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Transnational Judicial Dialogue on International Law in Central and Eastern Europe

Annex – Country Reports

WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

Law

Transnational Judicial Dialogue on International Law in Central and Eastern Europe

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edited by
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Introduction

The purpose of the EUROCORES research project 10-ECRP-02 "International Law through the National Prism: the Impact of Judicial Dialogue" was to explore the contribution national courts of Central and Eastern European States have made to the theory and practice of international law. The focus was placed on the broadly understood judicial dialogue as a means to facilitate the elaboration and spreading of ideas. The understanding of the impact of judicial decisions and of its extraordinary nature, given the history of the legal systems in the Central and Eastern part of Europe, was dependent on an in-depth empirical research forming the foundations for the subsequent analytical work. To this end the adjudicatory practices of the courts of all levels seated in the countries at stake and the case law were collected.

The collected information demonstrated in a comparative mode that the relationship between domestic and international law in all the States under examination have formally (through the constitutional provisions or other legal acts) been introduced to their legal systems. Yet, the existence of the formal basis for application of the international law in national legal systems does not guarantee that the former finds its reflection in courts' decisions. The judicial practices in this respect vary according to the legal system at stake, but also the type and the level of the courts.

This volume presents the results of the first, empirical, stage of research and the information resulting from the survey conducted on the basis of the written questionnaire addressed to country rapporteurs from the Czech Republic, Hungary, Lithuania, Poland, and Russia. The editors chose not to interfere with the content of the Country Reports (including the formal presentation of the information) in order to preserve the approach reflecting the systemic understanding and analysis of the case law and judicial practices visible in the work of the rapporteurs. This "raw data" was the basis for the analysis throughout the duration of the project and the analysis presented in the volume „Transnational Judicial Dialogue on International Law in Central and Eastern Europe".

International Law through the National Prism:
the Impact of Judicial Dialogue

Project 10-ECRP-028, European Collaborative Research Projects
in the Social Sciences (ECRP) – ECRP VI (2010)

Country Report – Hungary

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I. Legal basis for application of international law in domestic legal order

1. What are the provisions of the national Constitution that refer to international law: international agreements and treaties, customary international law, general principles of law, decisions of international organisations and organs, decisions of international courts and tribunals, declarative texts (e.g. Universal Declaration of Human Rights) and other non-binding acts (soft law)?

In Hungary a new constitution, officially the Fundamental Law of Hungary[1] (hereinafter: FL) was adopted on 25 April 2011 that came into force on 1 January 2012. The new constitution does not affect the scope of Hungary's international commitments. However, there are permanent modifications regarding the constitutional foundations, thus a short overview might be reasonable. Mention must be made about the Transitional Provisions of the FL (hereinafter: TP-FL) that were adopted by the Parliament on 30 December 2011, published on 31 December 2011, and it came into force on 1 January 2012.[2] The TP-FL served the coming into force of the new constitution. However, regarding its content the TP-FL was rather an amendment, as about half of its rules were not transitory 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 constructed an unusual constitutional liability for the "communist past", furthermore it has overruled some important statements of the Constitutional Court e.g. on the right to the lawful and impartial judge[3] and undermined the provisions of the FL on judicial independence, separation of churches and state, division of powers, independence of the Central Bank, etc.[4] According to the Commissioner for Fundamental Rights of Hungary, the TP-FL "severely harms the principle of the rule of law, which may cause problems of interpretation and may endanger the unity and operation of the legal system. The Ombudsman is concerned because the Transitional Provisions contain many rules having

1 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 or http://www.mkab.hu/download.php?d=65.

2 An unofficial translation of the TP-FL by Bánkuti, Miklós – Halmai, Gábor – Scheppele, Kim Lane is available at http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf.

3 Constitutional Court Decision № 166/2011. (XII. 20.) AB.

4 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 and Scheppele, Kim Lane), available at http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf.

obviously non-transitional character".[5] Thus 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.[6] 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 transitory character.[7] As a response, the governing majority adopted the 4th amendment[8] of

5 On the petition of the Ombudsman lodged in March, 2012 to the Constitutional Court concerning the TP-FL see http://www.obh.hu/allam/eng/aktual/20120314_3.htm.

6 In April, 2012 the Government of Hungary lodged a bill to the parliament as the 1st 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. It added a new 5th point to the Closing Provisions of the FL: "5. The transitional provisions related to this Fundamental Law adopted according to point 3 (31 December 2011) are part of the Fundamental Law". Other relevant points of the Closing provisions: "2. Parliament shall adopt this Fundamental Law according to point a) of subsection (3) of Section 19 and subsection (3) of Section 24 of Act XX of 1949. 3. The transitional provisions related to this Fundamental Act shall be adopted separately by Parliament according to the procedure referred to in point 2 above". (The FL was not in force yet when the Parliament adopted the Transitional Provisions – that is the reason of the reference to the former Constitution.)
The 1st amendment repealed – upon the criticalities of the EU – Article 30 of the TP-FL that infringed the independence of the Central Bank.

7 The Constitutional Court annulled approximately half of the articles of the TP-FL in its decision of 28 December 2012 [Decision № 45/2012. (XII. 29.) AB]. Press release: "The Constitutional Court has declared that the Hungarian Parliament exceeded its legislative authority, when enacted such regulations into the 'Transitional Provisions of the Fundamental Law" that did not have transitional character. The Hungarian Parliament shall comply with the procedural requirements also when acting as constitution-maker, because the regulations that violate these requirements are invalid. Therefore the Constitutional Court annulled the concerned regulations due to formal deficiencies. The Constitutional Court, regarding its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions" (available at http://www.mkab.hu/sajto/news/certain-parts-of-the-transitional-provisions-of-the-fundametal-law-held-contrary-to-the-fundamental-law). It is worth to mention the governing party's response, in which the faction leader immediately declared that the annulled provisions will be inserted into the FL.

8 On 8 February 2013, members of the governing coalition, having two thirds of the seats in the Hungarian Parliament, submitted a proposal to amend the FL. The Parliament adopted the amendment on 11 March 2013. It came into force on 1 April 2013. In March 2013, during the parliamentary debate of the 4th 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. See e.g. http://www.bbc.co.uk/news/world-europe-21740743, http://livewire.amnesty.org/2013/03/12/hungarys-constitutional-undermining-of-internationally-protected-human-rights/; http://www.un.org/apps/news/story.asp?NewsID=44389&Cr=judiciary&Cr1#.UUOI7jdMcY6; http://www.politics.hu/20130311/ex-president-solyom-urges-succe

the FL in March 2013, which incorporates into the constitution the majority of the quashed articles.

The FL expresses *commitment to the international community and law* (Article Q) and contains also a *European clause* mandating the cooperation in the EU (Article E). 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 former Constitution).[9] A taxonomic change is that the relevant constitutional objectives and authorisations are grouped into one article, not scattered through separate sections like in the former Constitution.[10]

> Fundamental Law Article Q
>
> (1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with every nation and country of the world.

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ssor-to-veto-constitutional-changes-slams-fidesz-use-of-basic-law-for-daily-political-goals/; http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/.
For joint expert opinion of Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union on 4th amendment, see 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 4th amendment is available here: http://helsinki.hu/wp-content/uploads/Appendix_2_Fourth_Amendment_to_the_Fundamental_Law_Unofficial_translation.pdf.

9 On the relation of international law and Hungarian law (before FL), see Chronowski, Nóra – Drinóczi, Tímea – Ernszt, Ildikó: *Hungary, in International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (ed. Dinah Shelton), Oxford University Press, Oxford 2011, 259–287, available at http://books.google.hu/books?id=HTsW3bjHsiIC&printsec=frontcover&dq=International+Law+and+Domestic+Legal+Systems&hl=hu&sa=X&ei=MOcaT-422Beek4AShieWzDw&redir_esc=y#v=onepage&q=International%20Law%20and%20Domestic%20Legal%20Systems&f=false.

10 Former Constitution Article 6(1): "The Republic of Hungary renounces war as a means of solving disputes between nations and shall refrain from the use of force and the threat thereof against the independence or territorial integrity of other states. (2) The Republic of Hungary shall endeavour to co-operate with all peoples and countries of the world. (4) The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe. §7 (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law. §2/A (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament".

(2) Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law.
(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation.

Fundamental Law Article E
(1) In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity.
(2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties.
(3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2).
(4) The authorisation to recognise the binding nature of an international agreement referred to in Paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.

Article Q(1) FL differs from the former Constitution in as much as it does not contain the renouncement of war and the prohibition of the use of force based on Article 2(4) of United Nations Charter.[11] Instead, it positively formulates the aims of peace, security and sustainable development during the international cooperation. Thus it incorporates the minimised version of one of the Union objectives in Article 3(5) of the TEU;[12] however, the latter covers more aspects of participation in international community. Unfortunately, the FL reduces the scope of cooperation to nations and countries and does not refer to other actors of the international community (e.g. international and transnational organisations, NGOs.

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"[13] it retains the monist

11 Sulyok, Gábor: 6. § [Nemzetközi kapcsolatok] [International relations], in: Jakab, András (szerk.), *Az Alkotmány kommentárja* [Commentary of the Constitution], Századvég, Budapest, 2009, mn. 16, 23.

12 Article 3(5) of the TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

13 These are customary international law and international *ius cogens.*

concept with adoption theory.[14] This results that the generally recognised rules have at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as part of the constitution,[15] or moreover, certain *ius cogens* norms have priority over the Constitution.[16] In case of other sources of international law (i.e. other sources than "generally recognised rules" – such as treaties, mandatory decisions of international organs and certain judgements of international courts, etc.) the FL supports the dualist model with transformation. It still does not express the priority of international law over domestic law.[17] The "harmony" shall be ensured just with those international norms, which oblige Hungary, thus the instruments of international soft law (e.g. recommendations, declarations, final acts) are excluded from the scope of the harmony rule.[18] According to the detailed explanation of the FL, the EU law also falls out of the scope of Article Q.

To ensure "harmony", the Constitutional Court under Article 24(2) point f) of the FL continues to review the conflict between domestic legislation and international treaties in the future, but the FL does neither regulate who may initiate this procedure, nor refer to the possibility of *ex officio* revision. This is defined in the cardinal act[19] on the Constitutional Court.[20] It is not clear either, how "harmony" shall be ensured, if a domestic legal

14 However, many scholars share the view that it means a general transformation rather then adoption, thus they maintain the dualist concept instead of monist. This approach means that the "generally recognised rules" are at lower rank then the constitution in the Hungarian hierarchy of legal sources. See e.g. Sulyok, Gábor, 'A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása' [Regulation of the relation of international law and domestic law in the Fundamental Law], *Jog Állam Politika* 2012/1, 17–60.

15 Jakab, András: *A magyar jogrendszer szerkezete* [Structure of the Hungarian legal system], Dialóg Campus Kiadó, Budapest–Pécs, 2007, 160.

16 The Constitutional Court stated in Decision № 45/2012. (XII. 29.) AB on unconstitutionality of TP-FL [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".

17 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. CC Decision № 53/1993. (X. 13.) AB határozat, Az Alkotmánybíróság határozatai [Decisions of the Constitutional Court] ABH [1993] 323, 333.

18 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, 68.

19 Cardinal act means organic law. The adoption requires two-third majority of the MPs present.

20 According to the Act CLI of 2011 on the Constitutional Court 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 Attorney General, the Commissioner for Fundamental Rights, or

act violates one of the "generally recognised rules of international law", thus – as hitherto – it can be answered by constitutional interpretation. The annulment of the domestic legislation breaching an international treaty is optional under Article 24(3) point c) of FL, which weakens the effectiveness of the constitutional requirement of harmony. It would have been preferable to oblige the Constitutional Court in the FL to annul those domestic legislative acts that are at the same rank as, or lower rank than the act transposing the international treaty.[21] The domestic legislation conflicting with TEU or TFEU should have been an exception to this rule. The breach of TEU or TFEU shall be established by the CJEU, thus it is an extern limitation for the Constitutional Court's competence.[22]

Article E(1) as the basis of the *European and Union cooperation* essentially follows word by word the Article 6(4) of former Constitution.[23] Thus the frame of interpretation remains unchanged;[24] this objective expresses the commitment to each kind of European (international or supranational) cooperation. The most intensive form of cooperation is within the framework of the European Union.[25] Article E paragraphs (2) and (4), with some simplification, adopts the rules of Article 2/A of the former Constitution; however, the formulation differs at one point. The difference is that the two distinct clauses of Article 2/A(1) ["exercise certain constitutional powers jointly with other Member States […]; these powers may be exercised independently and by way of the institutions of the European Union"] have been merged in Article E(4) ["jointly with other member states through the institutions of the European Union"]. However, in legal understanding, in the course of Union legislative processes the Member States do not exercise

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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.

21 Cf. with the former Act XXXII of 1989 on the Constitutional Court. Under Articles 44–47 the annulment was obligatory in such cases. See to this problem the point IV.1 of the Questionnaire as well.

22 See more about Article Q of the FL in Molnár, Tamás: 'Az új Alaptörvény rendelkezései a nemzetközi jog és a belső jog viszonyáról' [Provisions of the new Basic Law on the relation of international law and domestic law], in: Drinóczi, Tímea – Jakab, András (szerk.), *Alkotmányozás Magyarországon 2010–2011* [Constitution-making in Hungary 2010–2011], PPKE JÁK – PTE ÁJK, Budapest–Pécs, 2013, 83–91; Sulyok (2012), 17–60.

23 See also Bragyova, András: *No New(s), Good News? The Fundamental Law and the European law, in Constitution for a disunited nation* (ed. Tóth, Gábor Attila), CEU Press, Budapest–New York, 2012, 335–338.

