

4. Decision 53/1993. (X. 13.) AB – International Crimes

*Tamás Ádány** – *Réka Varga***

Generally recognised norms of international law become parts of Hungarian law by means of general transformation, while international treaties do so by means of specific transformation [through promulgation]. The harmony between international and domestic law must be ensured without prejudice to the hierarchy among the Constitution, international law and domestic law.

International law provides the conditions for the punishment of crimes to be prosecuted under international law. Therefore, the Constitution is not violated if an act of the Parliament stipulates—even retrospectively—that crimes against humanity and war crimes are not subject to statutory limitations. Nevertheless, this only holds true for offences where punishment is prescribed by international law.

The novelty of the Decision International Crimes, analysing the relation between international and domestic rules and crimes that are not subject to statutory limitations, was the HCC establishing well-known international legal theorems for the Hungarian legislation and for the domestic legal praxis. International law renders certain conducts punishable, therefore the *nullum crimen sine lege* maxim is to be applied in this case with regards to international law, and not domestic law. If international law rules out statutory limitations, then that should be respected regardless of domestic rules. The provisions of Art 7 (1) of the Constitution mean, therefore, that the relevant rules of international criminal law are to be applied through general transformation by force of the Constitution. Nevertheless, constitutionalism demands that such international rules can only apply through general transformation for offences defined by international law.

* PhD, Associate professor, Pázmány Péter Catholic University Faculty of Law and Political Sciences (Budapest).

** PhD, Associate professor, Pázmány Péter Catholic University Faculty of Law and Political Sciences (Budapest).

1. Background

1.1. Domestic legal background

Transitional justice was a core issue during the political transition of the early 1990s in Hungary. ‘Historical justice’—as it was often termed in the contemporary media—encompassed individual responsibility for the crimes committed during the 20th-century totalitarian regimes. Not every model of the transitional justice solutions garnered legislative interest: there were neither clear lustration rules, nor did declared, public amnesties take place.¹ Fact-finding remained unfinished—the question of the identities of the agents and partners of the Communist secret services haunts Hungarian politics to this day.² A particular emphasis in this public discussion was placed on the atrocities committed in and after the 1956 revolution. The discussion was around to have or not to have criminal proceedings, without intermediary alternatives ever being on the public table for long.³

The most frequent argument⁴ in support of the omission of criminal proceedings was the considerable lapse of time.⁵ Against this background it is hardly surprising that the first major legislative attempt tried to cut this Gordian knot of time. A bill drafted by majority MPs Mr. Zsolt Zétényi and Mr. Péter Takács proposed restarting the relevant period for

1 Zalaquett, ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints’ in Kritz (ed), *Transitional Justice. Vol. 1. General Practices* (1995), 10–11.

2 See for example Máthé (ed), *Az nem lehet, hogy súlyos bűntett ne legyen büntethető* (2016), 369.

3 Péter Márai (SZDSZ [Alliance of Free Democrats]) MP’s first speech at the plenary session of the Hungarian Parliament on 2 February 1993: ‘Hungarian society does not think about serving justice for the past but thinks about the present and the future’. Contemporary press reported in only one short paragraph about the suggestion of Professor Imre Békés about the setting up of a commission akin to Truth and Reconciliation Commissions. See Balázs Stépán, ‘Változatok igazságtételre’ [Variations for justice] *Magyar Hírlap*, 3 February 1993.

4 See especially the session of the Parliament of 2 February 1993 with respect to the debate around the law on international crimes where statutory limitations do not apply, that resulted in the HCC decision under present discussion (*Országgyűlési Napló*, <https://bit.ly/3bIpFca>) and plenary session of 2 February 1993 (*Országgyűlési Napló*, <https://bit.ly/3fz7WFj>).

