins, 'Commitment and Diffusion: Why Constitutions Incorporate International Law' [2008] (1) *University of Illinois Law Review* 201-237, 2002-203.

<sup>16</sup> An unofficial translation of the TP-FL by Bánkúti Miklós, Halmai Gábor and Kim Lane Scheppele is available at

<<http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf>> accessed 12 May 2012.

<sup>17</sup> Decision 166/2011. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 545.

<sup>18</sup> On the TP-FL and other cardinal acts read more in 'Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and Key Cardinal Laws' (ed. Halmai Gábor, Kim Lane Scheppele), available at <[http://lapa.princeton.edu/hosteddocs/hungary/Amicus\\_Cardinal\\_Laws\\_final.pdf](http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf)> accessed 12 May 2012. in Hungarian see Katalin Szajbély – Attila Láposy, 'Az Alaptörvény Átmeneti Rendelkezéseinek alkotmányosságáról' (2012) 5 (2) *Közjogi Szemle* 1-9.

<sup>19</sup> In April, 2012 the Government of Hungary lodged a bill to the Parliament as the First Amendment of the Fundamental Law of Hungary so as to clarify that the Transitional Provisions are the part of the FL. The first amendment was adopted in June 2012. The First Amendment repealed – upon the criticisms of the EU – Article 30 of the TP-FL that infringed the independence of the Central Bank.

<sup>20</sup> The Constitutional Court annulled – for formal reasons – approximately half of the articles of the TP-FL in its Decision 45/2012. (XII. 29.) AB (n 1). The Court emphasised that the Parliament acted *ultra vires* by creating non-transitional rules; at the same time it refused a substantive review of the rules concerned.

<sup>21</sup> The Parliament adopted the Fourth Amendment on 11 March 2013; it came into force 1 April 2013. In March 2013, during the parliamentary debate of the Fourth Amendment, the Council of Europe, the UN High Commissioner, the president of the European Commission, Hungarian human rights associations and scholars voiced concerns over the changes. For the joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union on the Fourth Amendment, see <[http://helsinki.hu/wp-content/uploads/Appendix\\_1\\_Main\\_concerns\\_regarding\\_the\\_4th\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_of\\_Hungary.pdf](http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf)>. Unofficial translation of the Fourth Amendment is available here: <[http://helsinki.hu/wp-content/uploads/Appendix\\_2\\_Fourth\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_Unofficial\\_translation.pdf](http://helsinki.hu/wp-content/uploads/Appendix_2_Fourth_Amendment_to_the_Fundamental_Law_Unofficial_translation.pdf)> accessed 15 April 2013.

incorporates the majority of the quashed articles into the constitution. The amendment was firmly criticised by the Venice Commission,<sup>22</sup> the European Parliament and the European Commission as it raises concerns with respect to the principle of the rule of law, EU law and Council of Europe standards.

Before the Fourth Amendment some hope was given regarding ‘constitutional continuity,’ in that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall the previous argumentation if the formulation of text of the FL is the same as was the wording of the Constitution.<sup>23</sup> However, the Fourth Amendment of the FL has repealed the decisions of the Constitutional Court delivered prior to the FL entering into force.<sup>24</sup> This brand new regulation reinforces the concern that the governing majority refuses the constitutional traditions of the last two decades.<sup>25</sup> It undermines not just the case law of the Constitutional Court, but also the practice of the courts of law, which, with increasing frequency, referred to Constitutional Court rulings, among them to decisions related to international law. Although the Constitutional Court refused the substantive examination of the Fourth Amendment, it emphasised the importance of the international and European constitutional achievements,<sup>26</sup> and later clarified that, even after the Fourth Amendment, it is possible to quote the former decisions under certain circumstances.<sup>27</sup> However, the Constitutional Court should give stronger evidence of its commitment to international and European law, because it could also trigger the ordinary courts to rely on international and European standards, and protect the rights of individuals even against the uncertain domestic law. This study will not enter into predictions, because it analyses the practice of the past, but at this point it may be ventured to say that the constitutional uncertainty and changing constitutional practice is unfavourable to the application of international law in the mostly dualist Hungarian legal system, especially because it was not really intensive even before the constitutional changes of 2010-13.

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See also Halmai Gábor: ‘Constitutionalism in Hungary: Undermining the Fundamental Law’ (2013) JURIST – Forum, April 12 <<http://jurist.org/forum/2013/04/gabor-halmi-hungary-churches.php>> accessed 15 April 2013

<sup>22</sup> See Opinion 720/2013 of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg 17 June 2013, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e>> accessed 17 June 2013.

<sup>23</sup> The Constitutional Court has clarified that the formulation of art E paras (2) and (4) of the FL and that of s 2/A paras (1)-(2) of the Constitution has the same meaning and so, during the interpretation of art E, the Court has maintained its previous precedent. Decision 22/2012. (V. 11.) AB of the Constitutional Court of Hungary, ABK June 2012, 94, 97. Reasoning [40]-[41]: ‘In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. [...] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid.’

<sup>24</sup> See art 19 of the Fourth Amendment and n 21.

<sup>25</sup> For detailed comments on the issue, see joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union, referred in n 21.

<sup>26</sup> The obligations of Hungary that arise from the international treaties, the EU membership and the generally recognised rules of international law, and the fundamental principles and values compose such a coherent system that cannot be left out of consideration during the constitution-making process, legislation and constitutional examination of the Constitutional Court. See Decision 12/2013. (V. 24.) AB of the Constitutional Court of Hungary, ABK March 2013, 542, 547.

<sup>27</sup> According to the position of the Constitutional Court, the use of the arguments in the decisions dated before the Fundamental Law shall be reasoned with sufficient detail. Ignoring the principles from the previous decisions is possible even if the content of certain provisions of the previous Constitution and the Fundamental Law is the same. However, the way that domestic and European constitutional development has done so far, the regularity of constitutional law affects the interpretation of the Fundamental Law as well. See Decision 13/2013. (VI. 17.) AB of the Constitutional Court of Hungary, ABK March 2013, 618, 624.