24 See also Blutman, László – Chronowski, Nóra: 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', *International Constitutional Law*, 2011/3, Vol. 5, 329–348, http://www.internationalconstitutionallaw.net/download/e31eb083ca4c5aa70873e5740bd3b46f/Blutman_-_Chronowski.pdf.

25 Blutman, László – Chronowski, Nóra: 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában I' [Constitutional Court and Community law: trapped in a constitutional paradox], *Európai Jog*, 2007/2, 8–9.

the competences "jointly", but those are exercised by the institutions.[26] Equating the form of 'joint' exercise of powers with that of exercise "through the institutions" is a misleading formulation in the text of FL. In the course of the federal development of the Union not only the institutional way of exercising powers is necessary (e.g. in case of treaty-amendment), and strictly speaking the joint exercise of powers is not the same as the exercise through the institutions.[27] All these would have been surmounted, if in the text of FL the "conferral" of certain constitutional powers appeared in accordance with Article 5 of the TEU.

Article E contains only one new rule compared to Article 2/A of the former 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 ground for 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 and Union law still stems from EU Treaties (i.e., asking for preliminary ruling) and not from the constitution itself. Thus 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.

In the fundamental rights chapter called "Freedom and responsibility" are further references to international and Union law. Article XXVIII on fair trial stipulates:

> Fundamental Law Article XXVIII
>
> (4) No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union.
>
> (5) Paragraph (4) shall not exclude the prosecution or conviction of any person for an act which was, at the time when it was committed, an offence according to the generally recognised rules of international law.
>
> (6) Except for extraordinary cases of legal remedy determined by law, no person shall be prosecuted or convicted for any offence for which he or she has already been acquitted or convicted by an effective court ruling, whether in Hungary or in any other jurisdiction as defined by international agreements or any legal act of the European Union.

26 Blutman, László: *Az Európai Unió joga a gyakorlatban* [EU law in practice], HVG-ORAC, Budapest, 2010, 94.

27 The Constitutional Court has also respected the relevance of the difference of exercising powers jointly and by the way of institutions. See the Decision № 143/2010. (VII. 14.) AB on the Act promulgating the Lisbon Treaty; press release is available at http://www.mkab.hu/letoltesek/en_0143_2010.pdf.

The *principle of nullum crimen sine lege* is and was the focal element of the constitutional legality of criminal law in Hungary. According to the Constitutional Court, it is not just a state obligation but the right of the individual to be found guilty and sentenced only according to law. The reference to the EU law has appeared first on constitutional level at the time of ratification of Lisbon Treaty. To enable the judicial cooperation in criminal affairs already the former Constitution was amended. A new element is in the FL that the text – as an exception to the rule – explicitly refers to "act, which was, at the time when it was committed, an offence according to the generally recognised rules of international law". However, it is not completely new, since the Constitutional Court in 1993 stated that war crimes and crimes against humanity are to be punished even in the absence of Hungarian criminalisation at the time of the commitment.[28] The explicit formulation of the principle of *ne bis in idem* is also a new element in the FL compared with the former Constitution, however, earlier the Constitutional Court guaranteed it under the principle of rule of law. Definitely a novelty is that the foreign judgments can be recognised not only on the basis of EU law but also on the ground of international treaties.[29]

With respect to Articles Q and E of the FL, international agreements 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. The above-mentioned articles set such requirements that broach no exceptions. The European constitutions also contain similar provisions with the same functions, reaffirming the existence of multilevel and parallel constitutionalism in the European legal area. Thus these kinds of constitutional provisions preliminary commit and restrain the national governments for and by the international and common European values.[30] 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.

For example, the Transitional Provisions of the FL (TP-FL) allowed further possible constraints on the right to effective judicial protection. If from the judgment of Constitutional Court or the CJEU or other court arises a debt obligation of the state, under certain circumstances a general contribution covering the common needs – i.e. extra tax – shall be adopted. It can be understood as an intention to sanction – at least indirectly – the lawsuits

28 Constitutional Court Decision № 53/1993. (X. 13.) AB, ABH [1993] 323.

29 Jakab, András: *Az új Alaptörvény keletkezése és gyakorlati következményei* [Formation of the new Basic Law and its practical implications], HVG-ORAC, Budapest, 2011, 229.

30 Ginsburg, Tom – Chernykh, Svitlana – Elkins, Zachary: 'Commitment and Diffusion: Why Constitutions Incorporate International Law', *University of Illinois Law Review* 2008, 101–137. http://works.bepress.com/zachary_elkins/1.

and complaints in cases of great economic significance.[31] The Constitutional Court annulled this regulation; however, the 4th amendment[32] to the FL incorporates it into the text of the constitution.

It gave some hope regarding the "constitutional continuity" 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 the wording of the former Constitution was.[33] However, the 4th amendment of the FL has repealed the decisions of the Constitutional Court delivered prior to the entering into force of the FL.[34] It is rather controversial, considering that originally the FL declared procedural continuity with the former Constitution. This brand new regulation reinforces the concern, that the governing majority refuses the constitutional traditions of the last two decades.[35] It undermines not just the case law of the Constitutional Court, but also the practice of the courts of law that more and more frequently referred to Constitutional Court rulings, among them the Constitutional Court decisions related to international law. By the constitutional amendment the former Constitutional Court decisions lost their legal force, they neither bound the Constitutional Court nor the ordinary courts. Thus the constitutional practice became incalculable, and one can just presuppose that in case of textual equivalence the interpretation of the FL will not changed.

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31 See Article 29 of TP-FL: "As long as the public debt exceeds 50% of the GDP, if the Constitutional Court, the CJEU, other court or other law applying that body's decision requires the state to pay a fine, and the Act on the central budget does not contain necessary reserves to pay the fine, and the amount of the fine cannot be allocated from the budget without undermining a balanced management of the budget or no other item from the budget may be eliminated to provide for the fine, a general contribution covering the common needs must be specified that relates in its name and content exclusively and explicitly to the above fine". This Article was also annulled by the Constitutional Court in its Decision № 45/2012. (XII. 29.) AB.

32 See Art. 17 of the 4th Amendment and note 8.

33 The Constitutional Court has clarified that the formulation of Art. E(2) and (4) of the FL and that of Article 2/A, (1)–(2) of the former Constitution has got a same meaning, thus during the interpretation of Article E the Court has maintained its previous precedent. Constitutional Court, Judgment of 8 May 2012, Decision № 22/2012. (V. 11.) AB, 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".

34 See Art. 19 of the 4th amendment and note 8.

35 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 note 8.

2. Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

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). The procedure related to international agreements is regulated by the Act L of 2005. This Act contains the rules on arrangements, establishment, and consent to be bound by, promulgation and entering into force, provisional application, modification, suspension, termination of international treaties. Altogether, it is an updated regulation and fits to the system of Hungary's international obligations as it covers more interrelations of domestic and international law than the previous law-decree did.[36]

The Act shall be applied *mutatis mutandis* to certain EU decisions, the compulsory decisions of international courts and other organizations. Without prejudice to the EU treaty provisions, the Act shall be applied *mutatis mutandis* to those decisions of the institutions, which stem from the treaties and establish, modify or terminate international rights and duties for Hungary.[37] If the dispute on the interpretation or application of an international treaty can not be arranged by direct negotiation within a reasonable time, the competent organ for authorizing to express the consent to be bound by the treaty shall decide whether or not it is required to submit the dispute to third party – in particular to the International Court of Justice, arbitration court or conciliation commission – considering the provisions of the treaty and the rules of international law. The decision of the third party is binding and shall be executed if the statute of the organ settling the dispute or the treaty in dispute so provides or the parties so agree. The decision shall be promulgated – with the appropriate application of the provisions regarding the promulgation of the treaties – in the Official Gazette [Magyar Közlöny].[38] According to *Molnár*, the judgments of the UN International Court of Justice, Permanent Court of Arbitration, OSCE Court of Conciliation and Arbitration, International Tribunal for the Law of the Sea, other ad hoc international courts of arbitration, 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)[39]

36 For a thorough analysis see Molnár (2012), 114–163.

37 Act L of 2005 Art. 12.

38 Act L of 2005 Art. 13(3)–(4).

39 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights – ECHR) Article 33 – thus the judgments upon individual complaints are not included.

and Court of Justice of the European Union (CJEU)[40] that resolute the disputes of states.[41]

By the force of the constitution or by transformation, the sources of international law shall be applied in Hungary, thus the application is a constitutional duty of the state organs. 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.

Thus the Act CLI of 2011 on the Constitutional Court is also relevant regarding to the application of international law.[42]

The Act CXXX of 2010 on legislation contains a general reference by stipulating that the legal acts shall be in compliance with the obligations stemming from international and Union law.[43] This provision closely related to the constitutional requirement of "harmony".[44]

II. Treaties

1. How do domestic courts define "treaty"/international agreements and distinguish legally-binding international texts from political commitments? Do they refer to the doctrine and decisions of international or foreign courts?

According to the Act L of 2005 the international treaty is a written agreement that is covered by instruments of international law, with any name or

40 Treaty on the Functioning of the European Union, Article 259.

41 Molnár (2012), 214–215.

42 Act CLI of 2011 Articles 23(3)–(4), 24, 32.

43 Act CXXX of 2010 Article 2(4) (c).

44 The Constitutional Court ruled in Decision № 7/2005. (III. 31.) AB: "The performance of the international law obligation (the performance of the task of legislation when necessary) is a duty resulting from Article 2 para. (1) of the Constitution [now Article B(1) of the FL] enshrining the rule of law including the bona fide performance of international law obligations, as well as from Article 7 para. (1) of the Constitution [now Article Q(2)–(3) of the FL] requiring the harmony of international law and domestic law, and this duty emerges as soon as the international treaty becomes binding on Hungary (under international law). Failure to act as required may result in the Constitutional Court establishing an unconstitutional omission of legislative duty. The Constitutional Court established an unconstitutional omission on the basis of the legislator's failure to perform a legislative duty resulting from an international treaty in force in Decision 16/1993 (III. 12.) AB (ABH 1993, 143, 154), Decision 45/2003 (IX. 26.) AB (ABH 2003, 474) and in Decision 54/2004 (XII. 13.) AB".

title and regardless of whether it is incorporated into one, two or more interrelated documents, concluded with other States or other subjects of international law with capacity to contract, which creates, modifies or terminates rights and obligations for Hungary under the international law.[45]

This definition complies with that of the Vienna Convention on the Law of Treaties [promulgated in Law-Decree 12 of 1987], 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*).[46] 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 Constitutional Court relied, *inter alia*, that the law-decree was not in accordance with the Vienna Convention.[47]

Thus the courts of law have to take into consideration the definition of the Act L of 2005, the rulings of the Constitutional Court, and the terminology of the Vienna Convention. They do not make attempts to create independent definition of "international treaty", or at least we did not find any concept different from the aforementioned in the judicial practice. The statutory definition clearly distinguishes the international treaties from political commitments.

2. Do they distinguish different kinds of treaties (ratified, non-ratified, approved by the government etc.)? What are the consequences of domestic law distinction? Are all treaties directly applicable?

45 Act L of 2005 Article 2(a).

46 Molnár (2012), 117.

47 Constitutional Court Decision № 7/2005. (III. 31.) AB, V.1: "In addition, the LD [Law-Decree 27 of 1982] endangers the enforcement of Article 7 para. (1) of the Constitution because its terminology is not in accordance with the Vienna Convention. For example, for the purposes of the LD the term 'ratification' means an act in domestic law by which the Parliament consents to the given international treaty becoming binding upon the Republic of Hungary. However, under the Vienna Convention, 'ratification' is a process resulting in the states acknowledging, at the level of international law, the binding force of international treaties upon themselves. […] Furthermore, Section 13 para. (4) of the LD is in conflict with Article 7 para. (1) of the Constitution guaranteeing the harmony of domestic law and international law, because it only allows the promulgation of an international treaty upon performance of the acts under international law necessary for entry into force (depositing the documents of ratification or exchanging diplomatic documents on the fulfilment of the conditions in domestic law necessary for the entry into force of the treaty). On the basis of Section 13 para. (4) of the LD, in many cases (mainly in the case of bilateral treaties), the promulgating statute cannot be adopted in the period between the performance of the acts under international law necessary for the entry into force of the international treaty and the date of entry into force of the international treaty, and this may result in the delayed performance of the treaty binding upon the Republic of Hungary under international law".

The courts distinguish the ratified, non-ratified, approved etc. treaties on the basis of the 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 refuse the application of those treaties, which did not come into effect.[48] One exception to this rule was when the Constitutional Court took into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights ECHR) in the reasoning of its landmark decision on the abolition of death penalty, although in 1990 Hungary was not the member of the Council of Europe and the Convention yet, as the government just applied for the membership after the transition and the first free parliamentary elections.[49] However, the ECHR was – and in most cases is still – just a point of reference for the Constitutional Court and the ordinary courts (referred as passing comment or *obiter dictum*), and not the rationale for the decision (*ratio decidendi*).

3. What are the criteria of direct application of treaties? Are the treaties invoked only against organs of the State or may they be invoked also between private parties? What was the role of international law doctrine and decisions of international or foreign courts in development of the doctrine of direct application in your country?

According to the Constitutional Court's case law,

As a general rule, the parties bound by an international treaty are the states parties to the treaty. It is the duty of these states to ensure the implementation

48 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, Fővárosi Ítélőtábla 5.Pf.20.736/2010/6.