5 See the Parliamentary debate on amendment of Act IV of 1978 on the Criminal Code of the Republic of Hungary. *Országgyűlési Napló*, 4 November 1991. <https://bit.ly/3ywc36>

statutory limitations on a symbolic date of the political transition, notably 2 May 1990. This solution was deemed a violation of Constitutional guarantees in Decision 11/1992. (III. 5.) AB (for an analysis of Decision on Retroactive Transitional Justice see our volume).⁶

After few months, Mr. Zétényi and Mr. Zimányi drafted a new bill, which became the subject of the Decision International Crimes, enacted by the Parliament on 16 February 1993.⁷ This avoided the radical efficiency of restarting the limitations period, rather it relied on exceptions from a general rule. In itself this solution was nothing new, because Hungarian criminal law is based on the general rule of statutory limitations; however, exceptions had been listed exhaustively by Article 33 (2) of the then relevant old Criminal Code.⁸

The novelty of this new act of 1993 would have been an extension of this closed list of exceptions to cover ‘offences committed during the 1956 October revolution’. The offences were listed according to either Article 13 (7) of Act VII of 1945 or certain articles of the 1949 Geneva Conventions.

The former consists of the remnants of a controversial Hungarian law used to prosecute crimes committed during World War II. The source of this controversy is the lack of many fair trial guarantees at the so-called People’s Courts that ruled over genuine war criminals but also held Communist backed show trials—sometimes even mixing the two aspects in the same procedure. This act created legal categories termed ‘war crimes’ and ‘crimes against the people’, not necessarily corresponding to the definitions of war crimes in international law.

6 The Constitutional Court decision on the law submitted by MPs Zétényi and Takács concerning statute of limitations established the unconstitutionality of a previously unpromulgated law. The law declared the re-commencement of the statute of limitations for three crimes (treason, intentional homicide, and fatal bodily harm) if the state did not enforce its criminal claim for political reasons. This HCC stated that any statutory provision relating to the statute of limitations is unconstitutional. Hence, the decision on the Zétényi–Takács act on statutory limitations cannot be considered as the antecedent of the Decision on international crimes because they are based on completely different legal bases: the decision on the Zétényi–Takács act on statute of limitations examines the nature of statute of limitations, while the Decision on international crimes deals with the domestic projection and application of the principle of *nullum crimen sine lege* applicable in international.

7 First speech of MP Zimányi Tibor on the plenary session of the Parliament on 2 February 1992. Országgyűlési Napló, <https://bit.ly/3vamjXf>

8 Mohácsi and Szeder, ‘Büntethetőséget megszüntető okok’ in Györgyi and Wiener (eds), *A Büntető törvénykönyv magyarázata – Általános rész* (1996), 80.

While there is an apparent semantic resemblance to international legal categories, the elements of the respective crimes evidently show that there are major, conceptual and contextual differences between them. These discrepancies existed not only in 1993 but also back in 1956. For various reasons the Hungarian legal system treated this international legal framework with so many and such grave conceptual mistakes that one may even conclude that the bulk of the relevant international legal materials remained unavailable to Hungarian legal praxis.⁹ For this reason it was indeed an important observation in the Decision International Crimes that the provisions of international law regulating international crimes were to be considered, without a doubt, ‘generally recognised rules’, hence, making the relevant international standards applicable to domestic prosecutors and courts through the general transformation of the Constitution. Due to the wording of Article 7 of the Constitution, the next major question therefore emerged: how precisely shall such rules of international law be applied in Hungary?

1.2. *International legal background*

Article 1 of Act XC of 1993 on exceptions from statute of limitations exempted ‘war crimes’—as defined by the background regulation of Act VII of 1945 on People’s Courts—from statutory limitations. This definition had always been broader, or rather significantly different from the international legal definition of war crimes.

This difference is a major terminological discrepancy between war criminals and their crimes. According to the International Military Tribunal (IMT) Statute a ‘war criminal’ is nonetheless not equivalent to the person who committed ‘war crimes’—as this category is only one of the three

⁹ Hungarian legal academics tried to remedy this situation. See Kovács, ‘Alkotmányosság és nemzetközi jog’ in Bánrévy, Jobbágyi, and Varga (eds), *Iustum, aequum, salutare* (1998), 186–203.; Hoffmann, ‘A nemzetközi szokásjog szerepe a magyar büntetőbíróságok joggyakorlatának tükrében’ (2011); Ádány, *A Nemzetközi Büntetőbíróság joghatósága* (2014); Varga, ‘Biszku-Case Reloaded: International Law Obligations and Lacuna in Compliance with Respect to Communist Crimes’ (2015); Ádám Gellért, ‘Büntetlen bűnösök’ [Unpunished criminals] *Index.hu*, 16 September 2017.

crimes prosecuted at the trials of ‘war criminals’.¹⁰ International law has omitted ‘war criminal’ as a legal term ever since the late 1940s.

