25 Facilitating War Crimes Procedures in Hungary: The New Criminal Code and *Lex Biszku*

*Réka Varga**

Hungary witnessed a number of challenges and adopted various measures in 2012 with respect to the implementation and domestic application of international law. The present article concentrates only on two issues: the provisions of the new Criminal Code dealing with war crimes, and the entry into force of *Lex Biszku,*[1] declaring the non-applicability of statute of limitations for grave breaches and crimes against humanity and its effects on the application of international law before domestic courts.

The adoption of both pieces of legislation were intended to facilitate domestic procedures with respect to serious international crimes, and, although both legal acts could ultimately contribute to this goal, there seem to be some shortcomings as well. The present note seeks to provide a constructive criticism to both pieces of legislation.

25.1 The New Criminal Code and Its Provisions Related to the Prosecution of War Crimes

The relevant Chapters of the new Criminal Code[2] were intended to reflect the provisions of the Rome Statute and to provide for a full implementation of the grave breaches – war crimes regime. All in all, the new Code is an important step forward in the repression of

* Ph.D., senior lecturer, Department of Public International Law, Pázmány Catholic University. Her main field of research includes national implementation of international humanitarian law treaties with special focus on criminal repression and domesic war crimes procedures. Adviser on international humanitarian law issues to the Hungarian Red Cross. Former legal adviser of the International Committee of the Red Cross Regional Delegation for Central Europe.

1 Law nr. CCX of 2011 on the prosecution and non-application of statute of limitations of crimes against humanity and the prosecution of certain crimes committed during the communist dictatorship. The law entered into force on 1 January 2012.

2 Law nr. C of 2012 (hereafter: Criminal Code). The Criminal Code enters into force on 1 July 2013. The specific provisions under consideration will be identified in the subsequent footnotes.

serious international crimes.[3] However, as the Ministerial explanations attached to the draft law describe, a specific intention was to shorten the provisions of the Rome Statute,[4] which, unfortunately, lead to the result that certain provisions were completely left out.

A detailed analysis of the new provisions may be interesting not only to map the new Hungarian legal environment when it comes to the prosecution of war crimes, but also considering the fact that many states in Europe had accepted similar provisions in new or amended Criminal Codes and are constantly amending them either to reflect changes in international law or in response to actual criminal proceedings which eventually exhibited shortcomings due to inaccuracies in legislation.

The new Criminal Code enters into force on 1 July 2013. The Code contains provisions relevant to the punishment of war crimes in both its General Part and Special Part. The closing provisions include the definition of armed conflict.[5] For the purposes of the Code, the term 'armed conflict' includes conflicts described in Articles 2 and 3 of the 1949 Geneva Conventions, Article 1(4) of 1977 Additional Protocol I and Article 1 of 1977 Additional Protocol II. The term also covers state of emergency with extraordinary measures, state of emergency, and, in case of war crimes and crimes committed by members of the armed forces, operations (according to the terminology of the Code: 'use of Defence Forces') carried out by the Hungarian Defence Forces abroad.[6]

The inclusion of situations defined by common Article 3 of the Geneva Conventions in the definition of armed conflicts is plausible. This is one of the important developments of the new Code compared with the previous regulations, which only referred to the 1977 Additional Protocol II. With this new, extended rule, Hungary aligned itself with most states in Europe that consider crimes committed in both kinds of conflicts the same way. At the same time it may be worth mentioning that the extension of the definition of armed conflict to operations of the Hungarian Defences Forces abroad may be at times controversial. Foreign missions may also include peace-keeping missions or missions that accomplish merely training tasks; application of the law of armed conflict to such situations could be highly questionable.