49 Constitutional Court Decision № 23/1990. (X. 31.) AB item V.4: "While art. 2(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, had recognized the legitimacy of capital punishment, art. 1 of the Supplementary Protocol adopted on 28 April 1983 provides that 'capital punishment shall be abolished. No one may be sentenced to death and capital punishment may not be enforced.' Also, art. 22 of the Declaration 'On Fundamental Rights and Fundamental Freedoms' endorsed by the European Parliament on 12 April 1989 declares capital punishment to be unconstitutional. Hungarian constitutional progress moves in the same direction since in Art. 54(1) capital punishment is still not clearly excluded; however, it is followed by the new text of Art. 8(2), which proscribes legal limitations upon the essential contents of fundamental rights".
It is 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).

of the treaty. It is an issue of domestic law how implementation takes place in the given legal system, how the international law obligations are enforced: through an act of legislation or through judicial practice. Individuals may claim rights directly on the basis of certain provisions of international treaties, more specifically, on domestic legal norms transforming international law obligations. In the case of such a self-executing treaty, the State undertakes to render the application of the treaty possible in domestic law, or at least not to exclude the possibility of the direct application of the provisions of the treaty in its legal system.

Whether an international treaty or a certain provision thereof is a self-executing one, i.e. whether it may be applied in national law without a specific implementing norm can be decided through interpretation. In some cases the states parties to an international treaty make a representation in the treaty about it being or not being a self-executive one, while in other cases it follows from the content or text of the treaty or from the provisions of the Constitution that a further internal legal act is necessary for the implementation of the transformed international treaty. There are cases where the legislator gives a clue for answering the question whether the treaty or a certain provision thereof may be directly applied in domestic law.

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

However, *the courts have the final* word in deciding whether in a given case the applicable international treaty or certain provisions thereof qualify as (a) self-executing one(s). […]

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.[50]

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

50 Constitutional Court Decision № 7/2005. (III. 31.) AB.

are sufficiently defined for judges in order to apply them in concrete cases, and establish subjective rights upon the treaty provisions.[51] It is in compliance with the rulings of the Constitutional Court.

Is there any influence of EU law, including the decisions of European Court of Justice?

The EU law is regarded as a separate legal system by the Constitutional Court and the courts of law since the accession. Thus the supremacy and direct applicability of EU legal acts are recognised, in most cases the courts ensure the effectiveness of Community/Union law,[52] however, it does not really influence the application of international law, except of 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;[53] the courts follow the well known textbooks on EU law or utilize the ministerial explanations attached to the bill of the applied Hungarian law. If the EU legal act refers to the ECHR, then the courts cite the referred article of the Convention and sometimes the landmark decisions of the ECtHR relevant in the given case, but only rare they add further interpretation or reach individualised conclusions in the light of the particular circumstances of the case.[54] However,

51 Fejér Megyei Bíróság (Court of Fejér County, now Székesfehérvári Törvényszék/Tribunal) 25.P. 22.432/2008/61., 25.P. ügyszám/2008/80.

52 See Dezső, Márta – Vincze, Attila: *Magyar alkotmányosság az európai integrációban* [Hungarian constitutionality in the European integration], HVG-ORAC, Budapest, 2012, 208–209.

53 See e.g. the Decision of the Court of Szabolcs-Szatmár-Bereg County (now Nyíregyháza Tribunal): "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)". Szabolcs-Szatmár-Bereg Megyei Bíróság 5.K.20. 631/2010/4.

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

54 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 ECHR. Thus 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 (ie, whether the 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 the family life (the living conditions of the family are sufficient in the host country). 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 the coexistence may be limited (proportionality of the expulsion)". This formula was used

the Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, ECHR and domestic law, and interpret the harmonised Hungarian legal acts in the light of ECHR, if the implemented EC directive provides minimum standard.[55]

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,[56] 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 and EU law as a constitutionality issue[57] and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.[58]

4. **Do the national courts always independently determine whether the treaty claimed to be binding on the forum State has come into existence or has been modified or terminated?**

5. **Do the national courts refuse to apply, in whole or in part, a treaty if they believe that such treaty is to be considered, for any reason whatsoever, either entirely or partially invalid or terminated, even if the forum State has not denounced it?**

According to the Act L of 2005 and Constitutional Court rulings, the ordinary courts may not determine completely independently whether

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by the Budapest Metropolitan Court in several cases, see Fővárosi Bíróság (Budapest Metropolitan Court) 27.K.33.900/2009/5., Fővárosi Bíróság 27.K.30.107/2010/6., Fővárosi Bíróság 27.K.32.880/2009/8., Fővárosi Bíróság 17.K.33.440/2008/5.

55 The Supreme Court (now Curia) established that only the refugees are covered by the scope of the Council Directive 2003/86/EC on the right to family reunification, however, in the light of Article 8 the ECHR, the domestic law may recognise this right of other protected persons as well. The Supreme Court (now Curia) emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. According to the Supreme Court (now Curia), there's no such international obligation that would require the equal safeguard of the right to family reunification of refugees and other protected persons, thus the 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 the equal protection shall be ensured with regard to the ECHR. Supreme Court Kfv. III.37.925/2009/7.

56 Constitutional Court Decision № 1053/E/2005. AB judgment of 16 June 2006, II ABH [2006] 1824.

57 Constitutional Court Decision № 72/2006. (XII. 15.) AB, I ABH [2006] 819, 860.

58 Blutman – Chronowski (2011), 329–348.

a treaty has come into existence, or has been modified or terminated relating to Hungary.

The promulgating act contains the date of coming into effect, modification, and ceasing of the treaty relating to Hungary if it is known at the time of acceptance.[59] If the above mentioned data are not known, the Foreign Minister publishes them in the Hungarian Official Journal (Magyar Közlöny) immediately after the information is known.[60] The promulgating act also contains reservations, exceptions, declarations, statements, the approval of the temporary application of the treaty (if needed), the organ which is responsible for the execution, and, if necessary, changes in acts, legal rules and other steps which need to be taken to harmonize international and national law.[61] Thus the courts determine whether the treaty claimed to be binding on Hungary has come into existence, etc. on the basis of promulgating act. Of course, in case the treaty concerned was not ratified by any of the participating states, the courts may declare this fact on the basis of the Vienna Convention of the Law of the Treaties, and refuse the application of the treaty.[62]

The courts may determine independently neither the constitutionality of an international treaty, nor the collision of domestic law and international law, instead they have to initiate the proceedings of the Constitutional Court (see point IV.1 of the questionnaire).

Quoting the case law of the Constitutional Court:

> In the examination of an obligation under international law, it is the Constitutional Court that is in a position to decide whether it has been incorporated into domestic law in line with the first part of Article 7 para. (1) of the Constitution [now Article Q(2)-(3) of the FL].[63]

> It follows from the second part of Article 7 para. (1) of the Constitution [now Article Q(3) of the FL] that the harmony of an international obligation undertaken in any form (e.g. in an international treaty) with domestic law must be ensured. *Finally* it is the Constitutional Court that is to guarantee this by adopting decisions – binding on everyone – on the constitutionality of the international

59 Act L of 2005, Article 10(1) (c).

60 Act L of 2005, Article 10(4).

61 Act L of 2005, Article 10(1).

62 See the Decision of the Supreme Court Gfv.IX.30.165/2008/11. In this case the Supreme Court declared that a bilateral agreement between the Hungarian Republic and Ukraine is not applicable because it was not ratified by Ukraine. The court applied Article 11 of the Vienna Convention. The plaintiff referred to the Article 18 of Vienna Convention; however, the court found that the principle of bona fide proceeding has no legal consequences in the given case, because the agreement has no binding force.

63 Constitutional Court Decision № 53/1993. (X. 13.) AB, ABH [1993] 323.

treaty to be concluded or already promulgated in a statute (and on the constitutionality of the promulgating statute), as well as on issues related to the international law obligation in terms of competence, authorisation and procedure.[64]

6. Do the national courts interpret a treaty as it would be interpreted by an international tribunal, avoiding interpretations influenced by national interests? (Do they cite e.g. the Vienna Convention on the Law of Treaties, jurisprudence, decisions of international or foreign 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 Vienna Convention is not cited very frequently by the courts. The most popular is definitely the ECHR and the case law of the ECtHR, while the foreign judgments related to the ECHR are never referred. The most consequent is the Constitutional Court in the field of the application of the Convention.[65] In the recent years (2011–2013) the references of the Constitutional Court became more and more 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 ECHR], the level of the fundamental rights protection provided by the Constitutional Court in no case may be lower than the level of international protection (typically that of elaborated 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 were not derived from its own previous "precedents".[66] For interpretation and clarification of 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 for the authentic interpretation of the Convention. Foremost those decisions (precedents) are taken as a basis, in which the ECtHR interprets the Convention itself, and points out what is in compliance with it and what violates it.[67] The interpretation of international treaties given by the Constitutional Court obviously shall coincide with the official interpretation given by the Council of Europe.[68]

64 Constitutional Court Decision № 4/1997. (I. 22.) AB, ABH [1997] 41.

65 See Szalai, Anikó: 'Az Emberi Jogok Európai Bírósága ítélkezésének megjelenése a magyar Alkotmánybíróság gyakorlatában' [The judgments of the ECtHR in the practice of the Hungarian Constitutional Court], *Kül-Világ*, 2010/4, 14–21.

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

67 Constitutional Court Decision № 166/2011. (XII. 20.) AB, ABH [2011] 545, 557, Constitutional Court Decision № 43/2012. (XII. 20.) AB on the protection of families.

68 Constitutional Court Decision № 41/2012. (XII. 6.) AB, reasoning section [17].

Molnár even assessed the phenomenon as if the Constitutional Court were declare so called "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.[69] 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.[70] In the latter case the Constitutional Court explicitly overruled its previous practice on the criminalizing 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 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 not unambiguous and consistent in this field. The Strasbourg case law does not fall within the scope of Act L of 2005, thus formally it does not bid the courts.[71] It is also true, that the government communication or action in certain cases might indirectly influence the enforcement of international courts' judgments, but the effect of the expressed "national interest" did not appear yet in the domestic courts' decisions.[72]

However the above mentioned rulings of the Constitutional Court may encourage the ordinary courts to follow also the ECtHR practice. Despite this, there were cases, when the ordinary court completely refused to apply the ECtHR judgments referred by the plaintiff,[73] or the court of appeal clar-

69 Molnár (2012), 210.

70 See also the attached templates.

71 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. Cf. with Act XIX of 1998 Art. 416(1) (g) and Art. 423(3).

72 E.g. in the Fratanoló case [Fratanoló v. Hungary, Application no. 29459/10, Judgment of 3 November 2011; subject matter: wearing five-pointed red star; ruling: violation of Article 10 of ECHR] the Hungarian Parliament adopted a resolution on 2 July 2012 [58/2012. (VII. 10.) OGY határozat], which expresses the disagreement of the Parliament with the ECtHR judgment. Cited by Molnár (2012) 211. See also point VII.5 of the Questionnaire.

73 In 2003 the Budapest Metropolitan Court drew the attention to the fact that the Hungarian judiciary does not apply a precedent system, and the judgments of the ECtHR cannot be referred in the proceedings the courts and administrative authorities before the EU accession. [This is obviously a professionally incorrect position.] Decision of Budapest Metropolitan Court, Fővárosi Bíróság 20. Kpk.45.434/2003/2. Cited by Szalai (2010), 18, and Molnár (2012), 2010. 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 Ítélőtábla Bfv.

ified for the court of first instance, that although the judgments of the ECtHR shall be considered, it does not mean that – regarding the differences between the applicable law and the parties concerned – it could be implemented generally and automatically.[74]

An opposite, however, 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 concerned association and movement) on the basis of ECtHR measures. Thus, instead of relying on the Constitution and the necessity – proportionality test of the Constitutional Court, the criteria elaborated under Article 10 of the ECHR was 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.[75]

7. Do the courts refer to the opinion of the Executive?

The Constitutional Court and courts of law may ask the opinion of the Executive (e.g. Ministry of Foreign Affairs, Ministry of Justice) if it seems necessary for the decision making, however this opinion is not mandatory for them.

The Constitutional Court has requested and considered the relevant opinions of the Minister of Justice, the Minister of Economy and Transport and the Minister of Foreign Affairs, when the President of the Republic sought a prior constitutional examination of an Act of Parliament on

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III.570/2012/2. Cited by Molnár (2012), 2010, and Bárd, Petra: *Strasbourg kontra Magyarország* [Strasbourg versus Hungary], Szuverén, 16.08.2012, http://szuveren.hu/jog/strasbourg-kontra-magyarorszag.

74 Decision of the Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla 5.Pf.20.736/2010/6. The subject matter of the case was the right to a judicial decision within reasonable time, and the court of first instance referred Article 6 of the ECHR, several judgement of the ECtHR, even the jurisprudence (textbooks, German commentaries), and interpreted the Article 2 of the Hungarian Civil Procedure Code (CPC) in that light. Article 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 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 independent legal basis, and the legislator did not intend to encourage such a broad interpretation of Article 2 of the Civil Procedure Code.

75 Decision of the Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla 5.Pf.20.738/2009/7.

the promulgation of an international treaty,[76] adopted by the Parliament but not yet promulgated.[77]

The court may ask the opinion of the Foreign Affairs Ministry, if the question of privilege or immunity of a person or organisation arises regarding jurisdiction.[78] The court, however, shall stay the proceeding and ask for the decision of the Ministry of Justice if in a given case the question of diplomatic or similar immunity occurs.[79]

8. Do the courts distinguish between reservations and other statements? Have the courts ever declared a reservation illegal? Do they refer to the doctrine and decisions of international or foreign courts?

No, or at least we did not find such a case.