Articles 11 and 13 of Act VII of 1945 reflect the use of ‘war criminal’ as a similarly embracing term. It is in itself noteworthy that the Act defines a ‘war criminal’ and not ‘war crimes’ as such. Consequently, while ‘war crimes’ as defined by international law cover ‘violations of the laws and customs of war’ and ‘crimes committed by war criminals’ in the meaning of Act VII of 1945 are distantly related, these are very far from bearing the same meaning.¹¹

The offences listed in Act VII of 1945—as cited in the subject matter legislative acts from 1993—encompassed *inter alia* conducts related to starting or planning a war (by ‘disrupting the peace among nations’), therefore treated by international law as ‘crimes against peace’.¹²

Article 2 of Act XC of 1993 consisted of actual war crimes as per international law, defined along the relevant provisions on grave breaches of the 1949 Geneva Conventions. Such offences were e.g., grave breaches committed against prisoners of war or the civilian population.¹³ The wording of this Article makes it clear that grave breaches are used in the international legal meaning as a technical term of the Geneva Conventions and its Protocols. All four Geneva Conventions set a clear list of grave breaches, the relevant Hungarian act clearly reflects articles 130 and 147 of the third and the fourth Geneva Conventions, respectively.

Notwithstanding the aforementioned international law considerations, the 1993 text of the Criminal Code only exempted ‘war crimes’ as defined by Act VII of 1945 from the statutory limitations. By disregarding international law, this list lacked crucial contextual elements of war crimes but consisted of quite a few elements that did not correspond to international law. First, the existence of any armed conflict was not stipulated as a legal prerequisite of war crimes in the Hungarian law. However, without a war

10 The other two would be crimes against peace and crimes against humanity. See: Annex to the Article 6 of the Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis (London Agreement).

11 Wright, ‘War Criminals’ (1945), 261.

12 See Gellér, *Nemzetközi büntetőjog Magyarországon, adalékok egy vitához* (2009), 16–17.

13 Ref. to the scope of application of the Third and Fourth Geneva Conventions.

(or an armed conflict after 1949),¹⁴ violations of the rules and customs of war become a legal impossibility. The importance of the contextual armed conflict is even greater because the text of Act XC of 1993 did not refer to the grave breaches of the third and fourth Geneva Conventions, but it established a connection to common Article 3 thereof. As this is the only article from the 1949 Conventions applicable also in a non-international armed conflict, the classification of the contextual armed conflict as international or non-international became a central issue of the judicial treatment of the 1956 atrocities.

Furthermore, tying the notion of war crimes to pre-1949 legal concepts created an unresolvable anachronism. The 1949 Geneva Conventions were binding international legal obligations for both Hungary and the Soviet Union in 1956.¹⁵ While both states have consented to the treaties, the promulgation in the USSR was delayed for decades, and the Hungarian promulgation was also troubled. Formally, Hungary promulgated the 1949 Geneva Conventions,¹⁶ but only the titles appeared in the national legislation, the actual normative text was omitted. This fundamentally fraudulent promulgation could not but fail to perform its single most important task of specific transformation into domestic law and obviously lacked accessibility. As state consent had been previously expressed in due form, the 1949 Geneva Conventions were clearly and obviously opposable for Hungary in 1956.

The above considerations in themselves would already create a closer-than-usual knot between international rules and Hungarian legislative acts. All these above concepts about war crimes, war criminals, crimes of war criminals or grave breaches could have been irrelevant, if none of them had been subject to statutory limitations in the 1993 Act. However only one of these, ‘crimes of war criminals’ as defined by a controversial and anachronistic law was recognised as an exception from the general rule of limitations.

14 After the prohibition of war as a legal term with a well-established, i.e., legally defined concept and consequences in 1945, the concept of ‘armed conflict’ was used instead of ‘war’ in international law.

15 The Soviet Union ratified the Geneva Conventions on 10 May 1954, Hungary ratified the Conventions on 3 August 1954. <https://bit.ly/3oPosFz>

16 Decree law 32 of 1954 on the statutory force in the Republic of Hungary of the international conventions adopted on 12 August 1949 in Geneva on the protection of war victims.