---

3 A draft international crimes code was prepared in 2003 by Norbert Kis and Balázs Gellér on request of the Hungarian government, with the view to adopt all international crimes and conditions of their punishment within that code in a solution close to the German *Völkerstrafgesetzbuch*. However, the government finally did not adopt the draft code and chose to leave these crimes in the Criminal Code. *See* N. Kis & B. Gellér, 'A nemzetközi bűncselekmények hazai kodifikációja de lege ferenda' (Domestic codification of international crimes de lege ferenda), *in*: Wiener A. Imre Ünnepi Köte, Budapest, KJK-Kerszöv 2005, and B.J. Gellér, *Nemzetközi Büntetőjog Magyarországon, adalékok egy vitához* (International criminal law in Hungary, addenda to a debate), Budapest, Tullius Kiadó 2009.

4 *See* <http://konyvtar.bpugyvedikamara.hu/wp-content/uploads/2012/02/BTKeloterjesztes-indokolas.pdf> (last accessed on 3 December 2012).

5 Criminal Code, Art. 459(1).

6 Criminal Code, Art. 459(1) 10.

Provisions in the General Part include the provision confirming the *nullum crimen sine lege* principle, making an exception to crimes that are to be punished based on generally accepted rules of international law, *i.e.* customary law.[7] This provision foresees that procedures directly based on customary law are not in violation of the *nullum crimen sine lege* principle, since they were punishable at the time by international customary law. As the Hungarian Constitutional Court rightly stated in 1993, international law requires the observation of the *nullum crimen sine lege* principle within its own system, *i.e.* international law demands that war crimes (or crimes against humanity) are to be punished at the time of their commission according to international customary law. Through the criminal jurisdiction exercised by Hungary, actually the criminal jurisdiction of the international community is exercised, based on the conditions and within the guarantees defined by the international community.[8]

At the same time, the subsequent paragraph of the Code confirms the *nulla poena sine lege* principle, without any special rule for crimes to be punished under international law.[9] The question arises, what sanction the judge may apply in case of a crime to be punished under international law, but not punishable under Hungarian law. The answer is to be found in the next article, which states that

> [t]he new criminal code shall be applied with a retroactive effect in case of crimes to be punished on the basis of generally accepted rules of international law, in case the act was not punishable under the Criminal Code at the time of the commission of the act.[10]

This means that in case of an act perpetrated before the entry into force of the Code, the judge will apply the Code retroactively, including sanctions. However, if the prosecutor or judge is confronted with a case involving a crime under international law that is not stipulated in the present Code, he/she would have to directly rely on the text of the international treaty or on customary law.

As regards jurisdiction, the Code states that it shall be applied to acts committed by non-Hungarian citizens abroad "in case of crimes formulated in Chapters XIII or XIV, or any other crime the prosecution of which is prescribed by an international treaty promulgated in law."[11] Chapter XIII of the Code includes crimes against humanity – a form of which is

7 Criminal Code, Art. 1(1): "Criminal responsibility of the perpetrator may only be confirmed for acts – excluding acts that are punishable based on generally accepted rules of international law – that were punishable by law at the time of commission of the act."

8 *See* decision No. 53/1993 of the Hungarian Constitutional Court, para. V.2.

9 *Supra*, Art. 1(2).

10 *Supra*, Art. 2(3).

11 *Supra*, Art. 3(2) ac).

genocide –, while Chapter XIV includes war crimes. In such cases the criminal procedure shall be initiated by the Prosecutor General.[12] Although this provision seeks to provide for universal jurisdiction in the case of international crimes, it may not be complete. First, not all international crimes are covered by Chapters XIII and XIV (*see*, comments forthcoming). Second, this provision does not seem to cover universal jurisdiction based on customary law. While the Constitution foresees that "Hungary accepts generally recognized rules of international law", the Code specifically states "international *treaty* promulgated in law" (emphasis added), and customary law is clearly not an international treaty. Although we may argue that in case of conflict, international law prevails, this wording may cause problems during application in the individual cases.