III. Customary international law

1. Is customary international law automatically incorporated into domestic law?

According to Article Q(3) of The Fundamental Law "Hungary shall accept the generally recognized rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law".[80] Constitutional Court Decision 53/1993. (X.13.) states that the generally recognized rules of international law are part of the Hungarian

76 Montreal Protocol No. 4 signed in Montreal on 25 September 1975 on the amendment of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and amended by the Protocol signed on 28 September 1955 in the Hague.

77 Constitutional Court Decision № 7/2005. (III. 31.) AB.

78 See e.g. the judgment of Budapest-Capital Regional Court of Appeal, Fővárosi Ítélőtábla No. 3.Pf.21.120/2012/1.

79 Law Decree 7 of 1973 on the Proceedings concerned diplomatic or similar privileges and immunities.

80 See also point I.1 of the Questionnaire. Article 7(1) of the former Constitution addressed the relationship between international law and domestic law in essentially the same manner. It stated: "The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law".

legal system without any further transformation by general transformation ensured by the Constitution itself.[81]

The expression "generally recognized rules of international law" may cover universal customary international law, peremptory norms (*ius cogens*) and general principles of law recognized by civilized nations. According to international law, these two categories belong to the sources of international law adopted by the whole international community. Customary international law is considered as generally recognized rule of international law;[82] however in decision 823/B/2003 the Constitutional Court did not share this view.[83] Customary norms become part of domestic Hungarian law by means of general transformation into the domestic legal system by Article Q(3) of the FL, but they cannot amend the provisions of the FL. Customary international law is not on the same level of the normative hierarchy either as constitutional provisions but it can have a supplementary interpretative role through the provisions of Article Q(3).[84] 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).[85] 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.[86]

Remarkably, certain authors disagree with the approach of the Constitutional Court. As for general transformation of customary international law through the Constitution, *Molnár* states that the reasoning is logically inaccurate as "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".[87]

2. Do the courts apply customary international law in practice? Do the national courts always take account of developments in the practice of

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

82 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 220.

83 Constitutional Court Decision № 823/B/2003 Alkotmánybírósági Közlöny [Gazette of the Constitutional Court] (ABK) [2006] 1143.

84 Constitutional Court Decision № 4/1997. (I. 22.) ABH [1997] 83.

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

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

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

States, as well as in case law and jurisprudence while determining the existence and content of customary international law?
What are the primary subject areas or contexts in which customary international law has been invoked or applied?

The Constitutional Court refers to *customary international law* but as relevant argumentation it is only cited in the form of its codified version. Sometimes the Constitutional Court only add the information that the cited norm is a *generally recognized rule of international law* but bases its argumentation on the treaty provision that codifies the customary law content.[88] Constitutional Court jurisprudence mainly refers to customary law in the field of criminal law. Apart from this field, only the principle of *pacta sunt servanda* is referred as a general rule of interpreting international obligations but no argumentation is fundamentally based on it.

The term "customary international law" is not used neither in the text of the Fundamental Law nor in that of the former Constitution, but it is covered by the expression "generally recognized rules of international law" and the practice of the Constitutional Court mainly focuses on norms that can be regarded as customary international law and peremptory norm as well. For instance, in decision 32/2008. (III. 12.) the principles of *nullum crimen sine lege* and *nulla poena sine lege* are declared to be *fundamental principles of international law*;[89] or the principle of *pacta sunt servanda* is referred to as *ius cogens* and customary international law as well.[90]

The practice of the Hungarian Constitutional Court includes only a small number of cases in which customary international law appears and an even smaller number of cases cite an exact customary norm. In cases referring to the principle of *nullum crimen sine lege* and the rule that war crimes and crimes against humanity shall be punished is declared to be *ius cogens*. It is to be noted, that the principle of *nullum crimen sine lege* also constitutes customary international law.[91]

In decision 53/1993. (X. 13.) the Constitutional Court pursued a preliminary norm control[92] concerning modification of the Hungarian criminal code and its conformity with international norms relating to prescription of crimes committed in violation of Common Article 2 and 3 of the 1949 Ge-

88 See Constitutional Court Decision № 53/1993. (X.13.) ABH [1993] 327.
89 Constitutional Court Decision № 32/2008. (III. 12.) ABH [2008] 334.
90 Constitutional Court Decision № 4/1997. (I. 2.) ABH [1997] 41, 52.
91 See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 327.
92 Article 23 of the FL (1) Based on a petition containing an explicit request submitted by an authorised person pursuant to Article 6 (2) and (4) of the Fundamental Law, the Constitutional Court shall, in accordance with Article 24 (2) a) of the Fundamental Law, examine for conformity with the Fundamental Law the provisions of adopted but not yet promulgated Acts referred to in the petition.

neva 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 a later decision, the Court explicitly stated that Hungarian courts can apply customary international law concerning war crimes and crimes against humanity even in the absence of explicit definition in the Hungarian Criminal Code since "It is international law itself which defines the crimes to be persecuted and to be punished as well as all the conditions of their punishability".[93]

In decision 32/2008. (III. 12.), for instance, the argumentation of the Constitutional Court concerning general and retroactive 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 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 set forth in the ECHR and that of the ICCPR but the provision of these conventions contain exceptions which allow the retroactive effect of criminalization of war crimes and crimes against humanity based on customary international law. Thus the Constitutional Court concluded that international legal obligations must be taken into account in the interpretation of the Constitution as Article 57(4) of the Constitution declaring the *principle of nullum crimen sine lege* in domestic law does not allow any exceptions.[94]

Concerning the practice of ordinary courts, customary international law is invoked only exceptionally. Hungarian criminal courts tried 9 cases in connection with criminal acts committed during the 1956 Hungarian revolution.[95] Since in decision 53/1993. (X. 13.) the Constitutional Court erroneously linked violation of Common Article 3 of the Geneva Conventions with crimes against humanity, i.e. equated them with war crimes committed

93 Constitutional Court Decision № 36/1996. (IX. 4.) [1996].

94 Constitutional Court Decision № 2/1994. (I. 14.) ABH [1994] 41; 53–54. For the analysis of the decision see Bodnár, László: 'Igazságtétel – most már kizárólag a nemzetközi jog alapján?' [Doing Justice – Only on the Basis of International Law from Now?], *Acta Universitatis Szegediensis – Acta Juridica et Politica*, Tom. 53, Fasc. (1998) 6, 77–84; Hoffmann, Tamás: 'A Nemzetközi Szokásjog Szerepe a Magyar Büntetőbíróságok Joggyakorlatának Tükrében' [The Role of Customary International Law in the Jurisprudence of the Hungarian Criminal Courts], *Jogelméleti Szemle*, [2011] (4), http://jesz.ajk.elte.hu/hoffmann48.html.

95 For more details see Hoffmann, Tamás: 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases', in: Manacorda, Stefano and Nieto, Adán (eds.), *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Cuenca, 2009, 735–753.

in a non-international armed conflict,[96] ordinary courts tried to establish the threshold of non-international armed conflict. However, the Review Bench of the Supreme Court treated the issue not as a question of determining the customary definition of non-international armed conflict but as a matter of treaty interpretation of the 1949 Geneva Conventions. Therefore, it relied on the official commentary of the International Committee of the Red Cross not as an evidence of customary international law but as an interpretative tool.[97] Similarly, in 2008 the Supreme Court relied on the definition of crimes against humanity set forth in the Korbély v. Hungary case of the ECtHR[98] to incorrectly conclude that the concept of armed conflict incorporates widespread and systematic attack without realizing that the question concerns customary international law.[99]

How do the courts prove existence of customary law?

Although the Constitutional Court refers to customary international law in some cases, it never attempts to systematically prove its existence. Even though in its argumentation it sometimes cites authorities which might viewed as evidence of a general practice accepted as law, it never clarifies that it is engaged in proving the customary statues of a norm and often simply states that the cited norm constitutes customary international law.[100] Generally, it refers to the convention or treaty that incorporates the customary norm as, for example, in decision 5/2001. (II. 28.) in which the Court referred to the *principle of free consent* as a customary international norm declared as such in the preamble of the Vienna Convention on the Law of Treaties of 1969.[101]

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96 See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 327. The Court explicitly asserted that "Acts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity".

97 Supreme Court Bfv.X.713/1999/3, 28 June 1999.

98 *Korbély v. Hungary* (European Court of Human Rights, Grand Chamber, Application No. 9174/02, 19 September 2008) [95].

99 Supreme Court Bfv.X.1.055/2008/5. See more in detail in Hoffmann, Tamás: 'Trying Communism Through International Criminal Law? – The Experiences of the Hungarian Historical Justice Trials' in: Heller, Kevin Jon and Simpson, Gerry (eds.), *Hidden Histories of War Crimes Trials*, O.U.P., 2013 [forthcoming].

100 For instance, in Decision № 53/1993. (X. 13.) the Constitutional Court cited the Nicaragua Judgment of the International Court of Justice and the Report on the Statute of the International Criminal Tribunal for the former Yugoslavia to establish the concept of crimes against humanity without stating that it was proving its customary status. See Constitutional Court Decision № 53/1993. (X. 13) ABH [1993].

101 See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [VCLT] preamble "*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", Constitutional Court Decision № 5/2001. (II. 28.) ABH [2001] 90.

Ordinary courts similarly do not clearly pronounce that they are proving the customary status of a norm. While sometimes courts cite authorities, it is generally regarded as an interpretative tool to establish the meaning of treaty provisions.[102]

3. Do the courts refer to the opinion of the Executive?

See point II.7. of the Questionnaire.

4. What are the legal basis for the cases on diplomatic or consular immunities or state immunity? Do the courts distinguish between diplomatic or consular immunities or state immunity? Do they refer to the UN Convention on Immunities of States and Their Property of 2004? How do they refer?

The legal bases for the cases on diplomatic or consular immunities or state immunity are the provisions of the two main conventions regulating this subject. The Vienna Convention on Diplomatic Relations of 1961 was published by Decree No. 22 of 1965 and the Vienna Convention on Consular Regulation of 1963 was published by Decree No. 13. of 1987. As these international norms have already been incorporated into the dualist Hungarian legal system due to the provisions of Article 7(1) of the Constitution (Article Q of the FL) they are the legal basis for the above mentioned legal areas.

The practice of the Constitutional Court has never decided on a case related to the diplomatic or consular immunities or State immunity, however, the initiative that was the base of decision 49/2003. (X. 27.) suggested the examination of conflict with international treaties, namely Vienna Convention on Diplomatic Relations of 1961 and that on Consular Regulation of 1963 and the Convention on the privileges and immunities of the Danube Commission of 1963 but it was rejected due to the lack of competence.[103] In the practice of the ordinary courts the above mentioned conventions were not discussed in the context of immunity.

The Constitutional Court has never referred to the UN Convention on Immunities of States and Their Property of 2004, nor did the ordinary courts.

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102 See Supreme Court Bfv.X.713/1999/3, 28 June 1999.

103 The Constitutional Court shall examine legal regulations on request or ex officio. At the time of the above mentioned procedure the *examination of conflicts with international treaties* could only be requested by the Parliament, its Commission or a Member of the Parliament; the President of the Republic; the Government or a Member of it; the President of the Court of Auditors; the President of the Supreme Court; and the Attorney General. See § 44. of Act XXXII. of 1989 on Constitutional Court. On the provisions in force see point IV.1 bellow.

IV. Hierarchy

1. How are treaties and customary international law ranked in the hierarchy of domestic legal system?[104]

In 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 Constitutional Court.

First, an international treaty shall be in harmony with the FL. The Constitutional Court has competence to *prior constitutional examination* of conformity of certain international treaty provisions with the FL. Before the acknowledgement of the binding force of an international treaty by the President of the Republic, the President of the Republic, or in case the international treaty is promulgated by a Government decree, before the consent to the binding force of that treaty, the Government may request the Constitutional Court to carry out this preliminary review.[105] If the Constitutional Court declares that a provision of an international treaty is contrary to the FL, the binding force of the international treaty shall not be recognised until the States or other legal entities of international law having the right to conclude treaties under international law eliminate such conflict with the FL or until Hungary, by making a reservation – if making a reservation is permitted by the international treaty – or by way of another legal instrument recognised in international law eliminates the conflict between the international treaty and the FL.[106] However, eliminating the unconstitutionality this way in some cases (e.g. in case of multilateral agreements) may take a long time, thus a amendment of the FL can be an appropriate instrument as well.[107]

The Constitutional Court also used to admit the initiations of the President of the Republic seeking for the prior examination of an Act promulgating

104 The answer is based on Chronowski – Drinóczi – Ernszt (2011), 259–287. For hierarchical position of "generally recognized rules of international law" please see question II.1.

105 Act CLI of 2011 on the Constitutional Court (ACC) Article 23(3)-(4).

106 ACC Article 40(3).

107 See Constitutional Court Decision № 4/1997. (I. 22.) AB.

an international treaty.[108] However, this examination is not unlimited: the date of entry into force of the promulgating Act (and of the commencement of the application of the international treaty) and the statutory provision specifying the authority responsible for implementation – as new normative provisions – may be subjected to a prior constitutional examination. If the promulgating Act is in conflict with the FL, the Parliament has to modify it. Under Article 6 the FL, the Parliament may also initiate the prior constitutional examination of any Acts, thus this competence may cover the Acts promulgating international treaties.