### 3. Questions Related to the Application of International Law

Apart from the category of generally recognised rules of international law, the Hungarian legal system follows the dualist approach with transformation. 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).<sup>28</sup> The procedure related to international agreements is regulated by Act L of 2005 and the same rules shall be applied *mutatis mutandis* to certain EU decisions, the compulsory decisions of international courts and other organisations.<sup>29</sup> The Constitutional Court has competence to decide whether the incorporation of an international norm was constitutional, and ensure the harmony of the domestic and international law. For this reason, Act CLI of 2011 on the Constitutional Court is also relevant regarding the application of international law.<sup>30</sup>

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 legal practice is a different aspect of harmony. 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 he or she expected to verify always 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? Principally the answers are all yes, and section 32 of the Act on the Constitutional Court prescribes for judges to turn to the Constitutional Court when they have to apply any domestic norm colliding with an international treaty. However, there are no sanctions if judges fail to do so. 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 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 a part of the convention itself. Is the Hungarian judge obliged to follow the practice of the European Court of Human Rights (ECtHR) on whether it develops the provisions of European Convention on Human Rights (ECHR) in a way that is different from the actual Hungarian legal practice, or is it only the task of the legislative power to keep the legislation updated? In the following, the study tries to outline the answers to the main points of these questions on the basis of the foregoing judicial practice.

## III Application of International Treaties

### 1 Definition of the International Treaties

According to Act L of 2005, an international treaty is a written agreement that is covered by instruments of international law, with any name or title and regardless of whether it is

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<sup>28</sup> The procedure related to international agreements is regulated by the Act L of 2005 (*2005. évi L. törvény a nemzetközi szerződésekkel kapcsolatos eljárásról*). This Act contains the rules on preparation, establishment, and recognition of binding force, publication and entering into force, provisional application, modification, suspension and termination of international treaties.

<sup>29</sup> Act L of 2005 s 12 and s 13 paras (3)-(4), see also Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 182ff.

<sup>30</sup> *2011. évi CLI. törvény az Alkotmánybíróságról* (Act CLI of 2011 on the Constitutional Court) s 23 paras (3)-(4), s 40 para (3), s 24-25, s 32, s 42, s 46 paras (1)-(2).

incorporated into one, two or more interrelated documents, concluded with other States or other subjects of international law with the capacity to contract, which creates, modifies or terminates rights and obligations for Hungary under the international law.<sup>31</sup> This definition complies with that of the Vienna Convention on the Law of Treaties<sup>32</sup> (promulgated in Law-Decree 12 of 1987, hereinafter: Vienna Convention), and even more, it has wider scope covering not only treaties created by states but also by other entities (e.g. the Vatican, Taiwan, Order of Malta, national liberation movements, states in statu nascendi).<sup>33</sup> The former regulation on the procedure related to international agreements (Law-Decree 27 of 1982) was declared unconstitutional by the Constitutional Court in 2005. The Court relied, inter alia, on the fact that the law-decree was not in accordance with the Vienna Convention.<sup>34</sup>

The courts of law therefore have to take into consideration the definition of Act L of 2005, the rulings of the Constitutional Court, and the terminology of the Vienna Convention. They do not make attempts to create an independent definition of ‘international treaty’. The statutory definition clearly distinguishes international treaties from political commitments.

## 2 Conditions of Direct Applicability

The courts distinguish the ratified, non-ratified, approved etc. treaties on the basis of Act L of 2005. However, because of the dualist approach, the courts apply only those treaties which are transformed, i.e. promulgated into a Hungarian legal act and entered into force. The courts do not intend to use treaties which are not in force,<sup>35</sup> but the situation is the same as with the domestic legal acts – they are applied by the courts when they come into effect. If an international treaty comes into effect earlier than the legislator can transpose it by a domestic legal act, the courts have the competence to decide whether the given treaty has to be applied in single cases.<sup>36</sup>

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.<sup>37</sup>

According to the courts’ practice, the procedural condition of direct applicability is the transformation of the international treaty, and the substantive condition is whether the rights, duties and sanctions in the given convention are sufficiently defined for judges to apply them in concrete cases, and establish subjective rights upon the treaty provisions.<sup>38</sup> It is in compliance with the rulings of the Constitutional Court.

## 3 The Influence of EU Law

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<sup>31</sup> Act L of 2005 s 2 item a).

<sup>32</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>33</sup> Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 109-110.

<sup>34</sup> Decision 7/2005. (III. 31.) AB of the Constitutional Court of the Republic of Hungary, ABH 2005, 83, 94.

<sup>35</sup> E.g. in a case started in 2008 the plaintiff referred to the Charter of Fundamental Rights of the EU. The Court of Appeal, however, found it irrelevant in 2010, as the Charter surely has no retroactive effect, and the legal dispute shall be determined on the basis of the legal acts effective at the time of the injury. Budapest-Capital Regional Court of Appeal 5.Pf.20.736/2010/6.

<sup>36</sup> Decision 116/B/2006. AB of the Constitutional Court of the Republic of Hungary, ABH 2007, 1936, 1938.

<sup>37</sup> Decision 7/2005. (III. 31.) AB (n 34) 88-89.

<sup>38</sup> Fejér County Court 25.P. 22.432/2008/61., 25.P./2008/80.

EU law has been regarded as a separate legal system by the Constitutional Court and the courts of law since the accession. As such the supremacy and direct applicability of EU legal acts are recognised; in most cases the courts ensure the effectiveness of Community/Union law<sup>39</sup> but it does not really influence the application of international law, except in certain cases, when the applied EU legal act refers to the ECHR. The references to the principles of direct effect or supremacy are rather automatic;<sup>40</sup> the courts follow the well-known textbooks on EU law or utilise the ministerial explanations attached to the bill of the applied Hungarian law. If the EU legal act refers to the ECHR, the courts then cite the referred article of the Convention and sometimes the landmark decisions of the ECtHR relevant in the given case, but only rarely do they add further interpretation or reach individualised conclusions in the light of the particular circumstances of the case.<sup>41</sup> However, the Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, the ECHR and domestic law, and interpret the harmonised Hungarian legal acts in the light of the ECHR, if the implemented EC directive provides a minimum standard.<sup>42</sup>

So far, the Constitutional Court has established two principles marking the boundaries of future constitutional practice. *First*, it will not treat the founding and amending treaties of the European Union as international law for the purposes of constitutional review,<sup>43</sup> thereby setting up a three-tier system of legal rules applicable within Hungarian legal practice that distinguishes between national, international and European law. *Second*, in the absence of jurisdiction to review substantive (un)constitutionality (as opposed to procedural constitutionality), the Constitutional Court does not regard a conflict between domestic law

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<sup>39</sup> See Dezső Márta, Vincze Attila, *Magyar alkotmányosság az európai integrációban* (2nd rev edn, HVG-ORAC 2012, Budapest) 208-209.