Regarding statute of limitations, the Code makes an exception from the general rule in several cases of which two exceptions are relevant for the prosecution of war crimes: (1) in case of exceptions stipulated by the law excluding statute of limitations for certain crimes (2) crimes defined in Chapters XIII and XIV.[13] Evidently the objective was to exclude statute of limitations for war crimes and certain other international crimes. In case an international treaty binding on Hungary provides for the non-application of statute of limitations for a crime that is not included in the Criminal Code, the first exception should be applicable, because the international treaty must be promulgated by law. Again, the theoretical question stands: if non-applicability of statute of limitations would be based on customary law, this international provision could not be applied based on the Criminal Code. At the same time, the formulation of the relevant sentence: "exceptions stipulated by *the* law excluding statute of limitations" (emphasis added), instead of by *a* law, may also refer to one specific law, probably *Lex Biszku*, which, as discussed below, basically repeated – although not entirely – the provisions of the 1968 Convention on the non-application of statute of limitations.

The Criminal Code does contain the non-applicability of defence of superior order: Article 130(1) stipulates that "[t]he soldier is not punishable for an act executed based on an order, except if he knew that he committed a crime by executing that order." Although the law does not expressly state that in case of international crimes the soldier may not claim that he did not know he was committing a crime, this interpretation can be said to be widely accepted in practice.

As regards specific crimes, the new Code includes important developments in order to cover all grave breaches and war crimes; however, the list remains incomplete. Article 149 deals with attacks on protected persons, but leaves out the following crimes: prohibition of starvation of the civilian population, prohibition of inhumane and degrading treatment

12 *Supra*, Art. 3(2) a) ac) and Art. 3(3).

13 *Supra*, Art. 26(1) and (3).

and punishment, and prohibition of deporting own citizens to occupied territories and unlawful deportation or displacement of the population of occupied territories.

Article 153 provides for the prohibition of attacks against protected objects. The provision seems to confuse the protection of non-defended localities with protection of objects and is also unclear on the issue of proportionality. The provision suggests that only those attacks are prohibited that are directed against objects that are not military objectives *and* are non-defended, and it only prohibits attacks that are not in conformity with the proportionality principle in case of non-defended localities. It is important to note that as in the case of installations or buildings designed for the treatment of the sick and wounded, belonging to the armed forces, these can be defended, *i.e.* their defence does not deprive them of protection,[14] and the proportionality principle does not only apply for non-defended localities. It seems as though the legislator confused the notion of protected objects (or non-military targets) with non-defended localities.[15]

At the same time, the provision correctly included protection of cultural property, including property under special and enhanced protection. It also stipulates the prohibition of use of cultural property for hostile purposes as well as looting and the destruction of cultural property. It also provides for the protection of the natural environment.

Article 157 prohibits the abuse of emblems protected by international law. The provision states that abuse of the red cross, red crescent, red crystal or other emblems serving a similar purpose and protected by international law are punishable, in case a more serious crime was not committed. The Code left out the prohibition of the abuse of the white flag, and emblems or uniforms of hostile forces or the United Nations (hereinafter 'UN').[16] Perhaps the provision 'emblems serving a similar purpose' was meant to indicate these; this is likely in the case of the white flag, however, it could be difficult to accept that emblems or uniforms of hostile forces or the UN should be understood as emblems serving a similar purpose to the humanitarian meaning of the red cross, red crescent or red crystal.

The other welcome and important improvement of the new Code is the manifestation of command responsibility. Article 159 basically adopted the text of the Rome Statute regarding the responsibility of the military commander. As regards the responsibility of a civilian leader, the Code uses the term 'official person or foreign official person in a leadership position', providing an even more comprehensive definition.

---

14 *See* Art. 13(2) of Additional Protocol I of 1977.

15 The controversies mentioned in the present pages have all been raised in a document submitted to the government for consideration prepared by the International Law Department of the Pázmány Catholic University, of which the present author drafted many of the recommendations related to the section on war crimes. The document also included several recommendations which were eventually adopted in the final text – whether or not as a result of the mentioned document – such as inclusion of common Art. 3 in the definition of armed conflict and the provision with respect to the protection of the distinctive emblems.

16 *See* Art. 8.2 (b) vii) of the Rome Statute of the International Criminal Court.