The Constitutional Court also extended its competence to *posterior examination* of the constitutionality of international treaties in 1997.[109] Although this was not spelled out explicitly in the former Act on the Constitutional Court, the Court held that laws enacting international treaties can be subject to a subsequent examination for constitutionality.[110] These types of laws are basically "normal" acts that can be referred to the Constitutional Court for *ex post* review. In its decision, the Constitutional Court found that *ex post* review can be extended to review the constitutionality of the international treaty becoming part of any law that implementing it. If the Constitutional Court holds that the international treaty or any provision of it is unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty. The decision of the Constitutional Court in which the Court declares the whole international treaty or any provision thereof unconstitutional has no effect on the obligations assumed by the Republic of Hungary under international law. As a result of the Constitutional Court's decision the legislation should – if it is necessary *by amendment of the Constitution* – harmonise the internal laws and statutes of the country

108 Constitutional Court Decision № 7/2005. (III. 31.) AB, II: "The right of the President of the Republic […] to initiate the prior constitutional examination of the provisions of an Act of Parliament prior to its signature naturally applies to the challenged provisions of an Act of Parliament promulgating an international treaty".

109 It was in the era of *actio popularis* initiation. Petitioner stated that it is unconstitutional that the Act on Constitutional Court permits only the *ex ante* constitutional review of international treaties. He suggested that the Constitutional Court should examine the possibility of *ex post* review of promulgating acts of international treaties.

110 Constitutional Court Decision № 4/1997 (I. 22.) AB. It was not obvious according to the former decisions. Cf. Decisions № 30/1990 (XII. 15.), and Decision № 61/B/1992 AB.
According to the Constitutional Court, there was no constitutional basis to deal with a law promulgating a treaty differently from any other legal rule when it came to constitutional review. Since it was derived from the Constitution that ex post facto review was to cover all kinds of legal rule, this universality could not be restricted even by statute. In this way the examination of international treaties, after they became part of domestic law, fitted into the logic of constitutional review. In those countries where this review process was universal and no specific reference was made to review of international treaties, constitutional courts reviewed the latter on the same basis as domestic law.

with the obligations assumed under international law.[111] After the FL, in the light of the new Act on CC and the 4th amendment of the FL, it is not clear again, whether the Constitutional Court will maintain the above mentioned practice. However, the ex post norm control proceeding may be initiated this time only by the Government, the Ombudsman, one-quarter of the MPs, the President of the Curia, the Attorney General or by a judge in concrete cases.[112]

Second, the pieces of domestic legislation shall be in harmony with international treaties, the guardian of which is the Constitutional Court again. An international treaty within the Parliament's competence shall be enacted and published in an act of Parliament. Other treaties shall be enacted and published in Government decree.[113]

By virtue of the Act on the Constitutional Court it is the duty of the Constitutional Court to examine a conflict between national law and international treaties. The Constitutional Court shall examine legal regulations conflicting with international treaties upon request or ex officio in the course of any of its proceedings. This proceeding may be requested by one quarter of MPs, the Government, the President of the Curia, the Attorney General or the Commissioner for Fundamental Rights. Judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.[114]

As to the legal consequences, the new Act on the Constitutional Court is rather ambiguous at this point.[115] Under Article 42(1) the Constitutional

111 Constitutional Court Decision № 4/1997. (I. 22.) AB, ABH 1997, 41.

112 FL Art. 24, ACC Article 24–25. Under the former Constitution on the basis of *actio popularis* initiation, any individual had the right to file a claim for posterior constitutional review regardless to being affected by the claimed legal act.

113 Act L of 2005 on the procedure related to international agreements Article 9(1).
According to Act L of 2005 Article 7(3), the following international treaties are relevant to the Parliament's competence:
- treaty in the field of EU cooperation (pursuant to Article E(2) of the FL);
- the subject matter of the treaty is regulated already by an Act of Parliament or pursuant to the FL, it shall be regulated in cardinal or other Act of Parliament;
- the treaty influences other matter belonging to the competence of the Parliament on the basis of Article 1(2) (a)-(c) and (e)-(k) of the FL.

114 ACC Article 32.

115 Just see the official translation of the ACC, Article 42 "(1) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty. (2) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in consideration of the circumstances and setting a time-limit – invite the Government or

Court shall annul the domestic legal act conflicting with an international treaty, if the given domestic legal act may not conflict with the act promulgating the given international treaty on the basis of the FL. I.e., if an international treaty is promulgated by an act of Parliament, and the challenged domestic legal act is e.g. a government decree then the latter shall be annulled. Under Article 42(2) the Constitutional Court shall call the Government or the law-maker to eliminate the conflict, if a domestic legal act conflicts with an international treaty, and the act promulgating the given international treaty may not conflict with the concerned domestic legal act on the basis of the FL. That is the case when an international treaty is promulgated by a government decree, and the domestic legal act conflicting with it is an act of Parliament. The new regulation does not answer the question of the same rank collisions, i.e. if the international treaty is promulgated by the act of Parliament, and the domestic legal act conflicting with it is also the act of Parliament. The Constitutional Court shall resolve this conflict with regard to the constitutional principle of "harmony".

Furthermore, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform it task and set a time-limit for that. It shall be considered as omission, if the law-maker fails to perform a task deriving from an international treaty.[116]

Thus, the preservation of harmony between international treaties and domestic law could be accomplished also in the future by the principle of the primacy of treaties in the hierarchy of legal norms. However, this system does not fully ensure the enforcement of constitutional obligations stemming from international law.[117] The organ requested to resolve any contradiction between domestic law and a treaty is obliged to fulfil its duty within an appointed time. However, this obligation to resolve contradictions is not legally enforceable. Consequently, sometimes there is no harmony between the international obligation and domestic law; and yet the constitutional order specified under Article Q(2)-(3) of the FL will not prevail.[118]

2. Have the courts recognized the concept of *jus cogens* norms? If so, how is *jus cogens* applied and what is its impact in practice?

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the law-maker to take the necessary measures to resolve the conflict within the time-limit set". Because of the complicated formulation the two cases seem to be the same! However, the Hungarian text shows the difference.

116 ACC Article 46(1)-(2).

117 International obligations become constitutional obligations by virtue of Article Q(2)-(3) of the FL.

118 Nevertheless, it does not mean the obligation effective under international law would not bind Hungary on the international level.

The Constitutional Court recognize the concept of *ius cogens* as generally accepted obligation which is transformed into the Hungarian legal system by Article Q(3) of the Fundamental Law [former Article 7(1)]. In Decision 53/1993. (X. 13.) it states that "national law shall not be applied as against an explicit peremptory norm of international law contrary to it".[119]

According to the practice of the Constitutional Court, the term "generally recognized rules of international law" covers peremptory norms as customary international law. The same rules refer to *ius cogens* concerning its role and place in the Hungarian hierarchy of norms. One of the main problems is, as *Molnár* states, that the exact set of these peremptory norms is uncertain; they have no exhaustive enumeration in the present state of international law.[120] This problem arises in the context of hierarchy of norms. In Decision 53/1993. (X. 13.) for instance, the Constitutional Court states that the principle *nullum crimen sine lege*, incorporated in Article 57(4) of the Constitution, had to give way *to ius cogens* norms on the prosecution and punishment of war crimes and crimes against humanity. According to *Molnár*, in such cases a constitutional provision contrary to a *ius cogens* rule is not deprived of its validity; the former is simply not applicable in the particular case (priority of application).[121] As regards the status of customary law and the general principles of law covered by the same term as *ius cogens* in the Hungarian hierarchy of norms, it can first of all be asserted that these international legal norms may not be above the Constitution.[122]

In Decision 30/1998. (VI. 25.) the Constitutional Court declares that Article 7(1) of the Constitution orders the harmonization of obligations assumed under international law with the whole of domestic law, including the Constitution.

At the same time, under Article 7 para. (1) of the Constitution, the legal system of the Republic of Hungary accepts the universally recognized principles of international law, and a similar constitutional order applies to the enforcement of the international *ius cogens* norms as well. However, contractual obligations assumed under international law outside the scope of international *ius cogens* rules may not be enforced as far as their unconstitutional content is concerned.[123]

119 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 332.
120 Molnár (2007), 458.
121 Molnár (2007), 463.
122 Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993]; Molnár (2007), 464.
123 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] p. VI. 3.

In addition, the Constitutional Court defined the term "*ius cogens*" by virtue of Vienna Convention on the Law of Treaties but no further enumeration has been given.[124]

Ius cogens is not cited directly in the practice of the Constitutional Court. The fact of being the peremptory norm of international law was cited as an argumentation in the above mentioned case of prosecution and punishment of war crimes and crimes against humanity with retroactive affect i.e. contrary to the constitutional provision of *nullum crimen sine lege*. No other case revealed any other norms of *ius cogens* neither before the Constitutional Court, nor before ordinary courts.

What is the role of the international law doctrine, decisions of international or foreign courts?

Examining the practice of the Constitutional Court, the role of decisions of international or foreign courts is only secondary; i.e. they interpret treaty based international obligations and this way help the Court to determine whether domestic law is in accordance with international law or they support the reasoning of the Court and thus put an emphasize on the fact that its practice conforms international standards.[125] Concerning ordinary courts, it is the Curia which has the competence to unify legal practice by the means of special uniformity decisions[126] that is not considered legislative norms but serves for the unified application and interpretation of legal pro-

124 Constitutional Court Decision № 30/1998. (VI. 25.) ABH [1998] 237–238.

125 See Constitutional Court Decision № 159/B/2003. ABH [2005] 1156.; Constitutional Court Decision № 102/B/2008. ABH [2008] 2839.; Constitutional Court Decision № 64/1993. (XII. 22.) ABH [1993] 380.; Constitutional Court Decision № 10/2001. (IV. 12.) ABH [2001] 137.; Constitutional Court Decision № 3/1998. (II. 11.) ABH [1998] 67.; Constitutional Court Decision № 6/1998. (III. 11.) ABH [1998] 94.; Constitutional Court Decision № 154/2008. (XII. 17.) ABH [2008] 1211.; Constitutional Court Decision № 50/2004. (XII. 6.) ABH [2004] 676.

126 Article 25(3) of the FL; Article 25 of Act CLXI of 2011 on the organisation and administration of courts of Hungary stating that: As part of the fulfilment of its duties determined in Article 25(3) of the FL, the Curia shall make legal standardisation decisions, shall conduct jurisprudence analyses in cases completed on a final and absolute basis and shall publish authoritative court rulings and authoritative court decisions.
Article 32(1) A law standardisation procedure shall be instituted if
a) it is necessary to adopt a law standardisation decision or to alter or to repeal a previously adopted law standardisation decision in the interest of the further development of jurisprudence or the maintenance of standard practices in the administration of justice, or
b) a justice administration chamber of the Curia wishes to depart from the ruling of another justice administration chamber of the Curia published as an authoritative court ruling or from a published authoritative court decision on a legal issue.
(2) In the case mentioned in Paragraph (1), (b), the chamber of the Curia shall suspend its proceedings until the adoption of a law standardisation decision, subject to the initiation of a law standardisation procedure.

visions. Reference to international law doctrine, decisions of international or foreign courts might be found in the reasoning of these instruments to support that way of interpretation that is supported by the Curia. Generally those legal problems are discussed in this context which has significant foreign practice like in the case of the right for compensation of children born with teratology and genetic disorders.[127]

3. Do the courts indicate any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

Apart from the superiority of *ius cogens*, the practice of the Constitutional Court does not indicate any higher status for any specific part of international law; however among all the international instruments it cites mostly the ECHR so as the practice of the ECtHR and the ICCPR in order to confirm and to support its argumentation. Since the establishment of the Constitutional Court in 1990 until 31 December 2011, it elaborated 4407 judgments.

The fact that these international instruments are invoked for the most of the time does not mean that human rights and fundamental rights have a higher status among international law areas but it shows that the Constitutional Court uses the most international legal instruments in this field. Regarding the available decisions, ordinary courts do not invoke *ius cogens* therefore no part of international law has a higher status in their practice.

V. Jurisdiction

1. Do the courts exercise universal jurisdiction over international crimes?

In principle, Hungarian criminal law provides for the exercise of universal jurisdiction over international crimes. According to Article 4(1) (c) of the Criminal Code, Hungarian criminal law shall be applied to prosecute crimes committed outside the territory of Hungary by non-Hungarians if the perpetrator committed an act within the purview of Chapter XI of the Criminal Code, i.e. genocide, war crimes, crimes against peace and apartheid or an act criminalized by an international convention.[128] Since

127 See for example uniformity decision for civil law № 1/2008.

128 Act IV of 1978 on the Criminal Code. See Constitutional Court Decision № 53/1993. (X. 13.) ABH [1993] 323–339. Paradoxically, although Chapter XI of the Criminal Code is entitled "Crimes against Humanity", it does not actually include the category of crimes against

Hungary has ratified the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, there is no prescription under Hungarian criminal law concerning such crimes.[129] The exercise of universal of universal jurisdiction, however, is based on the decision of the Attorney General to indict the alleged perpetrator, i.e. it depends on the discretion of the Attorney General.[130]

The new Hungarian Criminal Code, which will come into effect on 1 July 2013, does not change the procedural rules of the exercise of universal jurisdiction, however, as the new Code criminalizes a wider scope of international crimes – including crimes against humanity – these provisions might be more effectively used.[131]

Based on the available decisions, ordinary courts do not seem to actually exercise universal jurisdiction over international crimes. Even though Hungarian criminal courts have in the past tried international crimes, those proceedings were not under the principle of universality. Although according to press reports in certain cases private individuals have attempted to invoke it, the Attorney General has not initiated proceedings for crimes committed abroad by foreigners – no doubt primarily due to practical problems (such as collection of evidence, taking witness statements etc.) and the desire to avoid potential political conflicts with other states.