<sup>40</sup> See e.g. the Decision of Szabolcs-Szatmár-Bereg County Court 5.K.20. 631/2010/4.: ‘Since the date of the accession of Hungary to the European Union on 1 May 2004 May 1 the Community Treaty has the highest rank in the hierarchy of legal norms. From that date the inferior laws shall be always assessed and interpreted by the courts and the authorities in the light of the aim and spirit of the Treaty. This also means that the relationship of EU law and national law is determined by the principle of primacy, as the Supreme Court stated in principle: the national law shall be interpreted in a way that is appropriate to fulfil (i.e. implement) the Community law (EBH 2006/1568).’

See also Supreme Court Decision Kfv.I.35.052/2007/7. that referred to *Costa v ENEL* and *Van-Gend en Loos*.

<sup>41</sup> E.g. in the case law on expulsion, the courts are used to refer to the Council Directive 2003/86/EC on the right to family reunification, which cites Article 8 of the ECHR. Hence, the Hungarian courts quote Article 8 of the ECHR, and then summarise the practice of the ECtHR: ‘According to the case law of the ECtHR, in order to determine whether the family reunification might be limited or not (i.e. whether expulsion is applicable, and if so, how long), it must first be determined whether there is a family in the country of residence (does the referred family relationship correspond to the concept of the family), and then, whether the expulsion of the family member limits family life (the living conditions of the family in the host country are sufficient). If not, it must be considered whether the limitation of the family life is acceptable [Article 8(2) of ECHR justifies the reason], then, to what extent coexistence may be limited (proportionality of the expulsion).’ This formula was used by the Municipal Court of Budapest in several cases, see 27.K.33.900/2009/5., 27.K.30.107/2010/6., 27.K.32.880/2009/8., 17.K.33.440/2008/5.

<sup>42</sup> The Supreme Court established that only refugees are covered by the scope of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ 251/12; however, in the light of Article 8 of the ECHR, the domestic law may recognise this right of other protected persons as well. The Supreme Court emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. According to the Supreme Court, there is no such international obligation that would require the equal safeguard of the right to family reunification of refugees and other protected persons and so domestic law may lay down different rules in term of the different groups; however, express provisions on the differentiation is needed in the domestic law, otherwise equal protection shall be ensured with regard to the ECHR. Supreme Court Kfv.III.37.925/2009/7.

<sup>43</sup> Decision 1053/E/2005. AB of the Constitutional Court of the Republic of Hungary, II ABH 2006, 1824.



and EU law as a constitutionality issue<sup>44</sup> and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.<sup>45</sup>

#### 4 ECHR – the Most Popular Treaty Applied by the Hungarian Courts

The Hungarian courts usually refer to the interpretations of international tribunals when they apply an international treaty and usually put aside the national interest. The most popular is definitely the ECHR and the case law of the ECtHR, while foreign judgments related to the ECHR are never referred to. In general, the ECHR was – and in most cases is still – a point of reference for the Constitutional Court and the ordinary courts (referred as passing comment or obiter dictum), but not the rationale for the decision (ratio decidendi). The Constitutional Court is the most consequential in the field of the application of the Convention.<sup>46</sup> In recent years (2011-2013) the references of the Constitutional Court became increasingly explicit and definite.

According to the Constitutional Court, if the essential content of a certain fundamental right in the Constitution / FL is defined in the same way as it is formulated in international treaties (e.g. International Covenant on Civil and Political Rights [hereinafter: ICCPR] or the ECHR), the level of the fundamental rights protection provided by the Constitutional Court may not, under any circumstances, be lower than the level of international protection (typically that detailed by the ECtHR). It follows from the principle of pacta sunt servanda that the Constitutional Court shall pursue the case law of the ECtHR even if it has not been derived from its own previous ‘precedents’.<sup>47</sup> To interpret and clarify a certain provision of the ECHR, the Constitutional Court takes as a basis the practice of the ECtHR, which body was authorised by the contracting parties to give an authoritative interpretation of the Convention. Foremost those decisions (precedents) in which the ECtHR interprets the Convention itself, and points out what is in compliance with it and what violates it, are taken as a basis.<sup>48</sup> The interpretation of international treaties given by the Constitutional Court obviously shall coincide with the official interpretation given by the Council of Europe.<sup>49</sup>

*Molnár* even assessed the phenomenon as if the Constitutional Court was stating ‘double unconstitutionality’ by declaring first the collision with – or potential infringement of – the ECHR, and second the ‘domestic unconstitutionality’ upon the interpretation of the provisions of the Constitution or FL.<sup>50</sup> The best examples for this are the Constitutional Court Decisions 1/2013. (I. 7.) on electoral registration and 4/2013. (II. 21.) on using a five-pointed red star.<sup>51</sup> In the latter case, the Constitutional Court explicitly overruled its previous practice on criminalising the use of totalitarian symbols with regard to the decisions of ECtHR related to Hungary. In these decisions the ECtHR rulings seem to determine the ratio decidendi indeed and they do not remain just obiter dictum.

The ordinary courts also respect the ECHR and they should also respect the case law of the ECtHR; however, their practise is neither unambiguous nor consistent in this field. The

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<sup>44</sup> Decision 72/2006. (XII. 15.) AB of the Constitutional Court of the Republic of Hungary, I ABH 2006, 819, 860.

<sup>45</sup> Blutman, Chronowski (n 14) 329-348.

<sup>46</sup> See Szalai Anikó, ‘Az Emberi Jogok Európai Bírósága ítélezésének megjelenése a magyar Alkotmánybíróság gyakorlatában’ (2010) 7 (4) Kül-Világ 14-21, 15-16.

<sup>47</sup> Decision 61/2011. (VII. 13.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 290, 321.

<sup>48</sup> Constitutional Court Decisions 166/2011. (XII. 20.) AB, ABH 2011, 545, 557.; 43/2012. (XII. 20.) AB (on the protection of families), ABK 2012, 788, 800-801.

<sup>49</sup> Decision 41/2012. (XII. 6.) AB of the Constitutional Court of Hungary, ABK 2012, 742, 745.

<sup>50</sup> Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 186.

<sup>51</sup> Decisions 1/2013. (I. 7.) AB of the Constitutional Court of Hungary, ABH 2013, 50-87. and 4/2013. (II. 21.) AB of the Constitutional Court of Hungary, ABH 2013, 188-211.

