9 *Biszku*-Case Reloaded: International Law Obligations and Lacuna in Compliance with Respect to Communist Crimes

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9.1 Introduction

The 1956 revolution in Hungary and the brutal response from the communist government remains one of the darkest episodes of the 20th Century Hungarian history. Among the acts included in the response on protestors were the indiscriminate firing of weapons on the demonstrating crowds – the so-called volley-fire cases – and the subsequent persecution of anti-communist 'elements', including torture, killing, illegal imprisonment and execution. To this day, no systematic attempts have been made to bring those responsible to justice. The failure to address communist crimes in Hungary continues to be a bleeding wound in Hungarian society after the fall of communism.

In the 1990s the Parliament made several attempts to overcome the main legal impediment to prosecution of these crimes, that being the statute of limitations. Following the example of many countries facing the same question, the Hungarian Parliament endeavoured to incorporate the position that the statute of limitations should be treated as dormant until the regime that facilitated the crimes relinquished power. This approach recognizes that so long as the regime that perpetrated these crimes was divested of power, it was impossible to persecute such crimes and those responsible for perpetrating them. However, these legislative attempts were eventually all quashed by the Constitutional Court.[1]

While a basis for prosecution of these acts and of those perpetrating them was technically available under international law principles, apart from a few cases against lower-level perpetrators involved in the volley-fires, no systematic attempts were made to prosecute communist crimes based on international law. The question of how to deal with crimes committed in the communist regime was thus left unanswered for long years.

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1 See Constitutional Court Dec. 11/1992 and 53/1993.

In 2010, a documentary interview with Béla Biszku, Minister of Interior of Hungary between 1957 and 1961, was broadcast on national television. In that documentary, the former Minister denied the crimes committed in the 1956 revolution, resulting a huge uproar by Hungarian society. Biszku, now 94, was eventually charged with war crimes and denial of communist crimes in 2012. He was tried by the Metropolitan Court and sentenced to five and a half year imprisonment in 2014 for war crimes and denial of communist crimes (and for misuse of ammunition – not connected to the 1956 events). This case re-opened the public debate on prosecution of crimes committed in the communist era.

The proceedings against Biszku in 2012 were preceded by extensive delays and procedural morass. First, there was an unsuccessful attempt to initiate criminal investigation against him for his deeds committed as Minister of Interior during the communist regime, including the facilitation of pre-meditated criminal trials which resulted in the illegal imprisonment and eventually execution of a large number of persons in the years following 1956. The request to investigate these criminal offences was rejected by the prosecutor based on arguments which did not seem to be well founded in the decision.[2] The main argument behind the rejection was the prosecutor's determination that the acts in question did not constitute crimes against humanity, and that, if they did not qualify as crimes against humanity, the period available for their prosecution had elapsed. The primary shortcoming of the decision of the prosecutor to ignore the investigation of these crimes is that there were absolutely no arguments as to why the prosecutor decided that the crimes were not international crimes. Another worrying aspect is that while the prosecutor may have identified the crimes specified in the criminal complaint as those not qualifying to be international crimes, it could have initiated investigations *ex officio* in the case of other crimes that, in its view, qualified as international crimes. Such a move would have testified to its determination to prosecute communist crimes.

The General Prosecutor's Office's unsupported conclusions that the crimes were not international crimes made it clear that the office, probably due to a general uneasiness to apply international law, would not enforce standing international obligations such as prosecuting crimes against humanity through directly applying international law, and it also became clear that they refused that the statute of limitations for crimes against humanity and war crimes would not apply, and would accept such a position only if a Hungarian law expressly implemented such provisions. The General Prosecutor's Office demonstrated this refusal despite existing international obligations in promulgated treaties and in customary law.

2 See R. Varga, Facilitating War Crimes Procedures in Hungary: The New Criminal Code and *Lex Biszku*, *in* M. Szabó-P.L. Láncos-R. Varga (Eds.) *Hungarian Yearbook of International Law and European Law 2013*, Eleven Publishing, The Hague, 2014, pp. 491-507, pp. 497-498.

In response to this action by the General Prosecutor's Office, and with a view to assist the prosecutors' work, the legislature adopted the so-called *Lex Biszku*,[3] which repeated parts of the text of the 1968 New York Convention on non-applicability of statute of limitations for war crimes, crimes against humanity and genocide, and implemented the notion of crimes against humanity into Hungarian legislation.

This, in itself, and strictly legally speaking, was an unnecessary step, since the text of the New York Convention was already available in Hungarian law when it was promulgated by Hungary and the notion of crimes against humanity was existent in international customary law. *Lex Biszku* simply repeated the text already available and in force in the promulgated international treaty. However, as it appeared from the developments that unfolded and as will be described below, the adoption of this law seemed to be an essential step by the legislature to move things forward.

Eventually, even despite the adoption of *Lex Biszku*, the General Prosecutor did not initiate investigations *ex officio*. The prosecution of Minister Biszku only moved forward when a third party made a criminal complaint which finally triggered the initiation of a criminal investigation. Even though the complaint encompassed all the allegedly criminal actions of Minister Biszku occurring during and after 1956 in a broad sense, the prosecutor concentrated on the volley-fire case of Salgótarján. The prosecutor's reasons for limiting the scope of the prosecution to these events remains unexplained.

The indictment filed with the court was reportedly not researched exhaustively.[4] The first instance court found Béla Biszku guilty of war crimes through the act of giving indirect orders for the Salgótarján volley-fire. The first instance court also found the former Minister of Interior guilty of denial of communist crimes and sentenced him to five and a half years imprisonment. The decision was appealed, and the Metropolitan Regional Court acting as second instance court found in 2015 that the first instance judgment was not well founded and that the judgment failed to comply with the necessary requirements of establishing facts, evidence and providing solid legal reasoning. The Metropolitan Regional Court sent the case back for retrial by the court of first instance.[5] The whole procedure, beginning with the indictment, was heavily criticised for poor legal arguments, insufficient research and was generally seen as a 'shame for the Hungarian justice system' among the Hungarian general public and experts.[6]

3 Law CCX of 2011.

4 See http://mandiner.hu/cikk/20150602_gellert_adam_az_igazsagszolgaltatas_kudarca_a_biszku_per.

5 See www.origo.hu/itthon/20150531-biszku-bela-itelet-jogeros-fovarosi-brosag-eletfogytiglan.html (last visited 14 July 2015). The second instance judgment was not yet directly available at the time of drafting of the present article.