For instance, in 2009 a member of the far-right party Jobbik denounced acts committed by Israeli soldiers in the Occupied Palestinian Territories and requested the Attorney General to charge the alleged perpetrators with genocide, apartheid and crimes against humanity.[132] Similarly in 2012, two Members of the Parliamentary faction of Jobbik requested the Attorney General to initiate proceedings against perpetrators of atrocities committed against ethnic Hungarians in 1944–1945, in Vojvodina, Yugoslavia.[133] In neither case there is any official data concerning the initiation of criminal proceedings by the authorities.

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humanity. Nevertheless, based on Constitutional Court Decision № 53/1993. (X. 13.) Hungarian criminal courts can still prosecute such crimes by recourse to customary international law. See Hoffmann, Tamás: 'Individual Criminal Responsibility for Crimes Committed in Non-International Armed Conflicts – The Hungarian Jurisprudence on the 1956 Volley Cases', in: Manacorda, Stefano and Nieto, Adán (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.

129 Act IV of 1978 on the Criminal Code, Article 33(2) (a)-(b).

130 Article 4(2) of Act IV of 1978 on the Criminal Code.

131 Article 3(2)-(3) of Act C of 2012 on the Criminal Code

132 See http://nol.hu/belfold/morvai_krisztina_feljelentese_szo_szerint.

133 http://index.hu/belfold/2012/01/10/a_jobbik_feljelentest_tett_a_44–45-os_delvideki_meszarlas_miatt/.

2. **Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?**

   The Constitutional Court has not yet dealt with questions concerning this problem. According to the Hungarian Code of Civil Procedure, Hungarian courts only have jurisdiction over cases that have a connecting factor to Hungary such as Hungarian residence of the applicant or in case of non-contractual delicts (torts) that the wrongful act was committed in Hungary.[134] Consequently, ordinary courts cannot exercise jurisdiction over civil actions concerning international law violations that are committed in other countries without any connection to Hungary.

3. **Do the courts face the problems of competing jurisdictions and "forum shopping" in their practice? Do these problems concern conflicts of jurisdiction with foreign courts and international courts? How do they deal with such problems?**

   In the practice of the Constitutional Court no case has ever been examined concerning jurisdictional issues. While the civil and criminal jurisdiction of Hungarian courts is exhaustively regulated by domestic provisions, Hungarian law implicitly accepts "forum shopping". In case of criminal proceedings, if a foreign country requests that an ongoing criminal investigation or trial should be conducted in front of its criminal for a, it is possible to transfer the case.[135] In case of civil proceedings, if the Hungarian court determines that foreign courts had already initiated proceedings in the same subject-matter (*lis pendens*), it has to refuse to proceed with the case.[136]

VI. Interpretation of domestic law

1. **Is international law indirectly applicable, i.e. is it applied for interpretation of domestic law? Have the courts developed any presumptions or doctrines in this respect?**

   The Constitutional Court declared that domestic law shall be made and interpreted in the view of international obligations no matter if the obligation

134 Act III of 1952 on the Civil Procedure, Articles 29–41; Law Decree 13 of 1973 on Private International Law, Article 54.

135 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, Articles 11–17.

136 Law Decree 13 of 1973 on Private International Law, Article 65.

issues from customary international law or incorporated in treaty.[137] Using international law as an interpretational tool is based on Article Q(2) of FL as regards international law. The problem arise in connection with non-binding sources of international law, however, the Constitutional Court noted that invoking them would help the positivist foundation of argumentation.[138] *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 limitation to the interpretation.[139] The aim is to elaborate 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.[140]

According to the practice of the Constitutional Court, obligation derived from Article 7(1) means that the Hungarian State takes part in the community of nations and this participation is constitutional order for domestic law.[141] 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.[142] 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 the FL can be justified.[143]

According to *Blutman*, the main question is whether the application of Article 7(1) [now Article Q of the FL] creates the obligation to use or at least

137 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.

138 Kovács Péter concurring opinion: Constitutional Court Decision № 41/2005. (X. 27.) ABH [2005] 459. Blutman (2009) 302–303.

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

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

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

142 Blutman (2009), 303.

143 Blutman (2009), 304.

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. However, non-binding norms might be taken into consideration for interpretation of norms that oblige the State.[144]

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.[145] 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,[146] or only the "practice of the European Court of Human Rights" is invoked without any exact decision to support the statement.[147]

2. To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

Concerning the role and effect of international legal instruments on the reasoning of the Constitutional Court, three categories can be established.

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 declaring the principle 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

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

145 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.

146 See for example Budapest Metropolitan Court, Fővárosi Bíróság 19.P. 23.191/2006./19.; Supreme Court Kfv.III.37.385/2008/4.szám.

147 See for example Court of Békés County 5. P. 20259/2008/7.; Budapest Metropolitan Court, Fővárosi Bíróság 20.Bf.6162/2009/2.

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.[148] 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.[149] The Constitutional Court even highlighted the fact that the possibility of ignoring the principle of *nullum crimen and nulla poena sine lege* in the case of this kind of crimes is based on customary international law thus the non-applicability of statutory limitations obliges Hungary without any conventional provisions.[150]

International law has *additional constitutive effect* when the international norm plays 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 emphasize. For example in 1990 the 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 as 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;[151] and the ECHR with its Protocol № 6 dealing with the right to life.[152] These international norms clarified the provisions of the Constitution in the view of international obligations, thus they had significant role in the final reasoning of the decision.[153] Usually, if the decisions of international organizations and

148 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.

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

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

151 International Covenant on Civil and Political Rights, 19 December 1966, New York, 999 UNTS. 171. Article 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.

152 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.

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

judicial organs appear as the integrant part of the reasoning and the formation of the final decision, they never stand alone, they are accompanied by treaty based provision and judicial practice but to replace and complement the lack of constitutional practice related to a fundamental right.[154]

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 and the Constitutional Court relies many times on these sources as guidance so as the judgments and decisions of international judicial organs. However, for the most of the time they are just invoked to support argumentation, 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. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations issued from the ECHR, thus generally they are invoked in the company of treaty based provisions and ECtHR judgments, and for the most of the time they are not the source and base of the final decision, they are just invoked to support the argumentation based on domestic law. In these cases the used terms and phrases such as "Parliamentary Assembly of the Council of Europe also urges" or "the opinion of the Constitutional Court is in accordance with…" reveal the purpose of citation. The same is true with decisions of the United Nations and its specialized agencies and the communications of the institutions of the EU which are also cited to strengthen and to validate the argumentation. 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.[155]

As regards the practice of ordinary courts, no such categorization can be made, as in the most of the cases the invocation of international law has only supportive effect, and there is a very few cases that international law plays significant role in the reasoning of the court. When international law has constitutive effect on the case, it is usually the practice of the Court of Justice of the European Union or that of the ECtHR which form the base

154 See for example Constitutional Court Decisions № 386/B/2005. ABH [2011] 1536–1538.; 36/2000. (X. 27.) ABH [2000] 260.; 17/2001. (VI. 1.) ABH [2001] 224–225.; 5/2001. (II. 28.) ABH [2001] 87–92.; 30/1998. (VI. 25.) ABH [1998] 220.

155 See for example Constitutional Court Decisions № 1006/B/2001. ABH [2007] 1374.; 49/1998. (XI. 27.) ABH [1998] 378.; 5/1999. (III. 31.) ABH [1999] 88–89.; 36/2000. (X. 27.) ABH [2000] 260.; 17/2001. (VI. 1.) ABH [2001] 225.; 32/2002. (VII. 4.) ABH [2002] 160. 1152/B/2007. ABH [2010] 1746.; 14/2004. (V. 7.) ABH [2004] 249.; 18/2004. (V. 25.) ABH [2004] 306.

of the reasoning. The common feature of these cases is that the applicable law is deducted from the jurisprudence. The case of the registration fee to be paid in Hungary for those cars which were bought in another EU Member State is a typical example. As this legal practice confronted the principle of free movement of goods the Supreme Court take into consideration that at the time of its procedure the EU Court had already judged the case of the Hungarian registration system of foreign cars and based its own judgment on this decision and several former ones to support the fact that the applicant has right to deny the payment of the registration fee.[156]

As regards the ECtHR practice, the Supreme Court analyzed in details Article 6 (the right to fair trial) and 8 (the right to respect for his private and family life, his home and his correspondence) of the ECHR in connection with a case on legality of perquisition.[157]

There is a special practice mainly followed by the Budapest Metropolitan Court, i.e. international law is cited through the decisions of the Constitutional Court and thus the relevant statements are that of the constitutional judges based on the practice of the ECtHR.[158]

3. Do the courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

It is not a general practice of the Constitutional Court to cite treaties to which Hungary is not a party. However, the EU Constitution adopted in 2004 was the subject of four decisions which supervised the objections against the decisions of the National Election Commission (NEC). In Hungary it used to be the NEC which authorizes national referendum and until 31 December 2011 the Constitutional Court had the competence to revise objections against the permitting or refusing decisions of the NEC. There are some special fields that cannot be consulted by the way of this instrument of direct democracy. As regards international law, no national referendum may be held on any obligation arising from international treaties.[159] In the above mentioned four decisions the Constitutional Court pursued the procedure to revise objections against the decisions of the NEC concerning authorization of referenda set forth in questions related to the unratified Euro-

156 Supreme Court Kfv.III.37.454/2010/5.

157 Supreme Court Kfv.III.37.451/2008/7.

158 See Budapest Metropolitan Court Decisions, Fővárosi Bíróság 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.

159 Article 8(3) (d) of the FL.

pean Constitution. Through these decisions of the Constitutional Court, its competence related to international treaties was clarified and summarized as the European Constitution was not treated as a source of international obligations.[160] However, some years later, it was cited as the source of the Charter of Fundamental Rights of the European Union. In this decision, referring to its competence and the treaty establishing the European Constitution, the Constitutional Court held that it "will not treat the founding and amending treaties of the European Union as international treaties even though they arise from treaties",[161] and refused the procedure due to lack of competence as the Community law is not international law in the meaning of Article 7(1) of the Constitution.[162]

The Constitutional Court referred to EU law, the jurisprudence of the Court of Justice of the European Union and other norms as well, even before the entry into force of the accession treaty (1st May 2004). Decision 23/2010. (III. 4.) declared that the consideration of EU law is stated in Decision 37/2000. (IX.4.) and this might be due to the obligation of harmonization as the citation of *acquis communautaire* did not serve as source of law but rather as a reference to show that domestic law is in accordance with international and EU standards, so these instruments have only supportive role in the reasoning.[163]

The same situation happened to the ECHR before it entered into force in Hungary. The Constitutional Court had cited its provisions in its early practice even before the State ratified and promulgated it by Act XXXI of 1993. In those times when Hungary was not a party to the ECHR it was invoked as the standard of Europeanization.[164]

Apart from these fundamental and basic documents of different field of law, it rarely happens that a convention is invoked without Hungary being a party to. For instance, the provisions of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo, 1997) were cited once as bioethical

160 See Constitutional Court Decision № 56/2004. (XII. 14.) ABH [2004] 797–804.; Constitutional Court Decision № 57/2004. (XII. 14.) ABH [2004] 809–817.; Constitutional Court Decision № 58/2004. (XII. 14.) ABH [2004] 822–829.; Constitutional Court Decision № 1/2006. (I. 30.) ABH [2006] 39–48.

161 Constitutional Court Decision № 61/2011. (VII. 13.) ABH [2006] 325.

162 See Constitutional Court Decision № 61/2011. (VII. 13.) ABH [2006] 290–327.; Constitutional Court Decision № 72/2006. (XII. 15.) ABH [2006] 819, 861.; Chronowski – Drinóczi – Ernszt (2011), 273.

163 See Constitutional Court Decision № 23/2010. (III. 4.) ABH [2010] 138–139. See other decisions citing EU law before the accession: 37/2002. (IX. 4.); 28/2000, 209/B/2003; 37/2000.

164 Sólyom, László: 'Kölcsönhatás az Emberi Jogok Európai Bíróságának esetjoga és a szólásszabadság védelme között Magyarországon' [Interaction between the Case Law of the European Court of Human Rights and the Freedom of Expression in Hungary], *Állam- és Jogtudomány*, 1996/97, 3–4, 151, cited by Blutman (2009), 303–304.

standards before Hungary even became the party to it (the Convention was promulgated by Act VI of 2002).[165]

In decision 41/2005. (X. 27.) the Constitutional Court made a basic mistake by invoking Magna Charta Universitatum Europaeum signed by university rectors in 1988 in Bologna, to commemorate the 900th anniversary of the founding of the oldest university of Europe.[166] According to the general perception of international obligations, it is not a treaty, nor an obligation that binds the State, however, the Constitutional Court explicitly referred to it as a source of law in the question of autonomy of higher education. Justice *Kovács* gave a concurring opinion which expressed the same thought and stated that the Constitutional Court should have specifically dealt with the aspects of international law related to the autonomy of higher education.[167]

Regarding the available decisions, ordinary courts do not have the practice to cite and invoke treaties that Hungary is not party to.

VII. Other international sources

1. Do the national courts determine the existence or content of any general principle of law in accordance with Article 38 para 1 of the Statute of the International Court of Justice?

In its practice the Constitutional Court declares the sources of international law in accordance with Article 38 (1) of the Statute of the International Court of Justice.[168]

In the constitutional practice the expression "generally recognized rules of international law" may cover universal customary international law, the peremptory norms (*ius cogens*) and the general principles of law recognized by civilized nations. Customary law and general principles take

165 See Constitutional Court Decision № 36/2000. (X. 27.) ABH [2000] 260; Constitutional Court Decision № 386/B/2005. ABH [2011] 1536. Constitutional Court Decision № 22/2003. (IV. 28.) p. 258.; Constitutional Court Decision № 43/2005. (XI. 14.) ABH [2005] 556.; Dissenting opinion of Judge Harmathy Attila: Constitutional Court Decision № 39/2007. (VI. 20.) ABH [2007] 512–513.