It is therefore crucially significant how international law has regulated the effect of time lapse on the punishment of these crimes in 1956, in 1993 or today.

The UN General Assembly adopted a convention in 1968 about ‘the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity’.¹⁷ Unsurprisingly enough, this text defines war crimes and crimes against humanity in line with the Nuremberg regulations. From these, the Hungarian Act XC of 1993 only used war crimes, combined with the concept of grave breaches. The 1968 Convention however does not mention crimes against peace, meaning that international law left the regulation of this particular issue to state competence; and national legislations actually did show a wide variance in this matter.¹⁸ Considering this divergent state practice it is hardly possible to argue that the general rule of statutory limitations to all or certain crimes would be a *sine qua non* condition of rule of law systems¹⁹ as it was commonly understood in Hungary in the early 1990s. On the contrary: there are some conceptual differences in common law and civil law countries in this matter. So much so that statutory limitations as such cannot be considered a rule generally recognised by civilised nations. Common law countries seem to prefer the general rule of no limitations based on the lapse of time, and these legal systems use the legislation to create exceptions where time actually becomes an issue for the enforcement of the law.

The divergent approach by states to statutory limitations may have had some contribution to the relatively low number of ratifications to the 1968 Convention.

The mandatory application of statutory limitations, particularly as a general rule is not supported by state practice.²⁰ As such, it cannot become customary law. Customary exceptions cannot develop either because of the missing general rule. War crimes and crimes against humanity are therefore not subject to statutory limitations under customary international-

17 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity GA Res. 2391(XXIII) 23 UN GAOR p. 40. UNGA 16; A/RES/2391 (XXIII) (25 November 1968).

18 Question of the non-applicability of statutory limitation to war crimes and crimes against humanity. Study submitted by the Secretary General. E/C4.N/1966. 86. 105–106.

19 Question of the non-applicability of statutory limitation, E/C4.N/1966. 86. 103.

20 Question of the non-applicability of statutory limitation to war crimes and crimes against humanity. Study submitted by the Secretary General. E/C4.N/1966, 86. 103, 105–106.

al law: either because the general rule of statutory limitations is missing altogether, or because there is a general understanding that whatever the general rule may be, statutory limitations shall not apply to war crimes and crimes against humanity.²¹

3. *Petition*

The case was referred to the HCC by the President of the Republic. The President asked the HCC to examine the compatibility of the Act with the *nullum crimen sine lege* principle recognised by the ICCPR, the ECHR, the respective articles of the Constitution and with the legal requirements set out by the HCC in its earlier decision (Decision 11/1992, see analysis on the Decision on Retroactive Transitional Justice) on the Act on re-commencement of statute of limitations submitted by MPs Zétényi and Takács, because the President was of the view that the matter at hand deals with the same subject.

4. *Decision and its reasoning*

The HCC would not have found it intrinsically unconstitutional if the Act XC of 1993 had retrospectively exempted the 1956 atrocities from statutory limitations if it had been done along the conditions set out in its earlier decision, namely that such exceptions could have been provided by either international or by Hungarian national law. The HCC established a multiple prong test to decide if non-application of statutory limitations under international law would be possible: (1) The offence must be based on international law rule opposable to Hungary, (2) It must be classified as either a war crime or a crime against humanity, (3) International law renders non-application of statutory limitation either mandatory or at least possible for Hungarian law, (4) Were all these criteria to be met, it would be constitutional if the conditions of prosecution of the crimes defined by international law were applied according to conditions prescribed by international law, regardless of the statute of limitations in Hungarian law in force at the time of the commission of the offence.

21 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2009), 614–618. Analysing when this rule has become customary reaches beyond the scope of the present work.