All in all, the new Criminal Code follows the approach of extensive codification of international crimes and the conditions of their punishment[17] as opposed to leaving it to prosecutors and judges to directly apply international law.[18] As generally pointed out by numerous scholars,[19] and considering the Hungarian legal traditions and the earlier decisions of the Hungarian Constitutional Court delivering guidelines on the treatment of international crimes within the Hungarian legal system,[20] this seems to be the correct solution.

As one of the drafters of the Code noted, since the Hungarian Constitutional Court stated that the principle of legality must also be complied with in the case of international crimes, codification is the best means to ensure compliance with that principle. He further stated that the *nulla poena* principle was a constraint to the direct application of international law by domestic courts.[21]

At the same time, however extensive implementation may be, direct application by prosecutors and judges cannot be fully avoided, because written texts can never provide for such a precise picture of the international obligations as judicial application, considering the different logic of the two fields of law and the changing nature of international law. As Imre Wiener pointed out, the determination of specific features of international crimes required such a detailed and well-founded interpretation that this may be carried out more precisely on the level of application than on the level of the legislation, where the legislator is only capable of an abstract formulation.[22] Therefore, it seems, an extensive implementation, mixed with effective judicial application could result in full compliance with the relevant international obligations.

---

17 Similarly, one of the reasons for the adoption of the German *Völkerstrafgesetzbuch* was it providing a link between international law and national criminal legislation which is required for German courts to adjudicate in a concise manner acts violating international law, and to consolidate international criminal law into the German legal order, in order to ease the work of adjudicators. *See supra* note 4, Kis & Gellér, p. 364 and the ministerial explanation to the German *Völkerstrafgesetzbuch*.

18 By 'direct application of international law by domestic courts', the present author means application by domestic authorities of rules of international treaties that were ratified by the given state but its provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but did not implement that specific grave breach in its penal code. Similarly, direct application could also mean application of a customary rule without implementing it in national legislation.

19 *See e.g.,* Statement of V.-D. Degan, *Institut de droit international, Annuaire*, Volume 71, Tome II, Session de Craccovie, 2005 – Deuxième partie, Editions A. Pedone, Paris, p. 212, W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, The Hague, 2006, p. 36, or R. Varga, *The domestic prosecution of war crimes with special attention to criminal justice guarantees*, Ph.D. dissertation, available at <https://jak.ppke.hu/uploads/articles/12332/file/Varga_Reka_Ph.D._VEGLEGES.pdf> (last accessed 2 January 2013). As for collision of direct application of the Rome Statute with the principle of legality, *see* M. Cottier, 'Die "Umsetzung" des Römer Statuts hinsichtlich der Kriegsverbrechen', *Jusletter*, 14 March 2005, p. 4. In this article, Cottier poses the questions whether it is compatible with the principle of legality that the Swiss military penal code refers to crimes defined in international treaties while not defining the elements of crimes in the national penal code.

20 *See e.g.,* Constitutional Court decisions nr. 53/1993, and 36/1996.

21 *See* Gellér 2009, pp. 58-60.

22 *See* A.I. Wiener, 'Büntető joghatóság és nemzetközi jog' (Criminal jurisdiction and international law), XXXV *Állam-és Jogtudomány*, 1993, p. 205.

25.2 The *Biszku* Case: Attempts at Domestic Application of International Law and *Lex Biszku* [23]

25.2.1 Introduction

The present pages are not intended to provide a full overview and analysis of the *Biszku* case, but are merely aimed at providing an illustration of the difficulties of direct application of international law and the legislator's effort in finding a solution.

The decision of the prosecution in the *Biszku* case sent waves of astonishment among international lawyers in Hungary. The decision in question reflects the way international rules on serious international crimes are applied, or rather often not applied, in Hungary. The present lines will provide a general overview of the hurdles surrounding the direct application of international law.