166 See The Bologna Declaration, http://www.magna-charta.org/cms/cmspage.aspx?pageUid={d4bd2cba-e26b-499e-80d5-b7a2973d5d97}#

167 Constitutional Court Decision № 41/2005. (X. 27.) ABH [2005] 486.

168 Constitutional Court Decision № 988/E/2000 ABH [2003]1289.

precedence over domestic laws, except for the FL and only *ius cogens* rules can prevail even over the basic law.[169]

In Decision 53/1993. (X. 13.) the Constitutional Court talks about this hierarchy of the Constitution, international law and domestic law, and legal literature also supports this ranking, so as the other legal systems of several EU Member States or the constitutions of some ex-communist countries.[170] *Molnár* notes that putting customary law and general principles to a level superior to the Constitution would have a great (unwanted) impact on the standard of protection of fundamental rights since, in many cases, guarantees offered by customary law are under the human rights guarantees of the Constitution.[171]

In the practice of the Constitutional Court the general principle of international law is not a fundamental part of legal argumentation but it appears as an example nearby other instruments to support the reasoning of a decision.[172]

Regarding the available decisions, there is no evidence to prove that ordinary courts deal the question of general principle of law in accordance with the Statute.

2. Do the national courts refer to binding resolutions of international organizations? Do they treat them as independent source of law?

In general, it can be stated that the Constitutional Court frequently refers to resolutions of international organizations but for the most of the time, to clarify treaty based obligations.

As regards binding resolutions of international organizations, the FL does not contain any provisions. Since the entry into force of the UN Charter, the States have to face unforeseen legal obligations without their explicit consent as the Security Council is entitled to elaborate binding resolutions containing sanctions and coercive measures. There are other international organizations that make binding decisions like the North Atlantic Treaty Organization, the International Civil Aviation

169 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 (2009), 304.

170 For example Austria, France, Germany, Greece, Italy, the Netherlands, and Portugal as EU member States and Belarus, Turkmenistan, and Uzbekistan as ex-communist countries. Molnár (2007), 463–464.

171 Molnár (2007), 462–463.

172 For example see Constitutional Court Decisions № 7/2005. (III. 31.) ABH [2005] 83–101.; 32/2008. (III. 12.) ABH [2008] 325–360.; 53/1993. (X. 13.) ABH [1993] 323–339.; 2/1994. (I. 14.) ABH [1994] 41–58.; 45/2000. (XII. 8.) ABH [2000] 344–352.; 30/1998. (VI. 25.) ABH [1998] 220–233.

Organization, the World Health Organization and some regional fishing organizations.[173]

Concerning Security Council [hereinafter: SC] resolutions the Hungarian practice is incoherent, confusing and contradictory. Sometimes they are promulgated by government decrees or regulations and very rarely by acts.[174] 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,[175] and it happens quite often that they are published in the form of Foreign Office informant (*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.[176] In legal practice it causes problems in determining the applicable law. 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 let free to go. In fact the embargo was suspended for a while but at the time of the crime it was in force again.[177] 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 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.[178]

In the practice of the Constitutional Court only two Security Council resolutions has ever been invoked. They appear as example for punishment of international crimes in Decision 53/1993. (X. 13.) whereby the Constitutional

173 Molnár, Tamás – Sulyok, Gábor – Jakab, András: 'Nemzetközi jog és belső jog; jogalkotási törvény', in: Jakab, András (szerk.), *Az Alkotmány kommentárja I. kötet*, Századvég Kiadó, 2009, 411.

174 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)' [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 (18.11.2012).

175 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 Lone.

176 Molnár – Sulyok – Jakab (2009), 412.

177 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.

178 Court of Bács Kiskun County (now Bács Kiskun Tribunal) 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.

Court dealt with the question of *nullum crimen sine lege* and the prosecutions and punishment of war crimes and crimes against humanity.[179]

3. To what extent do the national courts view non-binding declarative texts, e.g. the UN Standard Minimum Rules on the Treatment of Prisoners, Council of Europe recommendations etc., as authoritative or relevant in interpreting and applying domestic law?

The recommendations and resolutions of the Council of Europe are frequently invoked as relevant interpretation of ECHR provisions and the Constitutional Court relies many times on these sources as guidance. However, for the most of the time they are just invoked to support argumentation, i.e. to justify that the opinion of the Constitutional Court echoed in the reasoning is in accordance with international standards thus recommendations are not constitutive sources of obligation. Many resolutions and recommendations of the Parliamentary Assembly, the Committee of Ministers or the Venice Commission are cited to interpret and clarify obligations thus generally they are invoked in the company of treaty based provision and ECtHR judgments and for the most of the time they are not the source and base of the final decision, just the support for 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…" reveal of the purpose of citation.[180] The same is true with decisions of the United Nations and its specialized agencies and the communications of the institutions of the EU which are also cited to support the argumentation with the same expressions. 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.[181]

However, sometimes these instruments have a more important role i.e. they form the integrant part of the reasoning and the formation of the final decision. In these cases they never stand alone, they are accompanied by treaty based provision and judicial practice but to replace and complement the lack of constitutional practice related to a fundamental right.[182]

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179 UN S/Res. 808 (1993) Tribunal (Former Yugoslavia); UN S/Res/827 (1993) Tribunal (Former Yugoslavia). 53/1993. (X. 13.) ABH [1993] 329.

180 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.

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

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

Regarding the available decisions, ordinary courts rarely invoke non-binding instruments of international law and 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.[183]

4. Are the courts asked to apply or enforce decisions of international courts (e.g. European Court of Human Rights)? If so, how do the courts respond? Do they view such decisions as legally-binding?

In the decision № 988/E/2000 the Constitutional Court had to determine the legal status of the International Court of Justice judgment in the *Gabčikovo-Nagymaros Project*.[184] In that case, the international judicial forum declared that the 1977 Treaty, the basic of construction works, was still in force and consequently governed the relationship between the parties. The ICJ accepted that new norms and standards of international environmental law had been developed since 1977 and that the parties were obliged to interpret the original Treaty in light of the new provisions of international environmental law. It held that Hungary and Slovakia must negotiate in good faith and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty. Since the 1997 judgment of the ICJ, the parties had been engaged in negotiations, but no substantive progress

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

184 In 1977, Hungary and Czechoslovakia had concluded a Treaty on the Construction and Operation of the Gabcíkovo-Nagymaros Barrage System (16 September 1977) ("1977 Treaty"), for the building of dam structures in Slovakia and Hungary for the production of electric power (the Gabcíkovo power plant), flood control, and improvement of navigation on the Danube. In 1989, Hungary suspended and subsequently abandoned completion of the project alleging that it entailed grave risks to the Hungarian environment and the water supply of Budapest. Slovakia (successor to Czechoslovakia) denied these allegations and insisted that Hungary carry out its treaty obligations. It planned and subsequently put into operation an alternative project only on Slovak territory, whose operation had effects on Hungary's access to the water of the Danube. In Gabčikovo-Nagymaros Project, Hungary v. Slovakia, Judgment, Merits, (1997) ICJ Rep 7; ICGJ 66 (ICJ 1997), 25 September 1997, the ICJ found that Hungary was not entitled to suspend and subsequently abandon its part of the works in the dam project. The ICJ held that Hungary and Slovakia must negotiate in good faith in the light of the present situation, and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty. On 3 September 1998, Slovakia filed a request with the ICJ for an additional judgment on the basis of Article 5 of the Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabcíkovo-Nagymaros Project, signed at Brussels on 7 April 1993 ("Special Agreement"): "If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment". On 7 October 1998, Hungary submitted its written statement.

had been made and the petitioner asked the Constitutional Court to declare unconstitutionality and order the Government to take steps to enforce the ICJ decision.

The petition was rejected as the judgment of the ICJ was not considered as a "generally recognized principle of international law" in the sense of Article 7 of the Constitution. Moreover, the judgment did not amount to an international obligation transformed into domestic law. The ICJ proceedings were based on the Special Agreement concluded between the two states, but the judgment was neither a norm nor a treaty: it only settled litigation. The ICJ had no jurisdiction to annul domestic rules of law or to obligate states to legislate. It was possible that a state could fulfil its obligation purely by legislative acts. It was possible also for the other party to enforce the judgment (for example by requesting an additional judgment, or by initiating the procedure of the Security Council), but the Constitutional Court had no jurisdiction in this respect.[185] According to Article 5 of the Special Agreement, 'either party may request the ICJ to render an additional judgment'. However, the Constitutional Court had no jurisdiction to oblige Parliament or the Government to initiate this procedure.[186]

The Constitutional Court held in this case that the ICJ judgment as such was not a part of the domestic legal system. For this reason, legal obligations may have arisen from the judgment only in international law and not in domestic law, and conflicts may have arisen between international law obligations and domestic law provisions. In its previous decisions, the Constitutional Court had declared that, irrespective of domestic law provisions, due to the primacy of international law, Hungary shall fulfil its international legal obligations by ensuring the conformity of international legal obligations with domestic legislation.

In general, the decision of an international judicial organ is binding only on the parties of the case.[187]

As for the application of international judgments, Constitutional Court decision 61/2011. (VII. 13.) states that the principle of *pacta sunt servanda* obliges the Constitutional Court to follow the ECtHR practice and its level of fundamental rights protection even it is contrary to the previous practice of Hungary.[188] This point of view is in conformity with Arti-

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

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

187 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 (2012a).

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

cle 13(1) of Act L of 2005 on the procedure regarding treaties stating 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.[189]

The Curia (former Supreme Court) is frequently asked to take into consideration in its review procedure those judgments of the ECtHR that were delivered in one or another aspect of the actual case before it. It is only a procedural step to get justice in the view of the decision of the ECtHR as there is a previous procedure with a judgment in force and the review procedure serves for the adjustment of it.[190]

Are the courts asked to apply or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty? If so, how do the courts respond? Do they view such decisions as legally-binding?

The Constitutional Court has never been asked to apply directly or enforce decisions or recommendations of non-judicial treaty bodies, such as conferences or meetings of the parties to a treaty. However in some cases the submission to the Court may contain that kind of instruments as a source of obligation but even if the Constitutional Court deal with the problem, only the treaties and conventions are appeared as sources of law or as legislation taken into account. Decisions and recommendations of non-judicial treaty bodies such as conferences or meetings of the parties to a treaty are just to support argumentation and that is the maximum role they play in the reasoning.[191]

Regarding the available decisions, ordinary courts are not asked to apply or enforce decisions or recommendations of non-judicial treaty bodies.

189 Molnár (2012a), 2.

190 See the series of decisions of the famous Vajnai case (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.); or Bt.I.1136/2008/3., Pfv.V.20.120/2008/5.; Pfv.IV.20.214/2010/9. See the legal analysis of the decision of European Court of Human Rights in Vajnai case: Koltay, András: 'A Vajnai-ügy' [The Vajnai case], *JeMa*, 2010/1, 77–82. See the relevance of the Vajnai case and the statements of the European Court of Human Rights in the Hungarian criminal law: Szomora, Zsolt: 'Az alkotmánykonform normaértelmezés és a büntetőjog – problémafelvetés' [Criminal Law and the Interpretation of Norms in Conformity with the Constitution – the Problem], in: *Sapienti Sat – Ünnepi kötet Dr. Cséka Ervin Professzor 90. Születésnapjára*, *Acta Universitatis Szegediensis. Acta Juridica et Politica*, 2012/LXXIV, 465–466.

191 For example see Constitutional Court Decisions № 32/2006. (VII. 13.) ABH [2006] 441.; 5/2001. (II. 28.) ABH [2001] 89.; Blutman (2009), 311.

VIII. Other aspects of international rule of law

1. **Do the national courts enjoy in determining the existence or content of international law, either on the merits or as a preliminary or incidental questions, the same freedom of interpretation and application as for other legal rules? Do they base themselves upon the methods followed by international tribunals?**

   Hungarian national courts apply law based on 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. This implies that the Hungarian courts should ascertain the meaning of international norms in light of the generally accepted framework of treaty interpretation as laid out in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties and determine the content of international legal provisions in accordance with the formal sources of international law under Article 38(1) of the Statute of International Court of Justice.

   However, in practice Hungarian courts seldom prove their familiarity with the methods followed by international tribunals. The Constitutional Court often quotes international jurisprudence – especially case-law of the ECtHR – as an evidence of the existence of a generally agreed interpretation of a norm without explicitly relying on the methods used by international fora.

2. **May they consult the Executive on issues of international law or international relations (especially on facts)? Is the opinion of the Executive binding or not?**

   In criminal law cases, courts might request information from the Department of International Criminal Law and Government Agency to the Strasbourg Court of the Ministry of Public Administration and Justice about the existence and relevant provisions of international conventions applicable to the case. In private international law cases the Department of Justice Cooperation of the Ministry of Public Administration and Justice might provide similar service. However, the Executive can only provide information to the courts, which are free to determine whether the specified international conventions are actually applicable to the case and how their provisions should be interpreted.

3. **May national courts adjudicate upon questions related to the exercise of executive power if such exercise of power is subject to a rule of international law? Or do they decline the jurisdiction in political questions?**

The political questions doctrine does not exist in Hungarian law therefore courts are obliged to exercise their jurisdiction whenever it is feasible. Nevertheless, courts have to uphold the immunity of foreign states.[192]

4. Do the national courts decline to give effect to foreign public acts that violate international law?

Hungarian courts are obliged to give effect to foreign court orders and judgments provided they are not in contravention to the Hungarian public order.[193] This implies that any public acts that violate international law has to be denied any legal effect in Hungary since it would correspondingly violate the Hungarian public order as well.