Strasbourg case law does not fall within the scope of Act L of 2005 and so it does not bind the courts on a formal basis.<sup>52</sup> It is also true that government communication or action in certain cases might indirectly influence the enforcement of international courts' judgments, but the effect of the expressed 'national interest' has not yet appeared in the domestic courts' decisions. Concerning the legal effect of a decision by an international judicial body, the reaction of the legislative power is recently something to be worried about. As regards the *Fratanoló case*<sup>53</sup> 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.<sup>54</sup> However, 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-conformant judgment and relieved the accused on the grounds that no crime had been committed in the view of the ECtHR according to its decision in a similar case.<sup>55</sup>

All in all, the above-mentioned rulings of the Constitutional Court may encourage the ordinary courts to follow the ECtHR practice as well. Despite this, there were cases when the ordinary court completely refused to apply the ECtHR judgments referred to by the plaintiff,<sup>56</sup> or the court of appeal clarified for the court of first instance that, although the judgments of the ECtHR must be taken into consideration, it does not mean that – regarding the differences between the applicable law and the parties concerned – it could be implemented generally and automatically.<sup>57</sup>

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<sup>52</sup> An exception to this rule that the Act XIX of 1998 on Criminal Procedure prescribes: review proceedings may be instituted in favour of the defendant if a human rights institution set up by an international treaty has established that the conduct of the proceedings or the final decision of the court has violated a provision of an international treaty promulgated by an act, provided that Hungary has acknowledged the jurisdiction of the international human rights organisation and that the violation can be remedied through review. The claim shall be judged on the basis of the decision of the human rights institution and disregard to the domestic law infringing the treaty provision. See *1998. évi XIX. törvény a büntetőeljárásról* (Act XIX of 1998 on Criminal Procedure) § 416 para (1) item g) and s 423 para (3).

<sup>53</sup> *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011 [violation of article 10 of the Convention by using of totalitarian symbols].

<sup>54</sup> 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 J/6852 of the Parliament on the execution of the judgement 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 58/2012. (VII. 10.) of the Parliament on the execution of the judgement of the European Court of Human Rights in the case of *Fratanoló v. Hungary*]. Molnár Tamás, 'Két kevésbé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi büntetőbíróság döntései, valamint az egyoldalú állami aktusok esete a magyar jogrendszerrel' (2012) 5 (3) *Közjogi Szemle* 1-7, 1.

<sup>55</sup> Curia Bfv.III.570/2012/2.; Molnár, *ibid* 3.

<sup>56</sup> In 2003 the Municipal Court of Budapest drew the attention to the fact that the Hungarian judiciary does not apply a precedent system, and the judgments of the ECtHR before the EU accession cannot be referred to in the proceedings of the courts and administrative authorities. [This is obviously a professionally incorrect position.] Decision of Municipal Court of Budapest 20. Kpk.45.434/2003/2. Cited by Szalai (n 46) 18. and Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 186. In the famous *Fratanoló* case, the Pécs Regional Court of Appeal in 2012 also declared that the judgments of the ECtHR are not directly applicable. Pécsi Ítéletábrla Bfv.III.570/2012/2. Cited by Molnár, *ibid*.

<sup>57</sup> Decision of the Budapest-Capital Regional Court of Appeal 5.Pf.20.736/2010/6. The subject matter of the case was the right to a judicial decision within a reasonable time, and the court of first instance referred to Article 6 of the ECHR, several judgement of the ECtHR, even the jurisprudence (textbooks, German commentaries), and interpreted Article 2 of the Hungarian Civil Procedure Code (CPC) in that light. Section 2 of the CPC provides for the courts to ensure the right to completion of the trials within reasonable time. Article 6 of ECHR guarantees the right to a fair and public hearing within a reasonable time. The judge assessed that the CPC shall be interpreted in compliance with the ECHR, and the right to completion of the trial shall not be restricted to the

An opposite (but rare) example is the landmark judgment in the Hungarian Guard case. The Budapest-Capital Regional Court of Appeal directly applied the ECHR, and deliberated the admissibility of the restriction of the given fundamental right (i.e., dissolution of the association and movement concerned) on the basis of ECtHR measures. Thus, instead of relying on the Constitution and the necessity – proportionality test of the Constitutional Court, the criteria drawn up under Article 10 of the ECHR were implemented (i.e. the restriction is prescribed by law, has a legitimate aim, and is necessary in a democratic society). The court also referred to the International Convention on the Elimination of all forms of Racial Discrimination (New York, 1965), so as to strengthen the argumentation.<sup>58</sup> Concerning the practice on international judicial decisions, the ECtHR is the most frequently cited; however, it happens that, in the reasoning, decisions of the ECtHR which are only indirectly connected to the case are cited and invoked, and sometimes the foreign names of these decisions are even misspelled. The famous *Babus case* of the Budapest-Capital Regional Court of Appeal is an 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, through the decoration of reasoning with irrelevant and incorrectly cited decisions of the ECtHR.<sup>59</sup>

It has to be noted that, in the practice of ordinary courts, there is a group of cases that reveal the application of international law; those containing a foreign element and international law has a significant role in the reasoning of the judgment, a definitive one or at least complementary. These cases are related to double taxation,<sup>60</sup> the calculation of social allowances such as old age pension<sup>61</sup> for those who lived a part of their life abroad – in a non-EU Member State or before the accession of Hungary – and, in most instances, litigation concerning the carriage of goods. Altogether, beyond human rights-related issues and the ECHR, the most frequently cited international instrument, among other bilateral treaties in the subject,<sup>62</sup> is the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR).<sup>63</sup>

#### **IV References to Customary International Law and Other Sources of International Law**

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right to a final judgment; instead it also covers the interim decisions and the hearings during the whole proceeding. The judge partially awarded for the plaintiff (against the defender court). The Court of Appeal, however, stated that Article 6 of the ECHR cannot be an independent legal basis, and the legislator did not intend to encourage such a broad interpretation of Section 2 of the Civil Procedure Code.

<sup>58</sup> Decision of the Budapest-Capital Regional Court of Appeal 5.Pf.20.738/2009/7.

<sup>59</sup> Budapest-Capital Regional Court of Appeal Decision 3.Bhar.341/2009/6. Koltay András, 'A Fővárosi Ítéltábla határozata Babus Endre újságíró rágalalmazási ügyében' (2010) 1 (3) Jogesetek Magyarázata 33-38, 35.

<sup>60</sup> 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. 30 August in Supreme Court Decision Kfv.I.35.460/2007/8 and Bács-Kiskun County Court Decision K.21.858/2006/17.

<sup>61</sup> See, for example, Agreement on social security between the Hungarian Republic and the Republic of Austria, 7 September, 1961 in Supreme Court Decision MfvK.IV.10.206/2007/4., Municipal Court of Budapest 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 in Győr-Moson-Sopron County Court Decision 9.K.27.302/2007/10.

<sup>62</sup> 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 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 in Supreme Court Decision Kfv.I.35.103/2007/.

<sup>63</sup> *Convention on the Contract for the International Carriage of Goods by Road* opened for signature 19 May 1956 399 UNTS 189 (entered into force 2 July 1961) See the application of the convention 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.