- 4.1. *Generally recognised norms of international law become parts of Hungarian law by means of general transformation, international treaties do so by means of a specific transformation, through promulgation. The harmony between international and domestic law must be ensured, without prejudice to the hierarchy among the Constitution, international law and domestic law [Article 7 (1) of the Constitution].*

In this landmark decision laying the foundations of the relation between international law and Hungarian law the HCC observed that the first provision of Article 7 (1) of the Constitution stating that '[t]he legal system of the Republic of Hungary accepts generally recognised rules of international law' results in such rules becoming parts of Hungarian law without specific transformation. Transformation in these cases is achieved by the Constitution itself. The Constitution and domestic laws must therefore be interpreted in such a way as to make the application of generally recognised international rules possible. 'Undertaken international legal obligations' mentioned in the second provision of Article 7 (1) are subject to specific transformation. The same provision creates an obligation to ensure harmony, which applies to every kind of international legal obligation: generally recognised obligations and specifically undertaken obligations as well.²² However, this is without prejudice to the hierarchy among the Constitution, international law and domestic law.

Next, the HCC examined the relation between international and domestic Hungarian law. As a first step, it clarified the consequences of the phrase 'generally recognised rules of international law'. The HCC did examine in detail what rules would be fitting in this category. As examples, it noted that the UN Charter and the 1949 Geneva Conventions do contain such provisions. The decision also noted that general transformation by means of the Constitution does not preclude the possibility of such norms being parts of specific treaties, whereby specific transformation is also possible [ABH, 1993, 327, 323–339.].

22 In practice, 'generally recognised obligations' encompass general rules accepted by civilized nations and customary international law. 'Specifically undertaken obligations' mean international treaties and decisions of international organizations.

4.2. *The constitutionality of a rule connected to international law must be scrutinized from additional perspectives compared to a rule related exclusively to Hungarian law [Article 7 (1) of the Constitution].*

The HCC found it important to specify the standard used in the constitutional review in the reasoning of the decision. This standard could not neglect international law and consequently Article 7 of the Constitution. Following a general inquiry into international law, the decision analysed war crimes and ‘crimes against humanity’ and found that the international community considers them criminal offences and defines their elements. While the difference between grave breaches and war crimes is not mentioned expressly, their dual legal consequences are present in the finding: ‘War crimes and crimes against humanity are prosecuted and punished by the international community by means of international tribunals and also by obligating the states wishing to be members of this community to prosecute such crimes.’ [ABH, 1993, 328, 323–339.].

The decision also cites a 1993 UN Secretary General’s report on the establishment of the would-be International Criminal Tribunal for the former Yugoslavia (ICTY).²³ This report was found to ‘specify and contain substantive international law, rules that are without a doubt customary in nature, therefore the problematic that not every state has become a party to certain treaties does not even emerge’ [ABH, 1993, 329, 323–339.]. This report clearly identifies the relevant part of the Nuremberg legal materials to be part of international customary law. Building on these arguments on the customary character of international crimes, the HCC delivered yet another important *dictum*: ‘the guarantee of *nullum crimen sine lege* in international law is meant to apply to itself and not to the domestic law’ [ABH, 1993, 330, 323–339.]. Therefore, the criminality of a conduct must be examined in light of the sources of public international law.

4.3. *Exclusion of statutory limitations may happen either according to Hungarian law, or by international law if there is an international legal obligation binding for Hungary [Article 7 (1) of the Constitution].*

‘In the application of Article 33 (2) of the [old] Criminal Code, a constitutional requirement is that non-limitation of criminal liability may be

23 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704).

established only in respect of the offences excluded from statutory limitations under Hungarian law in force at the time of the commission; unless the facts are classified as war crimes or crimes against humanity under international law, where exclusion from limitations is mandatory or possible under international law and there is an international obligation on Hungary to exclude limitations' [ABH, 1993, 323, 323–339.]. The merits of the decision found Article 1 of Act XC of 1993 (containing conducts deemed internationally crimes against peace) to be unconstitutional, but with regard to war crimes, the HCC found the rules allowing criminal proceedings (accepting an exception from statute of limitations) based on international law to be constitutional.