In the first phase of the *Biszku* case, a request for the initiation of investigation was filed by international criminal lawyer Ádám Gellért to the prosecutor's office against Béla Biszku, former Minister of Interior in Hungary after 1956, for acts constituted during the political persecutions following 1956, which qualify, according to the request, as crimes against humanity, namely persecutions on political grounds, murder and other inhumane acts.[24] The claimant argued that although criminal proceedings against Biszku cannot be initiated based on domestic law due to elapse of time, there is nothing to exclude prosecution based on international law, namely international customary law related to crimes against humanity, Article 6c) of the Nuremberg Charter and the 1968 New York Convention on the Non-Application of Statute of Limitations for War Crimes and Crimes Against Humanity. The Municipal Prosecutor's Office rejected the request.[25] Its main argument was that the acts referred to in the request did not constitute crimes against humanity.[26] In the decision, the prosecutor failed to go into details of the elements of crimes against humanity, nor did he examine or explain why he came to such a conclusion.

Subsequently, the claimant filed a complaint against the decision, basically arguing that the decision lacked substantial arguments,[27] but the Prosecutor General's Office rejected

23 The main findings of the present chapter were published in Hungarian under the following citation: R. Varga, 'A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára)' (Application of international crimes in Hungary – Notes on the Biszku-case), VII Iustum, Aequum, Salutare 4, 2011, pp. 19-24.

24 Legal opinion including a request for initiation of investigation, 21 October 2010. Available at <http://nemzetkozi-jog.blogspot.hu/2010/10/jogi-allaspont-az-1956-os-megtorlasokat.html> (last accessed on 2 January 2013).

25 Decision of the Municipal Prosecutor's Office nr. NF. 27942/2010/1 dated 29 October 2010. Available at <http://nemzetkozi-jog.blogspot.hu/2010/11/fovarosi-fougyeszseg-dontese-biszku.html> (last accessed 2 January 2013).

26 *Supra*, p. 5.

27 Complaint against the decision of the Municipal Prosecutor's Office, 16 November 2010. Available at <http://nemzetkozi-jog.blogspot.hu/2010/11/panasz-fovarosi-fougyeszseg-biszku.html> (last accessed 2 January 2013).

the complaint formally referring to non-observation of the deadline available for complaint, but also upheld the previous decision in substance.[28] Although it provided *ex officio* a completion of the grounds for the first instance decision, in essence it did not shed light on the substantial arguments of the prosecution as to why the referred acts did not constitute crimes against humanity.

This second decision, for reasons unsurmisable, undertook to analyse the acts in light of the Geneva Conventions, although the request did not even mention the Geneva Conventions and it seems to be clear that the acts cannot fall under its scope of application due to a lack of presence of armed conflict in the years following 1956. The decision concluded that the acts in question could not constitute grave breaches of Geneva Convention IV, namely depriving a person of the rights to a fair trial, because it cannot be concluded from the decisions of the Central Party Political Committee at the time, ordering that the prosecution and the Ministry of Interior sees to it that the guilty counter-revolutionaries receive adequate punishment, that the acts of the prosecutors and judges constitute acts described under Article 147 of Geneva Convention IV. The decision further notes that Articles 146-147 refer to procedural guarantees and the right to defence, while the request does not specify such acts.[29]

Besides the fact that war crimes or crimes against humanity are to be pursued *ex officio*, therefore arguing that specific acts were not included in the request does not stand, it is a mystery why the decision turned to the examination of the Geneva Conventions instead of formulating substantive arguments as to why the acts would not constitute crimes against humanity.

Finally, after some legal debate centring on the adequacy of the deadline of the complaint, the complaint was rejected,[30] which meant the end of this specific procedure, bearing in mind that no further possibilities existed for further appeals or complaints.