## 1 Customary International Law

The terminology ‘customary international law’ is used neither in the text of the FL, nor in that of the Constitution; it is covered by the term ‘generally recognised rules of international law’.<sup>64</sup> It is generally transformed into the domestic legal system by Article Q(3) of the FL and cannot derogate the provisions of the FL.<sup>65</sup> According to constitutional judge *Péter Kovács*, the question of the technical solution that transformed international rules can be debated but the fact that the principle of *pacta sunt servanda* obliges Hungary is unquestionable.<sup>66</sup>

The Constitutional Court refers to *customary international law* in the form of its codified version. Sometimes the Constitutional Court only adds the information that the cited norm is a *generally recognised rule of international law* but it relies, for its argumentation, on the treaty provision that involves the customary international law in question.<sup>67</sup> There is no sharp separation among the generally recognised 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 *fundamental principles of international law*;<sup>68</sup> and the principle of *pacta sunt servanda* is referred to as *ius cogens* and customary international law as well.<sup>69</sup> Moreover, the qualification is important as *ius cogens* can prevail even over the FL.<sup>70</sup>

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 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.<sup>71</sup> In decision 53/1993. (X. 13.), the Constitutional Court pursued a preliminary norm control concerning the modification of the Hungarian Criminal Code and its conformity with international norms relating to the 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 derived the legal basis for punishability without time limit from the fact that they are considered *ius cogens* as they threaten the whole of humankind. In decision 32/2008. (III. 12.), for instance, the argumentation of the Constitutional Court concerning the criminality of war crimes and crimes against humanity prescribed by universal principle of international customary law is declared to be effective in domestic law through the provisions of Section 7(1) of the Constitution. The obligations issuing from this norm are analysed and interpreted in the view of the principle of *nullum crimen sine lege*, which is declared in the ECHR and in the ICCPR; however, the provisions 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 mean international legal obligations to be taken into account as Section 57(4) of the Constitution – and Article XXVIII(4) of the FL – declaring the principle of *nullum crimen sine lege* in

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<sup>64</sup> Decision 30/1998. (VI. 25.) AB (n 6) 220.; but in decision 823/B/2003, ABH 2006, 1540. the Constitutional Court did not share this view.

0/1998. (VI. 25.) AB (n 6) 220.; but in decision 823/B/2003, ABH 2006, 1540. the Constitutional Court did not share this view.

<sup>65</sup> Decision 4/1997. (I. 22.) AB of the Constitutional Court of the Republic of Hungary, ABH 1997, 41, 83.

<sup>66</sup> Decision 95/2009. (X. 16.) AB of the Constitutional Court, ABH 2009, 863. (Judge Kovács).

<sup>67</sup> See Decision 53/1993 (X.13.) AB (n 9) 327.

<sup>68</sup> Decision 32/2008. (III. 12.) AB of the Constitutional Court of the Republic of Hungary, ABH 2008, 334.

<sup>69</sup> Decision 4/1997. (I. 22.) AB of the Constitutional Court of the Republic of Hungary, ABH 1997, 41, 52.

<sup>70</sup> For example see, Constitutional Court Decisions 4/1997. (I. 22.) AB, ABH 1997, 51.; 30/1998. (VI. 25.) AB (n 6) 237-238.

<sup>71</sup> See Decision 53/1993 (X.13.) AB (n 9) 327.

domestic law does not contain any exceptions from the general ban.<sup>72</sup> It is noteworthy, however, that since 2011 – on the bases of the aforementioned Constitutional Court decisions – Article XXVIII (5) of the FL limits the prohibition related to the principle of *nullum crimen sine lege*.

Concerning the practice of ordinary courts, only domestic customary law is applied except for the nine so-called ‘volley cases’. The term refers to the prosecutions of gunfire 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.<sup>73</sup> The Parliament adopted 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*.<sup>74</sup> Although the Act of 1993 was declared to be unconstitutional and annulled in 1996 for other reasons, the volley trials were however judged in the light of the statements of the 1993 decision of the constitutional Court and so the courts applied the customary international norm while delivering the judgments in these cases.<sup>75</sup>

## 2 ‘Other Sources of International Law’

The Constitutional Court frequently refers to the resolutions of international organisations to clarify treaty-based obligations.

As regards binding resolutions of international organisations, the FL does not contain any provisions; however, there are many international organisations that make binding decisions. The UN Security Council is a well-known example.<sup>76</sup> As for the transformation of Security Council decisions, Hungarian practice is incoherent, confusing and contradictory. Sometimes they are promulgated by government decrees or regulations and very rarely by acts.<sup>77</sup> Sometimes (such as many of the resolutions concerning sanctions against Iraq, Angola, Sierra Leone and Afghanistan) they do not even appear in the Hungarian legal system,<sup>78</sup> and it happens quite often that they are published in the form of a Foreign Office bulletin (*külgügyminiszteri tájékoztató*). This latter solution is a monist technique; as such, this kind of

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<sup>72</sup> Decision 2/1994. (I. 14.) AB of the Constitutional Court of the Republic of Hungary, ABH 1994, 41, 53-54.; See on this decision, Bodnár László, ‘Igazságtétel – most már kizárólag a nemzetközi jog alapján?’ (1998) 6 (53) *Acta Universitatis Szegediensis – Acta Juridica et Politica* 77-84.

<sup>73</sup> Hoffmann Tamás, ‘Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases’ in Stefano Manacorda, Adán Nieto (eds), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions* (Cuenca Ediciones de la Universidad de Castilla-La Mancha 2009, 735-753) 736.

<sup>74</sup> Decision 53/1993. (X. 13.) AB (n 9) 332.

<sup>75</sup> See for example, Supreme Court Bfv.X.1.055/2008/5. Bodnár (n 72) 77-84.; Hoffmann Tamás, ‘A nemzetközi szokásjog szerepe a magyar büntetőbíróságok gyakorlatának tükrében’ [2011] (4) *Jogelméleti Szemle* <<http://jesz.ajk.elte.hu/hoffmann48.html>> accessed 17 April 2013.

<sup>76</sup> Molnár Tamás, Sulyok Gábor, Jakab András, ‘Nemzetközi jog és belső jog; jogalkotási törvény’ in Jakab András (ed), *Az Alkotmány kommentárja* (2nd rev edn, Vol. I, Századvég 2009, Budapest, 357-386) 381.

<sup>77</sup> Security Council Resolutions and the Hungarian legal system is 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)’ [2011] *Grotius* <<http://www.grotius.hu/publ/displ.asp?id=JTIYVQ>> accessed 18 November 2012.