6 The whole procedure was heavily criticized by basically everyone: the defence lawyer of Biszku (see: www.origo.hu/itthon/20150608-biszku-bela-itelet-magyar-gabor-gulyas-gergely-fidesz-jobbik-igazsagszolgaltatas-partatlansag.html), the prosecutor who prepared the indictment (see: http://magyarhirlap.hu/cikk/27999/A_forradalmat_kerdojeleztek_meg), the Head of the National Judicial Authority (see:

All in all it seems fair to state that throughout the process since the 1990s, amid the failed weak efforts of prosecuting communist crimes, the actions of the legislative power, the prosecutors and the judges included worrying signs of a weak understanding of international law[7] and a failure to adopt a comprehensive approach to comply with standing international obligations.[8,9]

The present article focuses on the international law aspects of prosecuting communist crimes in general and the Biszku case in particular. The article highlights that there was an obligation based on international law to prosecute war crimes and crimes against humanity, and that the failure of Hungarian authorities to act on this since 1990 eventually results in violation of international law. Trials could have been conducted without any specific Hungarian implementing legislation in place. The article also seeks to demonstrate the uneasiness of prosecutors and judges to directly apply international law – a phenomenon also appearing in other states.

The article also incorporates the legal background of the development of individual criminal responsibility and the notion of war crimes and crimes against humanity which could be applicable for the 1956 revolution and its aftermath, and the legal obligation to prosecute such crimes domestically. Such an introduction to the more than half a century-long existence of international crimes and the obligation to prosecute them domestically testifies to the main message of the present article, notably that international obligations do exist to prosecute communist crimes and the international community demands that such crimes are not left unpunished. Finally, in all fairness with prosecutors and judges and acknowledging the difficulties they are facing, the article also demonstrates the practical aspects and challenges of domestic prosecution, with some examples of inter-authority cooperation in other countries to ensure effective trials.

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http://index.hu/belfold/2015/06/23/megelegelte_a_birosagot_ert_tamadasokat_hando_tunde/), political parties (see www.fidesz.hu/hirek/2015-06-08/tegyunk-meg-mindent-az-igazsagtetelert/) and by experts (see: http://mandiner.hu/cikk/20150602_gellert_adam_az_igazsagszolgaltatas_kudarca_a_biszku_per).

7 Hungarian court decisions, including Supreme Court decisions included erroneous interpretations of international humanitarian law. Just to mention one, the Supreme Court defined the scope of appliation of common Art. 3 for the events of 1956 based on the criteria of Additional Protocol II.

8 See R. Varga, Biszku és a nemzetközi jog, http://nol.hu/velemeny/biszku-es-a-nemzetkozi-jog-1549131 (last visited on 6 September 2015).

9 Despite the clear guidance of the Constitutional Court, the legislature did not correct the mistake where it considered violations of common Art. 3 to the Geneva Conventions as grave breaches. This was the reason why the subsequent law aimed at ensuring the Hungarian legal basis for prosecuting communist crimes was once again quashed by the Constitutional Court in its Dec. 36/1996.

9.2 International Legal Background: Evolution of Individual Criminal Responsibility, War Crimes and Crimes against Humanity in International Law[10]

During the events that are subject to review in the present article, two kinds of international crimes come into question: war crimes and crimes against humanity. Although international humanitarian law underwent substantial development from the middle of the nineteenth century until after World War I, enforcement of the offences against international humanitarian law lagged behind. The failures in establishing an international tribunal or international military tribunals after the Versailles Treaty and the serious shortcomings of holding those accountable during the Leipzig trials indicate that

> while the contours of war crimes law had been increasingly well established by World War II, persons violating that law faced only a hypothetical possibility of criminal sanction. In a sense, war crimes law had not yet truly become a form of criminal law.[11]

While individual criminal responsibility has not been a feature of international law for a long time, the Charter of the Nuremberg Military Tribunal raised the profile of individual criminal responsibility for violations of international humanitarian law.[12] Moreover, the Charter states that defendants are not free of their responsibility for violations of international law as the result of their official capacity. Additionally, the defence of superior order cannot be applied as negating responsibility. At most, a claim of adherence to superior orders may serve as a mitigating circumstance.[13] It was therefore the Nuremberg and Tokyo proceedings that advanced the concept of individual criminal responsibility in international law and produced important jurisprudence in this regard.

As a consequence, the International Law Commission (ILC) manifested individual criminal responsibility in its 1950 report even in case the crime in questions was not criminalized in national law.[14] The ILC understood international crimes as those coming

10 Certain findings under the present title have been submitted in the author's monograph, see R. Varga, *Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees*, Pázmány Press, Budapest, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2499495 (last visited on 6 September 2015).

11 T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', *American Journal of International Law*. July 2006/100/3, p. 559.

12 Charter of the International Military Tribunal, Art. 6.

13 Charter of the International Military Tribunal, Art. 8.

14 Principes du Droit International Consacrés par le Statut du Tribunal de Nuremberg et dans le Jugement de ce Tribunal, adopted by the UN International Law Commission on July 1950, Principle II. In: D. Schindler, J. Toman, *Droit des Conflicts Armés*, CICR, Institut Henry-Dunant, Genève, 1996, p. 1312.

under the jurisdiction of the Nuremberg Tribunal, and this is how eventually crimes defined in international law became 'crimes under international law.'

The first attempt to list war crimes was the Lieber Code of 1863, a set of regulations for the American army issued by President Abraham Lincoln. The Lieber Code listed serious breaches of the law of war, to include wanton violence against persons in the invaded country, including rape and murder, and forcing enemy members to serve in the hostile army. While the Lieber Code was a national legal instrument, it had a great effect on the development of the law of war crimes.

The Versailles and Sèvres Treaties did not include a list of war crimes. The Leipzig Trials were based on the 1907 Hague Regulations, even though the Regulations did not list war crimes, because the Regulations concentrated on the payment of compensation by the state as the chief form of punishment. This did not amount to holding an individual accountable for criminal acts, and thus did not amount to individual criminal responsibility. At the same time, violations of the Hague Regulations had long been seen as violations for which members of the armed forces or civilians could be held individually responsible,[15] and thus the rules of the Hague Regulations served the basis for the determination of war crimes during the Leipzig Trials.