The 1968 UN Convention on the non-application of statute of limitations for certain serious international crimes, like all other ratified/signed and promulgated treaties in Hungary, had become part of the Hungarian legal system with its promulgation in the official gazette, although it may not have been correctly implemented. Lack of implementation, however, does not suggest that the provisions of the treaty were not in force in Hungary – it probably merely made its application more difficult. This consequently means that notwithstanding the presence of implementing legislation, Hungary is obliged to punish international crimes – thus, prosecutors and judges are obliged to apply rules related to the punishment of international crimes – in the manner stipulated by international law,

28 Decision of the Office of the Prosecutor General nr. NF 10718/2010/5-I dated 17 December 2010. Available at <http://nemzetkozi-jog.blogspot.hu/2011/01/legfobb-ugyeszseg-elutasitotta-biszku.html> (last accessed 2 January 2013).

29 *Supra*, p. 4.

30 Decision of the Office of the Prosecutor General nr. NF 10718/2010/11-16/III, dated 1 March 2011.

even if they are not provided for in the Hungarian Criminal Code. The Constitutional Court of Hungary declared that the elements of war crimes and crimes against humanity,[31] and conditions of punishment thereof, are defined by international law.[32] We may find the same rule under international law stipulating that a state cannot refer to its domestic legislation – or lack of it – to justify non-compliance with international law.[33]

The confusion in the Hungarian legislation and practice on this point are perfectly reflected in the decisions of the prosecution, and the fact that not even the second decision was willing to make correct this mistake. The following lines provide a brief overview of some of the considerations with respect to the domestic implementation and application of international rules related to the prosecution of war crimes with special attention to how Central European states dealt with the question, arriving at solutions suggested for the case of Hungary.

25.2.2 Transformation – Implementation – Application

First, it is important to differentiate between legal considerations and practical considerations. From a legal point of view, the difference between transformation and implementation is that under transformation the international treaty is made part of the Hungarian legal order through promulgation (and it is in force from then on), while implementation means that the international treaty, already part of the Hungarian legal order, will be made 'digestible' for application through the incorporation of said provisions for instance in criminal legislation or by providing a practical and precise legal framework to the often general provisions stipulated in international treaties, naming those responsible for the execution of such provisions and so on. Examples for the former are the inclusion of elements of crimes, non-applicability of statute of limitations or excluding immunities for certain crimes in the criminal code. Examples to the latter may be rules on the use of the red cross emblem: while international law stipulates that medical services of the armed forces shall use the emblem, the implementing legislation would include details as to who is responsible for painting the red crosses, who keeps record of users, and so on.

This question is the essence of the issue of the direct applicability of international law in domestic systems. It is notably up to the state to decide how detailed implementation

31 Worth to note that in Hungarian legislation a general confusion had been present around the exact translation of 'crimes against humanity'. At certain pieces of legislation it was called 'emberiség elleni bűncselekmények' (crimes against mankind), at other places 'emberiesség elleni bűncselekmények' (crimes against humanity), without any logic. Fortunately the new Criminal Code is now consequent in using the term "emberiesség elleni bűncselekmények', which is, in the view of the present author, the correct formula.

32 *See* Constitutional Court decision 53/1993 (X.13.).

33 *See* P. Kovács, *Nemzetközi Közjog* (International Public Law), Osiris Kiadó 2006, p. 62. at p. 441; M.N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2003, p. 124.

measures it wishes to adopt – if any. Certain states only adopt implementation measures with respect to non-self-executing rules (typically Anglo-Saxon states, where this solution functions mostly well),[34] others include nearly all international obligations in the respective legislation, for instance in criminal legislation (typically continental legal systems).[35] However, generally Central European states had started to argue without further examination or research – for reasons unknown but most probably partly due to a hesitance in taking on the Sisyphus task of detailed implementation – that international obligations are directly applicable, and consequently, no implementation was necessary. At the same time, the vast majority of prosecutors and judges were not willing to proceed directly based on the ratified and promulgated international treaties and thus deal with all the difficulties arising from direct application all by themselves, which was reinforced by the fact that most prosecutors and judges at the time could not have dealt with this task due to a lack of knowledge of the international legal framework and the lack of knowledge of foreign languages, which was important considering that most secondary sources were and are still only available in foreign languages. It is important to note that this was probably not the fault of the individual prosecutors or judges themselves, but shed light on the defects of the systems.