4.4. *The rules on the punishment of war crimes and crimes against humanity, as they fundamentally endanger humanity and international coexistence, are peremptory rules of international law [Article 7 (1) of the Constitution].*

Finding that the relevant rules are customary would have been sufficient in itself to establish their classification as generally recognised rules of international law. The HCC went even further and observed that these rules are part of international *jus cogens*.²⁴ The HCC summarised its most important findings as follows: 'The rules governing war crimes and crimes against humanity are undoubtedly part of customary international law; they are principles generally recognised by the international community, or in the wording of the Hungarian Constitution, they are among the 'generally recognised rules of international law.' These rules are 'accepted' by Hungarian law according to the first indent of Article 7 (1) of the Constitution; and are therefore, without any specific transformation or adaptation, among the 'international obligations undertaken' whose harmony with domestic law is also provided for in the second paragraph of the cited Article of the Constitution' (ABH, 1993, 332–333, 323–339.). It follows from this that it was not contrary to the principle of the *nullum crimen sine lege* principle at that time²⁵ that an act was punished in Hungary according to these rules of international law. The finding is therefore that

24 Amnesty International: Universal Jurisdiction: The duty of states to enact and enforce legislation. Chapter 3. 1.; Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2018), 932; Berdud, 'El jus cogens, ¿Salió del garaje?' (2015), 116.

25 Article 57 (4) of the Constitution.

‘the principle of nullum crimen does not break here, but its restriction to domestic law’.

5. Doctrinal analysis

5.1. The relation between international law and domestic law

This decision was the first to offer a dogmatic interpretation of the relationship between international law and domestic law in Hungary, by clarifying the somewhat ambiguous provisions of the Constitution.²⁶ Although a rigid divide between monistic and dualistic legal systems seems today rather artificial and impractical,²⁷ elucidation of the issue was crucial to strengthening Constitutional and other public law institutions in the early 1990s in Hungary.

The Decision International Crimes²⁸ laid the foundations for the essentially dualistic, but inherently mixed system of Hungarian law. A dualistic system of specific transformation applied to treaties, while ‘generally recognised rules’ were treated in a monistic way through a general transformation²⁹ by the Constitution itself. The HCC also declared that interpretation of the Constitution itself must be done with due regard to international law as well.³⁰ Meanwhile a well-known dilemma for so many countries emerged, namely the inherent difference between constitutional and international legal perspectives. As the former suggests that no rule of law may be of a higher standing than the Constitution,³¹ the later finds

26 Molnár, ‘A nemzetközi jog és a magyar jog viszonya’ (Relations between international law and Hungarian law) in Jakab and Fekete (eds), *Internetes Jogtudományi Enciklopédia* (2018).

27 Ádány, ‘A nemzetközi jog és a belső jog kapcsolata’ in Csink, Schanda, and Varga Zs. (eds), *A magyar közjog alapintézményei* (2020), 194.

28 After the adoption of this decision, among others, Decision 4/1997. (I. 22.) AB and Decision 30/1998. (VI. 30.) AB dealt with this question.

29 According to Tamás Molnár the term ‘general transformation’ is incompatible with international law, because there is no existing body of international law in the case of customary international law that could be transformed. See Molnár, ‘A nemzetközi jog és a magyar jog viszonya’ in Jakab and Fekete (eds), *Internetes Jogtudományi Enciklopédia* (2018).

30 For an analysis of the decision see for example Blutman, ‘A nemzetközi jog joghatásai az alkotmánybíróvási eljárásokban’ (2013), 10–13, 30–31, 35.

31 ‘However, the Constitutional Court gives a special place to the generally recognized rules of international law. These are made part of the Hungarian legal

that no state can rely on any of its own national rules to invalidate or terminate an international legal obligation it has previously consented to.

This decision of the Court also noted that the participation of Hungary in the international community is a constitutional command; and that this leads to a mandatory objective of interpretation in order to make actual applicability of international rules of law possible [ABH, 1993, 327, 323–339.]. In László Sólyom's interpretation this meant that even though the constitution must be interpreted in compliance with international law, international law is not of a higher hierarchical standing than the Constitution—this is why the HCC has the mandate for the constitutional review of domestic rules that transformed international law into national law.³²