The 1919 Commission, in its report, drew up a list of war crimes,[16] including murder and massacre, torture of civilians, rape, and internment of civilians under inhuman conditions.[17] The list, however, and the justifications for including certain elements in the list indicate that it included both war crimes and what later became crimes against humanity. This last element was the main criticism of the United States against the findings of the Commission, indicating that violations of the 'laws of humanity' were vague and not well established, therefore it would violate the principle of legality.[18]

A few years earlier, the term 'crimes against humanity' was used first in a Declaration endorsed in World War I with respect to acts committed against the Armenian population, demanding the prosecution of members of the Turkish government.[19] However, the term did not find its way into the peace treaty at the conclusion of World War I, because, as described above, of the intervention of the US delegation, which argued that since the details of the term were not clarified, it could violate the principle of legality.

The text of the Statute of the Nuremberg Military Tribunal referred to laws and customs of war, laws, a reference primarily to the 1899 and 1907 Hague Treaties and the 1929 Geneva Conventions, none of which mentioned war crimes. Therefore it was the Nuremberg

15 See *above* n. 11, p. 554.

16 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, March 29, 1919. Reprinted: 14 *American Journal of International Law* 1920/95/14. 98.

17 See *above* n. 11, p. 555.

18 See *above* n. 11, p. 556.

19 Ferenc Sántha, 'Az emberiesség elleni bűncselekmények', *Miskolci Jogi Szemle*, 3/1, 2008, pp. 50-69, p. 51.

Statute that first adopted the term 'war crime' and provided a definition for it. The Nuremberg Statute also relied heavily on customary law to overcome the problem of a lack of proper international regulation of prohibition of attacks against civilians in the international treaties in force at the time of the Second World War. Hence, the Nuremberg Statute not only adopted the term 'war crimes', but also filled it with precise meaning, codifying existing customary law.

The 1949 Geneva Conventions and their provisions on applying penal sanctions for violations of international humanitarian law, and provisions on grave breaches were obvious followers of the Nuremberg Statute. However, the Geneva Conventions used the term 'grave breaches' instead of 'war crimes'. According to the ICRC Commentary,

> [t]he actual expression 'grave breaches' was discussed at considerable length. The USSR Delegation would have preferred the expression 'grave breaches' or 'war crimes'. The reason why the Conference preferred the words 'grave breaches' was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word 'crimes' had different legal meanings in different countries.[20]

The reason for adoption of the term 'grave breaches' was, therefore, to emphasize the difference between these very serious acts in violation of international law, referring to them as grave breaches, in contrast to ordinary crimes or infractions under national law.[21] The Geneva Conventions therefore concentrated on grave breaches of the Conventions, whether or not they represented 'crimes' under specific domestic laws.

The lists of grave breaches in the Geneva Conventions are substantially longer than war crimes listed in the Nuremberg Statute. In addition, the 1949 Geneva Conventions made the obligation of the 1929 Convention I regarding national legislation more imperative. While the 1929 Convention I merely said that '[t]he Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention',[22] the obligation of the 1949 Conventions '[...] has [...] been made considerably more imperative. The Contracting Parties are more strictly bound to enact the necessary legislation than in the past.'[23] The difference basically lies in the degree of obligation. The text of the 1929 Convention I suggests that implemen-

20 See J. S. Pictet (ed.): *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949* (First Reprint), ICRC, Geneva, 1995, p. 371.

21 G.K. McDonald-O. Swaak Goldman (Eds.): *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts, Commentary*, Vol. I, Kluwer Law International, The Hague, 2000, p. 70.

22 1929 Geneva Convention. Art. 29.

23 See *above* n. 20, p. 363.

tation of domestic legislation is a recommendation – 'shall propose' –, whereas the 1949 text clearly imposes an obligation – 'Parties undertake to enact'.

According to the Statute of the Nuremberg Military Tribunal, crimes against humanity are criminal acts attached to other crimes, committed during or before an armed conflict against civilian population. The aim was to criminalize actions carried out against the German Jewish population, since they legally could not be the passive objects of war crimes. Crimes against humanity were thus the basis for prosecuting Holocaust crimes where the defined war crimes could not be used to address acts in a given case. According to the Tokyo Tribunal's Statute, crimes against humanity could be committed in peacetime as well. Crimes against humanity served also the basis for conviction in famous trials such as Adolf Eichmann and Klaus Barbie.

In the Draft Code of Offences against the Peace and Security of Mankind prepared in 1954, link to armed conflict was not mentioned anymore.[24] The abandoning of the necessity to link the act committed to an armed conflict as a prerequisite for the application of crimes against humanity was strengthened by the 1986 draft, the report of which stated that this link was only a part of the notion of crimes against humanity until 1954.[25]

9.3 Obligation to Prosecute Grave Breaches and Crimes against Humanity

When it comes to obligation of states to prosecute these crimes, international humanitarian law and international criminal law include a variety of obligations. A common element of these obligations is that states are directed under the Geneva Conventions what to do but the Conventions do not specify how a state ought to do it. The only restrictions to such procedures are fair trial guarantees which are mentioned in human rights law instruments, and are also explicitly mentioned in the Geneva Conventions.

International treaties usually define an obligation to reach a certain result – the punishment of certain crimes –, which implies that states are bound to adopt internal legislation

24 'Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.' See Draft Code of Offences against the Peace and Security of Mankind 1954, Yearbook of the International Law Commission, 1954, vol. II., Para. 11, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf (last visited 13 July 2015).

25 'The 1954 draft code first rendered crimes against humanity autonomous by detaching them from the context of war.' Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, Extract from the Yearbook of the International Law Commission, 1986, Vol. II(1), Para. 28, http://legal.un.org/ilc/documentation/english/a_cn4_398.pdf (last visited 13 July 2015).

which satisfies this objective in any way they see fit.[26] This approach takes into account the consideration of state sovereignty.[27] The method by which a state complies with such obligations is left to them allowing the state to develop practices which conform to their legal culture, legal system and principles.

The Geneva Conventions and the Additional Protocols to the Geneva Conventions contain obligations which are based on a three-pillar system:[28] the obligation to repress or suppress grave breaches and the two elements of the *aut dedere aut judicare* principle: the obligation to search for persons having committed grave breaches and an obligation to try them or hand them over to another state.[29] Contents of these elements have been further developed by customary law and by international treaties, such as the statutes of international tribunals or the Rome Statute of the International Criminal Court.