Most of these states began to amend their criminal codes or adopt new ones in the years 2000,[36] however, the new or amended criminal codes, although all showing significant progress, still exhibited certain shortcomings in the repression of international crimes. Although such shortcomings could be compensated for by the direct application of international law by prosecutors and judges, they were, probably understandably, still mostly reluctant to include direct references to international treaties in their decisions.

Therefore the situation at present is that although important steps had been taken towards the full implementation of the grave breaches – war crimes regime, its implementation is not always complete, which would not be a problem in case prosecutors and judges were willing to fill in the gaps by direct references to international law.[37] Therefore, the prosecution in Hungary could have easily solved the issue in the *Biszku* case by directly referring to the 1968 UN Convention and other international legal provisions with respect to the qualification of the crime and the non-applicability of the statute of limitations, but it

34 *See e.g.,* United Kingdom, Geneva Conventions Act 1957 (as amended in 1995 and 2001).

35 For instance, Germany adopted a specific law on international crimes, incorporating the grave breaches of the Geneva Conventions and the Additional Protocols and the crimes of the Rome Statute. *See Gesetz zur Einführung des Völkerstrafgesetzbuches*, I *Bundesgesetzblatt* 42, 2002, pp. 2254-2260.

36 Lithuania adopted a new criminal code in 2000, Estonia in 2001, Slovakia in 2005, while Poland amended its criminal code in 2009.

37 The aversion of prosecutors and judges to directly apply international law is not only typical to this region. *See* E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *European Journal of International Law* 1993, p. 159.

failed to do so. This is an important aspect because not making the fulfilment of international obligations possible – through being able to proceed in the case of international crimes – is a violation of our international obligations.[38]

Coming back to repression obligations, it must be considered that even in case of the adoption of detailed implementation measures, it cannot be avoided that prosecutors and judges work with international law to a certain extent, since interpretation of the elements of crimes, commentaries of the relevant treaties, the decisions of international tribunals and courts – although not binding but certainly of guiding nature – are all parts of the body of international law that must be considered during such procedures.[39]

This is how we arrive at the practical considerations. Although legally the international treaties are in force for Hungary, since the prosecutors and judges are mostly only willing to proceed based on what is stipulated in their criminal codes, it may be more effective to decide for a detailed implementation – and not only in the framework of the criminal code.

The Hungarian Parliament, as a result of such effort, adopted a law in 2011 which entered into force on 1 January 2012, this is the so-called *Lex Biszku*,[40] which deals with a similar question. The law basically repeats the main provisions of the 1968 UN Convention on the non-application of statute of limitations and includes a translation of the relevant provisions of the Nuremberg Statute, *i.e.* the definition of crimes against peace, war crimes and crimes against humanity. The law thus expressly states that crimes to which no statute of limitation shall apply as per the rules of international law shall not elapse, even if at the time of the commission of the act, prescription was applicable to them based on domestic law.[41] The law then goes on to list such crimes, and includes crimes against humanity as described in Article 6 c) of the Nuremberg Charter, grave breaches committed in international armed conflicts as described in Article 2 of the Geneva Conventions, and grave breaches (*sic*!) committed in non-international armed conflicts as described in Article 3 of the Geneva Conventions.[42]

---

38 *See* Y. Dienstein, 'Defences', *in:* G.K. McDonald & O. Swaak-Goldman (Eds.), *Substantive and procedural Aspects of International Criminal Law – The Experience of International and National Courts*, Vol. I, The Hague, Kluwer Law International 2000, p. 382. For a comprehensive assesment of state responsibility under the Geneva Conventions, *see* M. Szabó, 'Az államok nemzetközi felelőssége a genfi egyezmények betartásáért', III *Földrész, Nemzetközi és Európai Jogi Szemle* 1-2, 2010, pp. 74-85.

39 *See* R. Varga, 'Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt' (War crimes procedures in front of domestic courts), *in:* E. Kris (Ed.), *Egységesedés és széttagolódás a nemzetközi büntetőjogban*, Bíbor Kiadó, Miskolc, Studia Iuris Gentium Miskolciensia – Tomus IV 2009, p. 107.