<sup>78</sup> SC Res 864, 3277<sup>th</sup> mtg, UN Doc S/Res/864 (15 September 1993), SC Res 1127, 3814<sup>th</sup> mtg, UN Doc S/RES/1127 (28 August 1997) SC Res 1173, 3891<sup>th</sup> mtg, UN Doc S/RES/1173 (12 June 1998) and SC Res 1221, 3965<sup>th</sup> mtg, UN Doc S/RES/1221 (12 January 1999); SC Res 1267, 4051<sup>th</sup> mtg, UN Doc S/RES/1267 (1999) (15 October 1999).

publication of resolutions is absolutely contrary to the provisions concerning Hungarian legal order and legal certainty.<sup>79</sup> In legal practice it causes problems in determining the applicable law. For example, during the years of the Yugoslav Wars, the SC imposed an arms embargo over the whole territory of the former state. A smuggler was arrested on Hungarian territory and convicted of violating it but at second instance the judgment was modified and he was discharged. In fact the embargo was suspended for a while but at the time of the crime it was in force again.<sup>80</sup> The earlier 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 bulletin providing for the suspension. The result was that the act committed was not qualified as a crime at the time of the appellate procedure, despite the fact that at that time Yugoslavia was embargoed again, as the latter resolution providing for it was not promulgated in time.<sup>81</sup> As for non-binding resolutions, the recommendations and resolutions of the competent organs of the Council of Europe are frequently invoked as relevant interpretations of ECHR provisions and the Constitutional Court relies many times on these sources as guidance. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations; in general they are therefore invoked in the company of treaty-based provisions and ECHR judgments and, most of the time, they are not the source and basis of the final decision, just the support for the argumentation based on domestic law. In these cases the terms and phrases used, such as *Parliamentary Assembly also urges* or *the opinion of the Constitutional Court is in accordance with [...]* reveal of the purpose of citation.<sup>82</sup> The same can be observed regarding the decisions of the United Nations and its specialised 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 evince the conformity of domestic law with international standards.<sup>83</sup>

It is rare but not unique for these instruments to form an integral part of the reasoning and the formation of the final decision; however, in such cases they are always accompanied by treaty-based provisions and judicial practice to replace and complement the lack of constitutional practice related to a fundamental right.<sup>84</sup>

Regarding the available decisions, ordinary courts rarely invoke non-binding instruments of international law, except by referring to Constitutional Court decisions that analyse or refer to them. As such, direct citation of non-binding international legal instruments is not practiced.<sup>85</sup>

## V Interpretation of Domestic Law in the Light of International Obligations

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<sup>79</sup> Molnár, Sulyok, Jakab (n 76) 382.

<sup>80</sup> See SC Res 757, 3083<sup>th</sup> mtg, UN Doc S/RES/757 (30 May 1992), SC Res 760, 3086<sup>th</sup> mtg, UN Doc S/RES/760 (18 June 1992) and SC Res 820, 3200<sup>th</sup> mtg, UN Doc S/RES/820 (17 April 1993) providing for sanctions against Yugoslavia; SC Res 1022, 3595<sup>th</sup> mtg, S/RES/1022 (22 November 1995) suspending the embargo and SC Res 1074, mtg, UN Doc S/RES/1074 (1996) providing for the embargo again.

<sup>81</sup> Bács Kiskun County Court I. Bf. 657/1997., BH 1998. 409. See Imola Schiffner, 'Nemzetközi jog a magyar bíróságok gyakorlatában' (2004) 14 (4) Acta Universitatis Szegediensis – Acta Juridica et Politica Publicationes Doctorandorum Juridicorum 437-480, 464-465.

<sup>82</sup> For example see, Constitutional Court Decisions 14/2004. (V. 7.) AB, ABH 2004, 249-252.; 57/2001. (XII. 5.) AB, ABH 2001, 496-498.; 10/2007. (III. 7.) AB, ABH 2007, 215-217.; 154/2008. (XII. 17.) AB, ABH 2008, 1211-1212.; 60/2009. (V. 28.) AB, ABH 2009, 523., 97/2009. (X. 16.) AB, ABH 2009, 876., 30/1998. (VI. 25.) AB (n 6) 220.

<sup>83</sup> See Decision 37/2002. (IX. 4.) AB of the Constitutional Court, ABH 2002, 240.

<sup>84</sup> See Constitutional Court Decisions 18/2004. (V. 25.) AB, ABH 2004, 306. and 40/2005. (X. 19.) AB, ABH 2005, 446.

<sup>85</sup> See for example, Supreme Court Kfv.IV.37.138/2010/4.; Municipal Court of Budapest 19.P.24.473/2007/17.

## 1 'Indirect Application' of International Law

The Constitutional Court declared that domestic law shall be made and interpreted in the view of international obligations, no matter whether the obligation issues from customary international law or is incorporated in a treaty.<sup>86</sup> Using international law as an interpretational tool is based on Article Q (2) of the FL. The problem arises in connection with non-binding sources of international law; however, constitutional judge Péter Kovács noted that invoking them would help the positivist foundation of argumentation.<sup>87</sup> *Blutman* says that, due to its independence, the Constitutional Court is free to choose its tools for the argumentation and interpretation. Only the validity, causality and verifiability of conclusions form limitations to the interpretation.<sup>88</sup> The aim is to devise a politically and ideologically neutral judgment. It can easily be achieved by considering the (non-binding) decisions of international organisations and interpretative solutions of judgments of third States' courts.<sup>89</sup>

Obligation derived from the FL means that the Hungarian State takes part in the community of nations and this participation is constitutional order for domestic law.<sup>90</sup> 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 good 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. Participation in the community of nations hence presumes the application of international norms containing social and moral standards as instruments for interpretation. In this way the citation of non-binding international documents and foreign jurisprudence as a tool for interpreting the Fundamental Law can be justified.<sup>91</sup>

According to *Blutman*, the main question is whether the FL 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 Section 7(1) of the Constitution (now Article Q of the FL) as well. However, non-binding norms might be taken into consideration to interpret norms that oblige the State.<sup>92</sup>

Regarding the available decisions, ordinary courts, most of the time, invoke the practice of the ECtHR if the case before them concerns Fundamental Law issues, in order to interpret domestic legal provisions correctly (mainly in those cases when they are quite ambivalent or do not seem to be in conformity with international obligations).<sup>93</sup> It is not rare that the ECtHR practice is invoked in the form that it was discussed and analysed in a Constitutional Court decision, and the relevant decisions of the ECtHR are not cited directly,<sup>94</sup>

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<sup>86</sup> Constitutional Court Decisions 4/1997. (I. 22.) AB, ABH 1997, 41, 48-49.; 380/B/2004. AB, ABH 2007, 2438., 61/2011. (VII. 13.) AB, ABH 2011, 320. *Blutman* László, 'A nemzetközi jog használata az Alkotmány értelmezésénél' (2009) 64 (7-8) *Jogtudományi Közlöny* 301-315, 304.