The three-pillar system of the Geneva Conventions and Additional Protocol I bases itself on the differentiation between serious violations (grave breaches) and other violations, and on a practical necessity to have these violations punished by any state. The treaties themselves list the grave breaches which states are obliged to punish.[30] For other violations, there is simply an obligation to suppress them, leaving the method of such suppression to states, which may, obviously, also include penal sanctions. The *aut dedere aut judicare* principle stems from the fear that perpetrators of serious offences would use conflicts between national jurisdictions to escape criminal liability and thus seeks to establish a global, universal solution.

Under the terms of the Geneva Conventions and Additional Protocol I, grave breaches are the most serious violations of the rules, committed in international armed conflicts. Other violations committed in international armed conflicts and violations committed in non-international armed conflicts are simply labelled as 'violations', 'breaches' or 'acts contrary' to the Conventions/Protocols. The difference, as noted above, lies partly in the obligation to prosecute and often in the degree of sanction.

Due to the underlying understanding of the grave breaches regime, that it is the states that are responsible to carry out penal procedures, the Geneva Conventions and Additional Protocol I did not detail the method by which violations are to be included in a state's

26 See I. Fichet-Boyle – M. Mossé, 'L'obligation de prendre des mesures internes nécessaires à la prévention et à larépression des infractions', in: Ascensio-Decaux-Pellet (Eds.), *Droit International Pénal*, Editions A. Pedone, Paris, 2000, p. 879.

27 Ibid.

28 See *above* n. 20, p. 362.

29 Common Art. 1 of the Geneva Conventions and the obligation to 'ensure respect' for the provisions of the Convention also oblige States, although on a more general basis, to eventually repress violations. See R. Varga, Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt (War crimes procedures in front of domestic courts), in E. Kirs (Dd.), *Egységesedés és széttagolódás a nemzetközi büntetőjogban*, Studia Iuris Gentium Miskolcinensia – Tomus IV, Miskolc University – Bíbor Press, Miskolc, 2009.

30 Some authors derive the obligation for repression also from *pacta sunt servanda*. See *above* n. 26, p. 871.

penal legislation[31] nor did they give any guidance on the procedures themselves except for the requirement of fair trial guarantees.[32] The Commentary is also mainly silent on this issue, noting only that legislation shall provide sanctions and it shall not be left to the judge to deal with these.[33]

Most probably the difficulties states might have in adopting proper legislation and ensuring effective procedures were not foreseen by the drafters of the Geneva Conventions. While many states seemingly complied with the obligations, actual efforts to prosecute such violations highlighted the difficulties arising in implementing such international provisions within domestic legislation. Hence, the word 'effective' received particular significance, although not specifically analyzed in the Commentary. Legislation merely adopted to demonstrate a state's compliance with international law but not enabling effective penal procedures is not sufficient to meet obligations under the language of the Conventions and the Additional Protocols. Many states seem to reflect they are satisfied they have met their obligation under the Conventions and Protocol without addressing the practical impact and procedural challenges with enforcing the provisions in their own domestic courts.

With respect to the obligation to prosecute crimes against humanity, Principles I and II of the Nuremberg Principles state that '[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment' and '[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.'[34]

Even though no treaty-based obligation exists to punish crimes against humanity, legal literature widely accepts the existence of an obligation to prosecute perpetrators of crimes against humanity, while many contest the existence of a basis of universal jurisdiction for crimes against humanity in international law.[35]

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31 See B. Gellér, A nemzetközi jog hatása a büntetőjogi felelősségre (Effects of international law on criminal responsibility), in: K. Bárd, B. Gellér, K Ligeti, É Margitán, I.A. Wiener (Eds.), *Büntetőjog Általános Rész*, KJK-KERSZÖV, Budapest, 2003, p. 302.

32 See common Art. 3 to the Geneva Conventions or Art. 75 of Additional Protocol I.

33 See *above* n. 20, p. 363.

34 Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950. Report of the International Law Commission covering its Second Session, 5 june – 29 July 1950, Document A/1316.

35 André da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry, Pedro Barreto Vianna Rigon: The obligation to extradite or prosecute (aut dedere aut judicare), International Law Commission, UFRGS Model United Nations Journal, 2013, pp. 202-221, pp. 209 and 211, www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/The-obligation-to-extradite-or-prosecute-aut-dedere-aut-judicare.pdf (last visited 13 July 2015); Jan Wouters, The Obligation to Prosecute International Law Crimes, p. 8, https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf (last visited 13 July 2015).

Finally, of interest related to the obligation of states to enforce the provisions of international humanitarian and international criminal law, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was adopted in 1968. The Convention states that statutes of limitations do not apply to war crimes as defined in the Nuremberg Charter, crimes against humanity as defined in the Nuremberg Charter and genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Convention specifically indicates that the application of this provision has retroactive effect[36] and that states are bound to eliminate statue of limitations in their domestic laws.[37]

Each of the international legal instruments listed above were in force and applicable to the events of 1956 and remained in effect after that date. Further, the principles recognized by the Nuremberg Charter were endorsed by the 1946 UN General Assembly resolution and became customary law.[38] Hungary ratified the Geneva Conventions in 1954,[39] and the Convention on the Non-Applicability of Statute of Limitations in 1971,[40] but due to the latter's retroactive effect, it applies to the crimes perpetrated in 1956 and afterwards.

Not only is prosecution of international crimes an international law obligation binding states, but many international organizations, such as the UN, have underlined its importance. The obligation not only to prosecute war crimes and crimes against humanity but also to cooperate in such prosecution has been expressed by the United Nations General Assembly, noting that

> refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purpose and principles of the Charter of the United Nations and to generally recognized norms of international law.[41]

Similarly, the Inter-American Commission on Human Rights in its annual report concluded with respect to the activities of the Chilean National Commission on Truth and Reconciliation that

36 Art. I: 'No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: [...].'

37 Art. IV: 'The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished.'

38 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, General Assembly Res. 95 (I) New York, 11 December 1946.

39 Law nr. 32 of 1954.

40 Law nr. 1 of 1971.

41 Question of the punishment of war criminals and of persons who have committed crimes against humanity, General Assembly Res. 2840 (XXVI) of 18 December 1971.