5.2. *Constitutional review of norms deriving from international law*

International law offers a choice for states to either make new treaty obligations compatible with their domestic legal systems or not to consent to be bound by such new treaties at all. Of course, such a simplistic approach is not feasible in the case of other sources of international law: these other sources typically are prone to a more dynamic evolution, sometimes even overriding the more static constitutional rules. Therefore, the HCC interpreted that the wording on accepting 'generally recognised rules of international law' as meaning that such rules are not part of the Constitution but are also 'obligations undertaken' and as such are part of domestic law that have to be applied [ABH, 1993, 327, 323–339.]. The above cited arguments from László Sólyom may still lead to a case where a HCC finds an international rule transformed into domestic law to be unconstitutional. A subsequent decision of the Court, however, clarified that such a finding would be irrelevant for the purposes of responsibility of a state

system through Article 7 (1) of the Constitution itself, and they are undoubtedly above the domestic laws in the hierarchy. But not over the Constitution. Whatever special status the Constitutional Court granted to the generally recognized rules, and actually »opened« the Hungarian legal order to the direct enforcement of these rules by para. 7, and even prescribed that even the Constitution should be interpreted to allow the application of the generally recognized rule of international law, it expressly maintained that the Constitution is superior to them and that the Constitutional Court is therefore entitled to examine the constitutionality of all international norms that have become domestic law.' Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (2001), 438.

32 Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (2001), 438.

under international law and would have no bearing on the existence of the international obligation.³³

The HCC interpreted Articles 7 and 57 of the Constitution together—therefore the provisions of international law and the Constitutional rule of the *nullum crimen sine lege* principle jointly set up the minimum threshold of constitutionality.³⁴ By this solution of inserting international law into the constitutional review the Court effectively avoided the necessity of resolving a conflict between international and domestic law.³⁵

5.3. *The assessment of the findings on statute of limitations*

The HCC noted that based upon the general rule of statutory limitations in the Criminal Code any exceptions thereto are constitutional only if those exceptions existed at the time of the commission of the crime—except for cases where such exceptions derive from international law, along with the elements of the crime itself. Thus, the decision follows the reasoning it had already presented with regards to the *nullum crimen sine lege* principle: it prescribes the application of domestic laws on statutory limitations in compliance with international law in force at the time of the commission of the act. An international obligation not to apply statutory limitations this way substitutes an explicit exception from this general rule under Hungarian law.

5.4. *Classification of international crimes*

The decision did not stop at examining the connection between international and domestic law, but it relied on substantive international legal arguments to decide the merits of the case. It was the only way to find that ‘the Act interconnects various elements of personal and subject matter scope of the Geneva Conventions and creates a connection among them that is not present in the Conventions themselves. A domestic rule of law cannot change the content of an international treaty.’ [ABH, 1993, 337, 323–339.].

33 Decision 4/1997. (I. 22.) AB.

34 Reference made in Decision 2/1994. (I. 14.) AB, point II/B.1.2.

35 Blutman, ‘A nemzetközi jog joghatásai az alkotmánybírósági eljárásokban’ (2013).

6. *Aftermaths of the Decision*

The decision became a standard reference point in discussing the relation of international and Hungarian law, and also for the domestic application of rules on international crimes. Therefore, the decision has remained an authority for many scholarly writings.

The system of international crimes subject to no statutory limitations has been reiterated by a number of subsequent decisions. Historical justice was revisited again in resolution 36/1996. (IX. 4.) AB. In its Decision 2/1994. (I. 14.) AB—reflecting on its Decision 66/1992. (XII. 17.) AB—the HCC upheld its findings from the present decision about generally recognised rules of international law becoming part of Hungarian law without a specific transformation.³⁶

Decision 30/1998. (VI. 25.) AB further refined the hierarchy among international law—the Constitution—and domestic laws.

The new Hungarian constitution, the FL regulates the relation between international and domestic law in Article Q. It bears a significant resemblance to the former text of Article 7 of the former Constitution.³⁷

Actual prosecution of international crimes did not take place in Hungary for quite a while. With a few notable exceptions (volley-cases, Képíró³⁸ and Biszku³⁹ cases) there were no genuine domestic criminal proceedings taking place. There would have been an applicable legal framework for such procedures: the very decision examined in this chapter clarified this legal framework, based on international law. That is one particular point of importance in the understanding of the effects of this decision: it made palpable that the provisions of international criminal law are to be applied in Hungarian law, regardless of any domestic rules on the punishment of such offences. All in all, the HCC established that there are no obstacles to prosecute and punish internationally defined crimes, regardless of the *lacunae* of Hungarian criminal law.

³⁶ Decision 2/1994. (I. 14.) AB, ABH 1994, 52, 41–58.