<sup>87</sup> Constitutional Court Decision 41/2005. (X. 27.) AB, ABH 2005, 459. (Judge Kovács); *Blutman* (n 86) 302-303.

<sup>88</sup> *Blutman* (n 86) 303.

<sup>89</sup> Constitutional Court Decision 21/1996. (V. 17.) AB, ABH 1996, 74.; *Blutman* *ibid*.

<sup>90</sup> Constitutional Court Decisions 53/1993. (X.13.) AB, (n 9) 323.; 15/2004. (V. 14.) AB, ABH 2004, 269.

<sup>91</sup> *Blutman* (n 86) 303-304.

<sup>92</sup> See Decision 45/2005. (XII.14.) AB, ABH 2005, 569. (Judge Kovács); *Blutman* (n 86) 304.

<sup>93</sup> 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.

<sup>94</sup> See for example, Municipal Court of Budapest 19.P. 23.191/2006./19.; Supreme Court Kfv.III.37.385/2008/4.

or only the ‘practice of the ECtHR’ is invoked without any exact decision to support the statement.<sup>95</sup>

## 2 The Effect of International Legal Instruments on the Reasoning

International law has *constitutive* effect on the reasoning when it serves the basis for the judgement. For example in 1993 the Hungarian Parliament passed a law on *Procedures Concerning Certain Crimes Committed during the 1956 Revolution*. This law tried to make possible some form of ‘historical justice’ in order to prosecute Communist offenders as they committed crimes against humanity. The President of the Republic did not promulgate the act, but turned to the Constitutional Court for a preventive norm control. The President asked the Court to review the law for its conformity with both the Constitution and two international agreements, Article 7 of the ECHR and Article 15 of the ICCPR, which declared the principles of *nullum crimen* and *nulla poena sine lege*. 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.<sup>96</sup> By signing and ratifying this convention, Hungary undertook an obligation not to apply its own statute of limitations in cases involving war crimes and crimes against humanity.<sup>97</sup> The Constitutional Court even highlighted the fact that the possibility of ignoring the principle of *nullum crimen* and *nulla poena sine lege* with regard to these kinds of crimes is based on customary international law and so the non-applicability of statutory limitations obliges Hungary without any conventional provisions.<sup>98</sup>

International law has *additional constitutive effect* when the international norm plays a supplementary role in the reasoning with other national legislative acts. In this case the final decision is based on the two types of sources as well, with the same emphasis. For example, in 1990 capital punishment was declared to be unconstitutional. The relevant provisions of the Criminal Code which permitted capital punishment as a criminal sanction conflicted with the constitutional prohibition against any limitation on the essential content of the right to life and to human dignity. This statement based on the Constitution was supplemented by international obligations and thus it is clarified as such: capital punishment conflicts with provisions that declares that human life and human dignity form an inseparable unit, thus having a greater value than other rights; and thus being an indivisible, absolute fundamental right limiting the punitive powers of the State. The reasoning is based on the relevant articles of the ICCPR;<sup>99</sup> and the ECHR with its Protocol no. 6 dealing with the right to life.<sup>100</sup> These international

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<sup>95</sup> See for example, Békés County Court 5. P. 20259/2008/7.; Municipal Court of Budapest 20.Bf.6162/2009/2.

<sup>96</sup> *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, opened for signature 26 November 1968, New York, 754 UNTS 73 (entered into force 11 November 1970) [hereinafter: 1968 New York Convention] Article II.

<sup>97</sup> See 1968 New York Convention, Article III-IV.

<sup>98</sup> Decision 53/1993. (X. 13.) AB (n 9) 323-338.

<sup>99</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, New York, 999 UNTS. 171. (entered into force 23 March 1976) Art 6.1. 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.

<sup>100</sup> While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognised 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,



norms clarified the provisions of the Constitution in the light of (partly prospective) international obligations and so they had a significant role in the final reasoning of the decision.<sup>101</sup> International law has a *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, and the Constitutional Court relies many times on these sources as guidance (as with the judgments and decisions of international judicial organs to support argumentation), or to justify that the opinion of the Constitutional Court in the reasoning is in accordance with international standards and international obligations; thus recommendations are not the sources of obligation, they are not the norms to apply; they are only the tools of interpretation of treaty based international obligations.

As regards the practice of ordinary courts, in the most cases the invocation of international law has only supportive effect, and there are very few cases where international law plays a significant role in the reasoning of the court. When international law has a constitutive effect on the case, it is usually the practice of the CJEU or that of the ECtHR which forms the basis of the reasoning. The common feature of these cases is that the applicable law is deduced from the jurisprudence. As regards the ECHR practice, the Supreme Court carried out a detailed analysis of Article 6 (the right to fair trial) and 8 (the right to respect for private and family life, home and correspondence) of the Convention in connection with a case on the legality of perquisition.<sup>102</sup>

## **VI Conclusions on Judicial Dialogue**

### **1 On 'Dialogue' in General**

Dialogue is when two (or more) participants, in an equal position, seek agreement via an exchange of views, generally in order to achieve some joint outcome. The precondition of the dialogue is the near identical or similar position of the participants, which primarily occurs at the level of powers and influence, and from this perspective, assumes identical weight. The dialogue is actually a specific form of debate; therefore it shall be distinguished from general discussion and consultation as well. As a specific form of debate, some criteria may be outlined that characterise dialogue, without which the parties would misunderstand each other.

First, the dialogue assumes a common goal or, if you prefer, a common subject on which the dialogue proceeds. The dialogue may never end by itself. The second criterion is the commitment to the common goal. All participants want to achieve the common goal, which is to eliminate or reduce the conflict, and the debate or their individual interests shall be subordinated to this goal. Regularity is also an important feature of the dialogue. The dialogue is rarely a single exchange of views, because the interests of the participants are usually complex. The fourth characteristic of a dialogue is that the parties strive to be conclusive and effective. All of them are interested in conflict resolution, and therefore they are willing to 'sacrifice', i.e., to give up some parts of their own interests in order to reach a compromise outcome, because this is usually preferable for everyone than enforcing their

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declares the abolition of capital punishment. Decision 23/1990. (X. 31.) AB of the Constitutional Court of the Republic of Hungary, ABH 1990, 88, 102-103.