> [t]he Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the Convention. [...] the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.[42]

The analysis above leads us to conclude that the international community undoubtedly decided after World War II to criminalize war crimes and crimes against humanity by the force of international law and to oblige states to prosecute them. This means that such acts are punishable irrespective of the existence of implementing domestic legislation. National justice systems are bound to prosecute these in the name of the international community, as such crimes are violating not only the state itself, but the whole international community.

9.4 International Crimes Applicable to the Case in Question

It is important to identify what acts committed by the communist regime could be regarded as international crimes and, for the purposes of war crimes, what is the applicable law. That analysis also requires an assessment of whether there was on and after 1956 an armed conflict, and, if so, what the nature of that armed conflict was.

A non-exhaustive list of the acts that could be relevant in the present case in and after the 1956 events for a prosecution based on international law include, among others: volley-fires (firing in the demonstrating crowd without discrimination), persecution on political grounds after 1956 against persons who took part or were involved in the revolution, including trials lacking fair trial guarantees resulting in the imprisonment and execution of a large number of persons, torture and inhumane and degrading treatment, killing and forcible transfer.

As for the applicable law, although the circumstances merit a detailed examination by historians and lawyers, it seems that with the beginning of the revolution on 23 October 1956, a non-international armed conflict existed within the terms of common Article 3 of

42 Annual Report of the Inter-American Commission on Human Rights 1996, Report nr. 36/96 of 15 October 1996, Para. 77.

the Geneva Conventions.[43] This conflict transformed into an international armed conflict[44] (occupation) through the intervention of Soviet forces on 4 November 1956.[45]

The length of the occupation is again a matter requiring careful examination. According to one possible approach, the occupation lasted until active hostilities were carried out, most probably until 15 November 1956[46,47] while according to another possible approach, and supported by the present author, occupation lasted much longer, as the Hungarian population was still under the control of the occupying Soviet forces, and the Hungarian government was acting based on Soviet dictates: leaders were appointed with Soviet nomination and agreement and all actions of the Hungarian government were basically hand-steered by the Soviet government. According to this second line of argument, the occupation lasted as long as the control of the occupying forces can be identified. The UN General Assembly stated at more than one occasion that the Hungarian government was installed by the Soviet Union and was subordinated to it which testifies to this latter view.[48]

Grave breaches of the Geneva Conventions in international armed conflicts are committed between the belligerent parties, notably the states. Therefore any violation committed by Soviet forces against Hungarian protected persons – sick and wounded, civilians, etc. – could clearly become a grave breach. The question is not so obvious with respect to Hungarian perpetrators. Here two interpretations merit attention. According to the first one, with the intervention of the Soviet forces, two parallel kinds of armed conflict took place: an international armed conflict between the Soviet Union and Hungary, and a non-international armed conflict within Hungary, between the government and the revolutionaries.

Thus, if we look at the relation between the Hungarian government functionaries and the Hungarian victims, their relation is to be considered within the framework of a non-international armed conflict, where no grave breaches regime existed, therefore no war crimes as international crimes could have been committed. Even in this case however, it

43 The ICRC called on all parties to collect and care for the wounded and sick. This was based on common Art. 3 of the Geneva Conventions. See I. Voneche Cardia, *L'octobre hongrois: entre croix rouge et drapeau rouge*, Burylant, Bruxelles, 1996. Reference is based on the Hungarian translation by L. Csejdy and Sz. Kovalik Deák, socio-typo, Budapest, 2006, p. 50.

44 F. Donáth, 'Nagy Imre 1956 november 4-i rádiószózata és a Genfi Egyezmények', pp. 150-151, www.pol-hist.hu/regi/multunk/letoltes/donathf.pdf (last visited 6 September 2015).

45 See T. V. Ádány, 'Individual Criminal Liability for the Crimes Committed in 1956', *Miskolc Journal of International Law*, Vol. 3 (2006) No. 3, pp. 46-55.

46 The Hungarian courts, based on guidance from the Supreme Court and the Constitutional Court took the position that an international armed conflict took place from 4 to 15 November 1956. See *above* n. 44, p. 151.

47 M. Róth, 'Circus Juris Hungarici avagy igazságtétel magyar módra', Kortárs online, www.kortarson-line.hu/2006/10/circus-juris-hungarici-avagy-igazsagtetel-magyar-modra/5900 (last visited 14 July 2015).

48 Report of the Special Committee on the Probblem of Hungary, General Assembly Official Records, Eleventh Session Supplement No. 18 (A/3592) New York, 1957, Paras. 78, 83, 84, http://mek.niif.hu/01200/01274/01274.pdf (last visited 15 July 2015).

could be argued that after the Soviet invasion on 4 November, the Hungarian leadership was in fact carrying out acts pursuant to and under Soviet orders, therefore they acted on behalf of the Soviet government. In this light it could be theoretically argued that this results in making these perpetrators individually responsible for grave breaches in the context of an international armed conflict. Therefore responsibility of Hungarian government officials and other persons for acts carried out against Hungarian citizens could well be regarded under the grave breaches regime.

According to the second view, the whole conflict became international. Under this view, all conduct is subject to review under the law applicable to international armed conflicts. This is the reasoning the Hungarian courts adopted in the above mentioned Salgótarján volley-fire case, where they found the actions of the Hungarian perpetrators to be grave breaches.

All these questions require further examination from a historical and a legal perspective. However, for the purposes of the present article, it is necessary to consider both grave breaches of the 1949 Geneva Conventions and crimes against humanity when discussing the responsibility of perpetrators of core international crimes during and after the events of 1956.

9.5 Applicability of the Grave Breaches Regime and Crimes against Humanity in Hungarian Criminal Cases on Communist Crimes: Were Corresponding International Rules in Force?

The applicable rule concerning crimes against humanity to the events in and after 1956 is the definition in the Nuremberg Charter. Although Hungary is not a signatory to the Charter, the provisions of the Nuremberg Charter were definitely part of international customary law by 1956. The UN General Assembly endorsed the principles and rules of the Charter in a resolution adopted in 1946.[49]

While the Nuremberg Charter was, therefore, customary international law and the Hungarian Constitution considered customary international law a part of Hungarian legislation without the need for any transformation,[50] given the obligatory nature of international customary law, Hungary was obliged to apply the notion of crimes against humanity as of 1990, when the political barriers of prosecution of communist crimes were lifted. Underlining this argument, the Hungarian Constitutional Court also stated that the

49 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, General Assembly Res. 95 (I) New York, 11 December 1946.