³⁷ The obligation to cooperate stipulated in Article Q) (1) of the FL was included in Article 6 (2) of the Constitution.

³⁸ Budapest-Capital Regional Court, 10.B.155/2011.; Military Chamber of Budapest-Capital Regional Court, K. 35/2006. See also: Várady, ‘Restitution of Hatred or of Mutual Understanding?’ (2011).

³⁹ Budapest-Capital Regional Court, 41.B.2158/2013. In a repeated procedure: Budapest-Capital Regional Court, 25.B.766/2015.

Bibliography

- Tamás Ádány, 'A nemzetközi jog és a belső jog kapcsolata' [Relations of International Law and National Law] in Lóránt Csink – Balázs Schanda – András Varga Zs. (eds.), *A magyar közjog alapintézményei* [Basic Institutions of Hungarian Public Law] (Pázmány Press: Budapest 2020), 194.
- Tamás Vince Ádány: 'A Nemzetközi Büntetőbíróság joghatósága' [Jurisdiction of the International Criminal Court] (Pázmány Press: Budapest 2014)
- Carlos Espaliú Berdud, 'El jus cogens, ¿Salió del garaje?' (2015) 1 *Revista Española De Derecho Internacional*, 116.
- László Blutman, 'A nemzetközi jog joghatásai az alkotmánybíróági eljárásokban' [Legal Effects of International Law in Constitutional Court Procedures] (2013) 4 *Jogelméleti Szemle*, 2.
- Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (Springer: Berlin and Heidelberg 2018)
- Balázs Gellér, *Nemzetközi büntetőjog Magyarországon, adalékok egy vitához* [International Criminal Law in Hungary, Additions to a Debate] (Tullius: Budapest 2009)
- Péter Kovács: 'Alkotmányosság és nemzetközi jog' [Constitutionality and International Law] in Gábor Bánrévy, Gábor Jobbágyi, and Csaba Varga (eds), *Iustum, aequum, salutare – Emlékkönyv Zlinszky János tiszteletére* [Iustum, aequum, salutare – Festschrift in Honour of Professor János Zlinszky] (Osiris: Budapest 1998), 186.
- Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press: Cambridge 2009)
- Tamás Hoffmann, 'A nemzetközi szokásjog szerepe a magyar büntetőbíróságok joggyakorlatának tükrében' [Role of International Customary Law in View of the Jurisprudence of Hungarian Criminal Courts] (2011) 4 *Jogelméleti Szemle*, 29.
- Áron Máthé (ed), *Az nem lehet, hogy súlyos bűntett ne legyen büntethető – Jogi fejezetek a magyarországi igazságtétel és kárpótlás történetéből* [It Cannot Be That Serious Crimes Cannot Be Punished Legal Elements from the History of Transitional Justice and Reparations in Hungary] (NEB: Budapest 2016)
- Péter Mohácsi and Gyula Szeder, 'Büntethetőséget megszüntető okok' [Grounds for Preclusion of Punishability] in Kálmán Györgyi and Imre Wiener A. (eds), *A Büntető törvénykönyv magyarázata – Általános rész* [Commentary to the Criminal Code – General Part] (KJK: Budapest 1996)
- Tamás Molnár, 'A nemzetközi jog és a magyar jog viszonya' [Relations Between International Law and Hungarian Law] in András Jakab and Balázs Fekete (eds), *Internetes Jogtudományi Enciklopédia* [Internet Encyclopedia of Legal Scholarship] (2018) <https://bit.ly/2SlkCI4>
- László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* [The Beginnings of Constitutional Adjudication in Hungary] (Osiris: Budapest 2001)

4. Decision 53/1993. (X. 13.) AB – *International Crimes*

Tibor Várady, 'Restitution of Hatred or of Mutual Understanding? On the 2011 Serbian Act on Restitution – from the Angle of History of my Home Town' (2011) 6 *Hungarian Review*, 20.

Quincy Wright, 'War Criminals' (1945) 2 *The American Journal of International Law*, 257.

Réka Varga, 'Biszku-Case Reloaded: International Law Obligations and Lacuna in Compliance with Respect to Communist Crimes' in Petra Lea Lángos, Marcel Szabó, and Réka Varga (eds), *Hungarian Yearbook of International and European Law* (Eleven: The Hague, 2015)