5. In the context of the rule of law, how do the courts refer to: the UN Charter, the Vienna Convention on the Law of Treaties, the European Convention on Protection of Human Rights and Fundamental Freedoms, UN Covenants on Human Rights?

Many times the conventions and treaties are referred as international treaties, in their original form; however, there are many examples when they are mentioned as international obligations but they are cited in the form of their promulgating act. It has nothing to do with the content of the obligation but makes a little dogmatic disturbance. An international treaty based obligation is transformed into domestic law by virtue of promulgation in the form of a national legislation form and it gets inserted into the hierarchy of norms. Formally, the international obligation is not international anymore as it prevails in a domestic legislation form.[194] For example the "Constitutional Court indicated that it took into consideration the Decree 12 of 1987 promulgating the 1969 Vienna Convention on the Law of Treaties (hereinafter: Vienna Convention)".[195] In other decisions it refers to the same source of international law as a convention and simply adds the information that it was promulgated by the above mentioned decree.[196] The following practice is quite confusing but in the same time clearly shows that the form of citation has no importance in the content of the obligation.

192 Law Decree 13 of 1973 on Private International Law, Article 62/C (c).

193 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, Article 47; Law Decree 13 of 1973 on Private International Law, Article 72 (2) (a).

194 For example see Constitutional Court Decisions № 152/B/2009. ABH [2010] 1984; 1154/B/1995. ABH [2001] 829.; 49/2003. (X. 27.) ABH [2003] 561.; 562.

195 Constitutional Court Decisions № 36/2003. (VI. 26.) ABH [2003] 413.; 43/2003. (IX. 26.) ABH [2003] 464, 467.; 44/2003. (IX. 26.) ABH [2003] 470; 472. The same can be noticed in Constitutional Court Decisions № 45/2003. (IX. 26.) ABH [2003] 476–477.

196 Constitutional Court Decision № 37/2002. (IX. 4.) ABH [2002] 239–240.

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*[197] the Parliament adopted a decision declaring that the alleged provision of the Hungarian Criminal Code is correct and even if the ECtHR stated otherwise, the Parliament does not agree with the opinion of the ECtHR.[198] 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-conform judgment and relieved the accused on the ground that in a similar case no crime had been committed in the view of the decision of the ECtHR.[199]

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 ECtHR 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 in 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.[200]

6. Do the courts import "foreign" notions, e.g. of human rights, democracy, or export their own interpretations of those value-laden concepts to other jurisdictions?

Foreign notions are not imported by the Hungarian courts; they refer to the principles of rule of law, democracy, human dignity, etc. on the basis of

197 *Fratanoló v. Hungary*, Application no. 29459/10, Judgment of 3 November 2011 [violation of article 10 of the Convention by using of totalitarian symbols].

198 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 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 szólójelentés elfogadásáról szóló 58/2012. (VII. 10.) OGY határozat [Resolution No. 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 (2012a), 3.

199 Curia Bfv.III.570!2012/2.; Molnár (2012a), 3.

200 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.

the Constitution/FL. They do not consider concepts of other jurisdictions either in the light of their own interpretation.

7. Does the EU law and the decisions of the European Court of Justice as well as the European Convention on Human Rights and the decisions of the European Court of Human Rights, especially concerning international law, influence the general perception of international law by domestic courts?

The decisions of the European Court of Justice as well as the decisions of the ECtHR are not considered as direct sources of international law, they are rather 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.[201] However, in decision 988/E/2000 it 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.[202]

As for the content of decisions of the ECtHR related to interpretation of provisions of the Convention, the Metropolitan Court of Budapest highlighted that the judgments of foreign courts do not oblige Hungarian courts, however the legal reasoning is to be taken into consideration even if the ECtHR decisions in question was rendered one year later than the facts of the case before the Hungarian court. In this case the statutory limitation is not to apply. The Metropolitan Court of Budapest emphasized that the retroactivity of interpretative reasoning is also supported by decision 75/2008. (V. 29.) of the Constitutional Court.[203]

In general, ordinary courts cite frequently foreign decisions and mainly that of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases. In most of the cases the citation of judicial practice of the ECtHR serves only for a subsidiary support of the statements even without invoking *expressis verbis* the relevant judgment.[204] It is more often that 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 Budapest Metropolitan Court.[205]

201 Blutman (2009), 310.
202 Constitutional Court Decision № 988/E/2000. ABH [2003] 1290.
203 Budapest Metropolitan Court Decision, Fővárosi Bíróság 24.K.35.639/2006/25.
204 See Supreme Court Decision Kfv.IV.37.629/2009/70.
205 See Budapest Metropolitan Court Decisions, Fővárosi Bíróság 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.

IX. Judicial dialogue on international law in Eastern Europe

1. **Do the courts refer to decisions of international and/or foreign courts?**

   The Constitutional Court frequently refers to international court decisions but very rarely to foreign ones.

2. **For what purposes do the courts refer to international and foreign decisions? Do they do this to find the content and common standard of interpretation/understanding of international law or just to strengthen their own/domestic argumentation? Are they more likely to dialogue in highly politicised cases where their independence appears compromised and they need to support their position with additional sources of authority?**

   The Constitutional Court tends to support its argumentation by invoking foreign legislation or foreign court decisions to demonstrate the "*international tendencies*"[206] that rule a certain legal question and thus enumerates the judicial practice of different States. The jurisdiction of the Constitutional Court does not indicate any political character and the cases in which foreign State practice is cited are usually related to fundamental rights such as right to life for instance, which usually divide the society. Invocation of foreign State practice occurs in majority[207] and minority opinions as well.[208] Hungarian Constitutional Court follows the jurisprudence of other States, even its website lists a collection of the sites of the Constitutional Courts of the world. Apart from the EU Member States, 20 other European, 24 Asian, 25 American, 19 African and the Australian Constitutional Courts are directly available through the links.[209]

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.

206 Constitutional Court Decisions № 36/2000. (X. 27.) ABH [2000] 260.

207 For example see Constitutional Court Decisions № 14/2000. (V. 12.) ABH [2000] 99. 18/2000. (VI. 6.) ABH [2000] 124–125.; 57/2001. (XII. 5.) ABH [2001] 490–491.; 37/2002. (IX. 4.) ABH [2002] 2.; 5/2004. (III. 2.) ABH [2004] 83.; 43/2005. (XI. 14.) ABH [2005] 539–541.

208 For example see Constitutional Court Decisions № 13/2000. (V. 12.) ABH [2000] 76.; 6/2001. (III. 14.) ABH [2001] 107.; 35/2002. (VII. 9.) ABH [2002] 223.; 37/2002. (IX. 4.) ABH [2002] 238.; 22/2003. (IV. 28.) ABH [2003] 250–257.; 260.

209 See Constitutional Courts in the world, http://www.alkotmanybirosag.hu/useful-materials/constitutional-courts-in-the-world (20.12.2012).

Concerning the practice of domestic courts on 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 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.[210]

3. How the courts refer to "external" judgments? By citing, critique or according legal relevance to decisions of external courts?

Concerning the practice of the Constitutional Court, there is no unitary guidance for citation thus even in the case of citing international legal instruments there is a lack of consequent method and sometimes the retrieval is problematic. The same is even more so if the foreign court decisions and legislations are invoked.

Two categories can be separated in the practice of the Constitutional Court. First, when the Constitutional Court refers to the name of the State to demonstrate a point of view represented by that country without citing any instruments to support the statement. For example in the question of organ donation the Constitutional Court categorized the States based on their legislation on the subject and mentioned only the name of them and not the exact norms.[211] The common feature of the citations is that the Constitutional Court never criticizes the foreign decisions; it just refers to them as the example of international tendencies.

The other category is formed by those reasoning which categorize the States but cites the concrete legislation or decision. One of the most demonstrative decisions of the Constitutional Court is the one dealing with the legality of euthanasia. It reviewed the most remarkable standpoints concerning the relationship between the right to life and the right to self-determination. It examined in details the history of the legislation of euthanasia in the United Kingdom, including the *Dianne Pretty case* which was later judged by the ECtHR as well, that of the Netherlands, Belgium, the United States of America with the practice of different States, and the Australian legislation. However, there is a long description of different legal practices; it has no significant effect on the reasoning of the decision of

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

211 For example see Constitutional Court Decisions № 386/B/2005. ABH [2011] 1531.

the Constitutional Court.[212] A few lines further down it even declares that its reasoning is in accordance with international tendencies but this time it cites the judgments of the Canadian Supreme Court and that of the ECtHR to support the statement.[213]

4. What is the frequency with which the courts refer to decisions of international/foreign courts? If the courts never or not often refer to decisions of international or foreign courts what could be the practical reason of non-referral?

As regards the practice of the Constitutional Court, it is not a frequent phenomenon that it invokes foreign State practice; however it consults foreign practice to demonstrate how democratic States handle a special legal issue, usually in the sphere of fundamental rights. It has already pursued legal comparison in the case of, for instance, state symbols [13/2000. (V. 12.)], right to vote [57/2001. (XII. 5.)], euthanasia [22/2003. (IV. 28.)], publishing the results of poll [6/2007. (II. 27.)], television and radio broadcasting of the sessions of the Parliament [20/2007. (III. 29.)], and domestic violence [53/2009. (V. 6.)].[214]

Concerning the role of foreign legal practice the Constitutional Court summarized its point of view in its recent decision. It states that the constitutionality of a legal institution is based on the Constitution, the legal system, the historical and political background of the State, thus the Constitutional Court does not consider that any foreign legal practice is determinative to the examination of conformity of any legal acts with the Fundamental Law (Constitution). The fact that a special field of law is regulated in the same way as in Hungary is not a relevant argument and it has no relevance when the Constitutional Court deals the question whether domestic law and the international obligations of Hungary are in conformity.[215]

Regarding the available decisions of ordinary courts, there is no practice of considering foreign court decisions. The Supreme Court had the chance to form a short opinion on the plaintiff's reference to the French regulation as a model solution to be taken into consideration. It only declared that no foreign jurisdiction or legislation bounds the Hungarian courts.[216] As for the decisions of the international judicial organs see VIII. 7.

212 Constitutional Court Decision № 22/2003. (IV. 28.) ABH [2003] 250–257.
213 Constitutional Court Decision № 22/2003. (IV. 28.) ABH [2003] 261.
214 See Constitutional Court Decision № 1/2013. (I. 7.) ABH [2013]. 3.4. 55.
215 Constitutional Court Decision № 1/2013. (I. 7.) ABH [2013] 3.4. 55.; see also Constitutional Court Decision № 32/1991. (VI. 6.) ABH [1991] 146, 159.
216 Supreme Court Kfv.IV.37.488/2006/7.

5. **Are there any procedural or practical obstacles for judicial dialogue with international and foreign courts (e.g. lack of translations, poor language skills, poor dissemination of foreign judgments)?**

   Concerning the practice of the Constitutional Court, the quality and level of using international legal instruments and foreign court decisions or legislation mainly depends on the judges, their skills and their field of expertise. For instance there are judges who avoid and neglect international legal instruments or just join to other minority opinions, but there are those who are quite active concerning application of international law.

6. **Are the courts more likely to cite cases from states which they share cultural or other links with (e.g. religious or trade relationships)? Do the national courts refer more to the foreign courts they (rightly or wrongly) deem "prestigious" (such as the US Supreme Court or the German Bundesverfassungsgericht)?**

   Apart from judicial decisions, the Constitutional Court prefers citing German legislation as guidance or a desirable model regulation. However, the application of the highly respected norms is sometimes inverted. For instance, in the case of regulation of incitement against a community the Constitutional Court refused the implication of the German model twice, in 2004 and 2008, as it did not meet the Hungarian constitutional benchmark. Surprisingly, in Decision 95/ 2008. (VII. 3.) the Constitutional Court cited the German legislation even though it was not in conformity with its own benchmarks, thus the foreign source cannot be applied to strengthen the argumentation; in fact, it rather weakened the legal reasoning. The legal comprehension is superficial, and it leads to wrong conclusion such as the invocation of the *Tucholsky case* of the German Court which raised the problems of punishability in the crime of defamation to the Hungarian case related to incitement against a community.[217]

   Judicial dialogue is very rare in ordinary court practice. In a case related to forestry the Supreme Court *expressis verbis* stated that foreign legislation invoked by the applicant as an example (hereby the French regulation) cannot be taken into consideration by the Hungarian court.[218]

7. **Please indicate the most representative examples of decisions concerning judicial dialogue (please use attached template).**

217 Szomora (2001), 39.
218 Supreme Court Kfv.IV.37.488/2006/7.

INDEX

Names of the referred Hungarian courts before and after the FL

Hungarian	*BEFORE FL*	*AFTER FL*
… Megyei Bíróság ↓	Court of … County	
Törvényszék		Tribunal of …
Fővárosi Bíróság ↓	Budapest Metropolitan Court (in other texts it is also called Budapest-Capital Regional Court, and – in ECtHR judgments – Budapest Regional Court)	
Fővárosi Törvényszék	–	Metropolitan Tribunal of Budapest
Fővárosi Ítélőtábla	Budapest-Capital Regional Court of Appeal	Budapest-Capital Regional Court of Appeal
Pécsi Ítélőtábla	Pécs Regional Court of Appeal	Pécs Regional Court of Appeal
Legfelsőbb Bíróság ↓	Supreme Court	
Kúria		Curia