50 See Constitutional Court Dec. 53/1993, Para. III/a.

international community is punishing war crimes and crimes against humanity on one hand through international tribunals, on the other hand through national domestic courts.[51]

One general argument against directly applying international customary law in domestic proceedings is the principle of legality, that is, the contents of customary law are often not exact, or it is not even clear what customary law is.[52] While this may be true with respect to customary law that is recent and continuously developing, it does not seem to present a legitimate argument with respect to crimes against humanity, the contents of which are clear both from the Nuremberg Charter and from the Nuremberg Principles.

Another problematic issue with respect to direct application of international crimes which have not been domesticated in national legislation is the lack of specific sanctions in the domestic criminal code. Notably, one could argue that the *nulla poena sine lege* principle is violated when the judge is applying elements of a crime defined in international law which are not included in domestic criminal legislation. Under this argument, while there could be a prosecution, no sanction is available in domestic criminal law. One theoretical solution could be to apply sanctions of the corresponding ordinary crime, such as the sanction for murder in case of attacks against civilian population.[53]

The Hungarian Constitutional Court dealt with compatibility of application of international law with legality principles as well. It stated that international law understood the *nullum crimen sine lege* principle in relation to itself and not to domestic law and consequently, argued the Court, referring to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, prosecution of *sui generis* international crimes is legal under domestic law even if their notions and punishability is not part of national law.[54]

At the same time, many criminal lawyers in Hungary raised the issue of lack of sanctions in case of direct application of international crimes, arguing that such procedure would violate the *nulla poena sine lege* principle.[55] However, the European Court of Human Rights stated in 2010 in *Kononov v. Latvia*[56] that 'where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law.'[57]

51 Constitutional Court Dec. 53/1993, Para. IV.2.

52 This question was discussed with respect to the *Bouterse* case in the Netherlands, see Comment of Harmen van der Wilt, *Bouterse* case, ILDC 80 (NL 2001), C5.

53 This is what happened in Hungary at the volley fire – cases, where the Hungarian courts applied the sanctions of the conventional crimes that corresponded to the international crime, without its 'international' content.

54 Constitutional Court Dec. 53/1993, Para. IV.4.a.

55 See B.J. Gellér, *Nemzetközi Büntetőjog Magyarországon, Adalékok egy vitához*, Tullius Kiadó, Budapest, 2009, pp. 58-60.

56 *Kononov v. Latvia*, Appl. No. 36376/04, Judgment of the Grand Chamber of 17 May 2010.

57 Ibid., Para. 212.

9.6 CONCLUSIONS WITH RESPECT TO THE (IN)ACTION OF THE HUNGARIAN LEGAL SYSTEM

As a consequence of the modern paradigm of the relations between international and national law, international law enjoys primacy over domestic law. Thus, there is an obligation under international law to prosecute international crimes. That obligation is an absolute obligation on states. It follows from this statement that Hungary seems to have been in violation of common Article 1 and Articles 146 and 147 of Geneva Convention IV and the customary obligation to prosecute crimes against humanity by not prosecuting communist crimes which occurred in 1956 and thereafter. Since these crimes are crimes to be prosecuted *ex officio*, criminal investigations should have been initiated in the 1990s, after the fall of communism.

Who is to blame is a complex question and probably the parallel inaction or rather not appropriate action of many authorities has produced this outcome. The legislature, on its own part, could have facilitated the process already in the 1990s by including crimes against humanity in the criminal code and by offering logistical support, resources and other support to the prosecutors and judges facing the difficult task of conducting criminal procedures based on international law. This effort by the legislature would have addressed the concerns prosecutors and judges expressed in the past years in avoiding the investigation and prosecution of these offences under international law. The prosecutors and judges could also have raised this issue in the 1990s and call for a comprehensive approach which results in an adequate legal and material background for successful prosecutions. The adequate – and international law-compliant – action would probably have been to initiate criminal proceedings in the 1990s *ex officio*, and, at the same time, to request additional resources from the state to support effective prosecution and sentencing. What becomes clear is that the successful conduct of such trials requires an integrated approach.

9.7 WAR CRIMES UNITS

In order to revolutionize the attitude of prosecutors and judges with respect to the enforcement of international crimes, an integrated unified action is required by Hungarian national authorities. Effective trials of international crimes – both historically but also contemporary crimes – in other states can be attributed to the establishment of specialized units dealing with such proceedings. The appointment of a few persons with specialized experience or expertise to address the investigation and prosecution of such actions, and designation of specific courts and judges who would be responsible for ensuring the fair trial guarantees as well as with specific competence in the area of law enable successful implementation of the obligations of states to enforce the international obligations the

state has undertaken. The actors in these institutions receive specialized training and additional resources for their unique and important task.

An additional component of the integrated unified action required to achieve full compliance with Hungary's international obligations – not speaking of communist crimes now – is to have an effective integration of these specialized courts within the immigration process. The effective detention of those alleged to be war criminals, as well as the identification of victims or witnesses often occurs through the immigration process, with individuals entering as immigrants, migrants or refugees. Accurate and timely identification of alleged perpetrators and their effective detention, as well as the accurate and timely identification of victims and witnesses and capture of their evidence, requires specialized knowledge.

The judicial, prosecutorial, investigative and immigration units must be obliged to cooperate with each other. This requires a strategic plan from the state in order to allow for the cooperation of these and other authorities and agencies to carry out the specific task. A recent summary prepared by Human Rights Watch of activities and best practices of war crimes units of a number of selected countries shows that a) the setting up of war crimes units assists war crimes prosecutions, b) these units must cooperate with each other and c) ongoing training for all components of such units is inevitable.[58]

Many countries have such units in place that deal exclusively with international crimes: war crimes, crimes against humanity and genocide. The first war crimes units were set up with respect to investigation and prosecution of suspects with respect to Nazi crimes. Such

58 Human Rights Watch: The long arm of justice: Lessons from Specialized War Crimes Units in France, Germany and The Netherlands, 2014, https://www.ind.nl/organisatie/themas/1F/Documents/Asiel.pdf (last visited on 6 September 2015).

units were established in Germany in 1958,[59] in the US in 1979,[60] in Canada in 1985,[61] in Australia in 1987,[62] in the UK in 1991[63] and in Poland in 1998.[64]

Special units set up in the investigation and prosecution authorities usually comprise of a couple of persons within the police and/or prosecution dealing exclusively with war crimes cases. In Denmark, such a unit is comprised of 17 persons (including both investigators and prosecutors) and is a part of the Danish Prosecution Service.[65] In Belgium, the unit is comprised of one senior prosecutor and five police officers are dealing only with serious international crimes.[66] In the Netherlands, 31 persons in the police[67] and six persons in the prosecutor's office[68] deal exclusively with international crimes at the domestic level.[69]

59 The `Central Office of the State Justice Administration for the Investigation of National Socialist Crimes (Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen) www.zentrale-stelle.de/pb/,Lde/Startseite?ROOT=1193201 (last visited on 6 September 2015).