<sup>101</sup> Decision 23/1990. (X. 31.) AB (n 100) 94-145. The Constitutional Court took into consideration the ECHR in the reasoning of its decision, although in 1990 Hungary was not yet a member of the Council of Europe and the Convention. It is also noteworthy that this landmark decision of the Hungarian Constitutional Court was cited by the South African Constitutional Court, in its Judgment of 6 June 1995 (Case No. CCT/3/94).

<sup>102</sup> Supreme Court Kfv.III.37.451/2008/7.

individual interests. Finally mutuality must be mentioned, which should characterise all of the participants. Mutuality also encompasses concession, empathy, tolerance, etc. The meaning of a dialogue is not overcoming each other, but to achieve a common goal.

## 2 Hungarian Courts and International Judgments

A focal question is whether, and to what extent, the Hungarian courts consider the judgments of international courts. Do they just simply refer to them, or do they reflect on them by overruling their own, prior jurisprudence? The latter would prove the existence of judicial dialogue; the former, however, is not enough to satisfy the criteria of the dialogue.

The decisions of the ECtHR as well as the decisions of the CJEU are not considered as direct sources of international law; instead, they are interpretations. In decision 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.<sup>103</sup> In decision 988/E/2000 the Constitutional Court highlighted that the judgment of the International Court of Justice is neither a norm nor a treaty. It decided upon a unique legal dispute even if its statements have theoretical significance and become precedent.<sup>104</sup> Two years later the new act on the procedure regarding the 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.<sup>105</sup> As for the form of promulgation, it is the form of the *compromis* (the agreement between opposing parties to turn to a judicial forum to settle a dispute) that is determinative. It is to be noted that this obligation shall not refer to decisions in litigation where the other party to the dispute is a private individual and not a state, just like in the case of ECtHR.<sup>106</sup> In such cases only Section 13(1) of Act L of 2005 obliges Hungary to consider the decisions of the organ having jurisdiction over the disputes in relation to the treaty in the course of interpreting it. In this case the decision is not a source of law; however, it can be a significant guidance for the interpretation of treaty-based obligations.<sup>107</sup>

In general, ordinary courts frequently cite international court decisions and mainly those of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases. In many cases, the citation of the judicial practice of the ECtHR is given even without invoking *expressis verbis* the relevant judgment,<sup>108</sup> or the practice is invoked indirectly by citing the statements of the Constitutional Court based on the practice of the ECtHR. This phenomenon is mainly seen in the judicial activity of the Municipal Court of Budapest.<sup>109</sup>

Concerning the practice of domestic courts at a lower level, sometimes the application of international judicial decisions is beyond the scope of domestic norms. For instance, 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

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<sup>103</sup> Blutman (n 86) 310.

<sup>104</sup> Decision 988/E/2000. AB of the Constitutional Court, ABH 2003, 1290.

<sup>105</sup> Act of L of 2005, s 13.

<sup>106</sup> See Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (n 10) 184ff.

<sup>107</sup> See Municipal Court of Budapest Decision 24.K.35.639/2006/25.

<sup>108</sup> See Supreme Court Decision Kfv.IV.37.629/2009/70.

<sup>109</sup> See Municipal Court of Budapest Decisions 19.P.24. 472/2006/4.; 19.P.24. 473/2007/17.; 7. P. 26.047/2008/5.; 18. P./P.21.661./2006/6; 19.P. 24.053/2009.; 31.P. 25.751/2009., 18. P/P.- III. 20.339./2006/19.; 19.P. 25-386/2006/8.; 19.P. 631.904/2004.; 31.P. 23.691/2009.; 19.P. 24.213/2006.; 19.P. 24.327/2008., 19.P. 23.752/2005., 31.P. 24.109./2010.; 31.P. 22.002./2009.

the dogmatic frames and bases. 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, echoing the Hungarian constitutional practice, of the Constitutional Court [36/1994. (VI. 24.) AB].<sup>110</sup>

### 3 Dialogue or Monologue? – Final Conclusions

Applying the general features of dialogue to the courts, one can conclude that the basic condition – an equal position – is given if we consider the powers and status of, say, the ECtHR, the Constitutional Court and ordinary courts of last instance. As to the common goal and the commitment to that – the first and second specific conditions – it may be supposed that the analysed courts are to protect fundamental rights and common constitutional values, but these are very broad and abstract common goals. The concrete goal of each court is to solve a given case, or safeguard the ECHR or the Constitution in line with its function, and the way they reach this goal is influenced by the circumstances of the given case, the references of the parties concerned, and the presumption of the judges regarding the *ratio decidendi*. The latter also interferes with regularity, because the Hungarian courts usually refer to international sources only if it supports the reasoning or has stronger persuasive force than the purely domestic legal based argumentation. Fourth, the courts have no conflict with each other; hence – although they respect each others' statements and rulings – they do not need to be conclusive and effective in this respect. Sometimes the domestic courts seem to be rather careful or reticent over the interpretation of international treaties – maybe they try to avoid a potential future conflict with the international court interpreting the given treaty authoritatively. Of course if all role-players – i.e. courts – agree that the conflict can be traced back to a given piece of domestic law infringing a normative international commitment, and the procedural conditions are available (their procedures were initiated, at least one of them has power to eliminate the concerned norm, they have appropriate procedural ties between each other), the international and domestic courts may cooperate effectively by referring to each other's decisions. Finally, in the 'dialogue' of the courts, mutual respect can be observed and rivalry is a really rare phenomenon, but it is also true that courts are not compelled to give mutual concessions.

As such, as a final conclusion, it can be stated that the Hungarian courts apply international law if they have to or they want to decorate their reasoning with it, but it is still far from a constructive dialogue. Hungarian courts already *listen to* the international courts, because they refer to the decisions when applying international law, but *rarely do they answer* – i.e. revise their former practice. Even the judgments of the ECtHR do not have a strong position, as they are – according to the Hungarian courts – just of a declaratory nature. The principle of *iura novit curia* is known and accepted by the Hungarian courts.<sup>111</sup> The efficient – and not just effective – application of international law and response to the international courts' judgments might help the preservation of the values common to liberal democratic societies. It is up to the judges to recognise that they have a role to play in maintaining the shared constitutional values of European states.

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<sup>110</sup> Szomora Zsolt, 'Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn Grundrechtsbeeinflusste Widersprüche im ungarischen Strafrecht' (2011) 6 (1) Zeitschrift für Internationale Strafrechtsdogmatik 29-43, 33.; Koltay (n 59) 36.

<sup>111</sup> See, for example, Debrecen Regional Court of Appeal Gf. I. 30 741/2012/3. BDT 2013. 2884.