60 US Department of Justice Human Rights and Special Prosecutions Section, www.justice.gov/criminal-hrsp/about-hrsp (last visited on 6 September 2015).

61 Canadian Department of Justice, War Crimes Program. In 1987, the Department of Justice Canada, the Royal Canadian Mounted Police and Citizenship and Immigration Canada were given specific mandates to take appropriate legal action against alleged Second World War crime suspects believed to be in Canada. In 1998, the Government expanded its war crimes initiative to modern (post-Second World War) conflicts, because there was no real distinction between the process and policy applicable to WWII and Modern War Crimes. S. www.justice.gc.ca/eng/cj-jp/wc-cdg/prog.html (last visited on 6 September 2015). As for the efforts of the Canadian government to prosecute core international crimes, see F. Lafontaine, 'The unbearable lightness of international obligations: when and how to exercise jurisdiction under Canada's crimes against humaniy and war crimes act', in *Revue québécoise de droit international*, 23.2 (2010), http://rs.sqdi.org/volumes/23_2-Lafontaine.pdf (last visited 13 July 2015).

62 D. A Blumenthal, T.L.H. McCormack (Eds.): *The Legacy of Nuremberg: Civilising influence or institutionalized Vengeance?* Martinus Nijhoff Publishers, Leiden, 2008. See review by B. Batros, *Journal of International Criminal Justice*, 2009/7/2, pp. 440-442.

63 See War Crimes Act 1991.

64 The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN). See http://ipn.gov.pl/en/brief-history/brief-history (last visited on 6 September 2015).

65 SICO (Special International Crimes Office), since its establishment in 2002, has opened investigations in 237 cases related to crimes that have taken place in around 30 countries; out of these, 172 cases have been concluded until 2009. S. www.sico.ankl.dk/page34.aspx (last visited on 18 January 2012). The majority of the cases are related to the Middle East, followed by the former Yugoslavia. S. 2009 Annual Report. Annual Report 2008 www.anklagemyndigheden.dk/Documents/arkiv/SICO-2008-Summary-in-English.pdf (last visited on 6 September 2015), Annual Report 2009 – Summary in English available at: www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (last visited on 18 January 2012). Later reports could not be reached online.

66 See Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units, Report of REDRESS-FIDH, December 2010, summary on p. 31. These dates were current in 2010, no further update is available online.

67 Such a high number of persons assigned only to international crimes may be explained by the fact that the Netherlands is a specially affected state due to its favorable immigration policy and its determination to carry out effective war crimes procedures.

68 It should be noted that this excludes the several international or internationalized courts and the United Nations and international staff which supports those efforts.

69 Numbers actual as of 2014. See The Long Arm of Justice; Lessons from Specialized War Crimes Unit sin France, Germany and the Netherlands, Human Rights Watch, 2014, pp. 37-38.

The specialized unit in the prosecutor's office became operational in 2003. Until 2002, not one single prosecution was initiated; since the unit became operational, the office took eight cases to trial, resulting in six convictions, one acquittal and one retrial.[70] The Netherlands has also set up an International Crimes Taskforce in 2012 to enhance cooperation and tackle remaining challenges.[71] In Germany, two prosecutors are assigned permanently and four prosecutors temporarily for a period of approximately two years; from the police, ten officers are active in international crimes cases.[72] Investigations into such crimes can often be lengthy, however, the Danish unit's demonstrated aim is to be able to determine within 12 months whether there is sufficient evidence to prosecute or else investigation should be halted. In the twelve-month period in 2009, 22 cases have been decided and this goal was met in 16 cases.[73]

The result of the overall work of specialized units is nevertheless striking: out of 24 convictions on account of serious international crimes, 18 involved investigation and prosecution undertaken by specialized units.[74] The International Federation for Human Rights (FIDH) and REDRESS in 2010, and Human Rights Watch – all these NGOs are dedicated to protection of human rights, ending impunity of perpetrators of the most heinous offences – in 2014 have undertaken projects to map the work of such existing units and to assess their usefulness; the Human Rights Watch concentrating on universal jurisdiction cases. The conclusion of FIDH/REDRESS is that 'it will be difficult, if not impossible, to successfully prosecute a suspect for serious international crimes without special arrangements',[75] while the Human Rights Watch report concludes that

> [i]n addition to having motivated and experienced staff and specifically earmarked budgets, the decision to create specialized war crimes units often reflects heightened political will within the countries in question to fight impunity for the gravest international crimes.[76]

Indeed, numbers show that the number of investigations, prosecutions and eventual convictions are much higher in states having a specialized unit and cases are concluded within much shorter time if units exist. In Finland, for instance, *ad hoc* resources were provided for an ongoing case, which resulted in investigation and prosecution being concluded within three years, and the trial itself was concluded within 10 months. The case raised

70 See *above* n. 69, p. 38.
71 See *above* n. 69, p. 32.
72 See *above* n. 66, pp. 17-18.
73 See www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (last visited on 18 January 2012). No further update is available online.
74 See *above* n. 66, p. 18.
75 Ibid., p. 21.
76 See *above* n. 69, p. 3.

huge media attention.[77] Finland's Minister of Justice, Tuija Brax, said in an interview that the Nordic country was both capable and ready to host the trial. 'We have specialists and lawyers working in international fields and expertise in international criminal cases [...] It's a global world, and we're not an isolated island.'[78] In most countries these time-frames would be highly praised even for an average domestic case, let alone for a case involving an international crime. It goes therefore without question that the setting up of units dealing with serious international crimes requires relatively little effort and results in huge advantages.

It is well known that cases prosecuting war crimes and grave breaches tend to require more time due to the complex nature of such proceedings. The complications include the international locations of victims and witnesses, the challenges of obtaining their evidence, and of providing them with a secure environment in which to deliver their evidence, as well as ensuring the fundamental protections for those accused of such serious crimes. By way of expertise, judges hearing such cases may require evidence to be presented which addresses the history, as well as the military and psychological components of the case. The expert witnesses may include other areas which relate to the unique nature of these cases. The prosecutors and judges may have to consider questions of legality when it comes to the joint application of international and domestic law, the legality of application of international law and customary international law in the absence of domestication, as well as the need to apply sanctions of ordinary crimes to international crimes

Thus, successful enforcement of the state's international obligations requires a different approach than that which is applied in a standard domestic prosecution. International law and European law include more and more direct obligations on internal law and directly on individuals. The prosecutor and judge may no longer look exclusively into the domestic criminal code. Even if international crimes are implemented in the domestic code, the origin of such domestic legislation is found in international law including written international treaties as well as sometimes non-codified customary international law.

Whatever solution Hungary chooses, a strategic step is required to change the situation. It requires a recommitment of the government to its obligations under international law, and a commitment to change fundamentally the approach being taken by the courts and the prosecutor's office in implementing Hungary's international obligations in and through the domestic court system. The solution would include the appointment of personnel in

77 Around 100 witnesses had been heard in the pre-trial phase, most of them abroad; 68 witnesses were heard by the trial court. Only one of the 68 witnesses called during the trial lived in Finland. The court proceedings included court sessions in Kigali and Dar es Salaam to hear witnesses, and a site visit in Nyakizu, Rwanda, where the crimes were committed.

78 See *Prosecutor v. Francois Bazaramba* (R 09/404), judgment of June 2011. See http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue12.html#rw1 (last visited on 15 September 2015) and Press Release of the District Court of ITÄ-UUSIMAA of 11 June 2010, www.adh-geneva.ch/RULAC/pdf_state/Finland-decision.pdf (last visited on 15 September 2015).

the investigative, prosecution and court systems who receive specialized training in international criminal law, international human rights law and international humanitarian law. The solution requires additional resources for the research that is necessary, to include translation of international law materials for use in domestic courts, as well as other needed resources.

9.8 Summary: Is This Only Hungary's Own Business?

Hungarian authorities have thus far seemed to treat the question of prosecution of communist crimes committed in Hungary solely as a matter of concern to its own state. However, like the prosecution of Nazi war crimes, communist crimes that amount to international crimes have not only violated the victims themselves or the interests of Hungary, but have violated the interests of the international community as a whole. Thus Hungary is obliged, in the name of the international community, to investigate and prosecute these crimes. This is precisely why the notion of international crimes was formed: to express the will of the international community to stop such conduct, making such actions criminal actions by way of international law, irrespective of the decisions of the national legislators.

When there is no international tribunal proceeding in a case, trials of persons charged with international crimes must take place in national courts.

> These courts may be regarded, for this purpose, as organs of the international community applying international criminal law and bringing it home to the individual, who is directly subjected to international obligations [...].[79]

The uneasiness of prosecutors and judges to directly apply international law is not only a Hungarian phenomenon: it is common in other states as well, and the results vary. Some domestic courts have reached back directly to international law,[80] others were hesitant to

79 Y. Dinstein, 'International Criminal Law', in: *Israel Yearbook on Human Rights* 5/55, 1975, p. 73.

80 See *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, H (3). In this case, the case of deportation of Hutu political leader Léon Mugesera from Canada on grounds of incitement to commit genocide, the Canadian courts reached back to international law when interpreting elements of crimes against humanity. See R. Varga: Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees, Pázmány Press, Budapest, 2013, p. 90.

do so.[81,82] In order to find a solution, first we need to identify that there is a problem. Then we need to discuss alternative solutions and ways forward. Hungary thus needs an integrated approach not only for the prosecution of communist crimes, but to ensure the prosecution of international crimes in general. The idea behind *Lex Biszku*, notably to assist the prosecutors and judges by implementing rules related to international crimes should be extended to all international crimes and to all the rules around their prosecution, which practically means that the international rules on which crimes to prosecute and rules defined in international on how this should be done – non-application of statute of limitations, universal jurisdiction, and so on – should be implemented in domestic law. Prosecutors and judges would nonetheless be obliged to also apply non-codified international customary rules as well. Furthermore, the establishment of units or appointment of persons in each authority is inevitable to deal with the situation. Finally, the government should stand ready to allocate funds and ensure adequate background for the prosecutors and judges to carry out their task in compliance with international law.

> Prosecution and punishment of such crimes serves as retribution and expression of the moral condemnation of society, which should proclaim and enforce its condemnation of abuses in order to affirm the rule of law and fundamental societal norms.[83]

Thus, it sends the wrong message when a state, through all its authorities, including the legislature, the prosecutors and judges, does not do everything feasible to ensure the prosecution of international crimes, within the framework of fair trial guarantees. Therefore the Biszku-case, the question of prosecution of communist crimes and generally the issue of prosecution of international crimes cannot be considered solely through the eyes of Hungarian criminal law, but it requires the understanding of the international nature of such crimes and the violation these cause to the international community as a whole. This is not just Hungary's business.

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81 *Public Prosecutor v. Van Anraat*, LJN: AX6406, Rechtbank 's-Gravenhage, 09/751003-04 (District Court of the Hague) and LJN: BG4822, Hoge Raad, 07/10742 (Court of Appeal) (exclusive application of domestic law). In this case, the Dutch courts had differing opinions: while the District Court took the ICTY case law as a reference for the assessment of *mens rea*, the Court of Appeal took the opinion that although there should be a preference for the application of international law, if the case law of international tribunals is not clear, Dutch national law should be applied exclusively. See *above* n. 10, p. 90.

82 Supreme Court of the Netherlands, nr. HR 00749/01 CW 2323 LJN: AB1471, NJ 2002, 559. The Dutch Supreme Court in the *Bouterse* case did not accept reliance on customary law if it collided with national law.

83 D. Shelton, *Remedies in International Human Rights Law*, Second Edition, Oxford University Press, Oxford/New York, 2005, p. 396.