40 Law nr CCX of 2011 on the punishability of crimes against humanity and non-observation of statute of limitations and on the prosecution of certain crimes committed during the communist dictatorship.

41 *Ibid.*, Art. 1.

42 *Ibid.*, Art. 1 a)-c).

The direct trigger of the law was the already mentioned decision of the Office of the General Prosecutor in the *Biszku* case.[43] However, no matter what the direct trigger was, the law seems to be somewhat short-sighted and at certain instances incorrect from a legal point of view. First, whether or not the legislator specifically had the *Biszku* case in mind, there seems to be no reasonable ground to pick and choose certain crimes the UN Convention referred to and not to mention others.[44] The Convention namely also mentions eviction by armed attack or occupation and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the Genocide Convention. If the goal of the legislator was to repeat clearly what the UN Convention, already in force, regulates, then this should have been carried out in a circumspect and complete form.

Second, reference to violations of the Geneva Conventions in non-international armed conflicts as defined in common Article 3 as grave breaches is simply wrong. The grave breaches regime only applies to international armed conflicts. Although there is a general tendency to treat violations committed in both kinds of conflicts the same way – this is embodied for instance in the Rome Statute of the International Criminal Court and in several domestic legislation – however, this was not the case at the time the UN Convention was adopted and at the time Biszku committed the alleged crimes. Including Article 3 violations to crimes that are not subject to statute of limitation may have been well thought to be a progressive step, but it cannot be done retroactively. The law entered into force on 1 January 2012 and thus applies to procedures starting after this date, and nothing excludes its application to crimes committed in non-international armed conflicts that were committed at a time when international law did not lift statute of limitations for Article 3 violations. In this regard, therefore, the law has a retroactive effect that is not in conformity with the principle of legality.

Third, probably the main problem with the law is that it only concerns a small part of the rules related to the repression of serious international crimes, and although it's goal is undoubtedly to be supported, it could, in the long run, unfortunately result in more negative effects than bringing results. It is not necessarily wise to focus on one detail and regulate that alone while leaving the rest of the international rules unregulated. Moreover, the text of the law seems to suggest that the provisions therein are constitutive instead of

43 *See* <http://fn.hir24.hu/itthon/2011/10/19/benyujtottak-a-lex-biszkut/> (last accessed on 3 January 2013).

44 According to the author of the law, these crimes were left out since they were anyway regulated in the criminal code, including barring the statute of limitation. *See* <www.es.hu/gellert_adam;a_biszku-ugyhoz;2011-12-14.html> (last accessed on 4 Januaryy 2013). This approach, however, causes confusion in the view of the present author and is not a wise solution for codification. If the barring of statute of limitations for certain crimes is already incorporated in the criminal code, then the same should have been done with crimes against humanity, and this should have been done through amending the criminal code and eventually including the elements of crimes against humanity in it.

being declarative.[45] This may lead to the result that the prosecutors and judges will, from now on 'justifiably', require that *all* international obligations and what the prosecutor and judge should do are expressly stated, as a matter of fact, 'translated', into a Hungarian implementing law (and we are not talking of transformation here), which may lead to the undesired effect where the prosecutor and judge is even more reluctant to directly regard international law itself.

Notably, as already mentioned, statute of limitations is only one of the possible issues that may arise. Similar problems could be caused by having to proceed based on a crime formulated under international law and not named in the criminal code or where the contents of the crime or the formulation of it is different from the corresponding international rule.[46] Similarly, in some countries the question arose whether it would be compatible with the principle of legality if the domestic criminal legislation were to include a crime through a general reference to the international rule, without including all the elements of the crime.[47] The new Hungarian Criminal Code also makes references to international law.[48] Such references are understandable, since in many cases the definition of weapons or cultural property as protected by international law are stipulated in treaties including a long definition and related rules about what property is exactly protected and under what circumstances. The repetition of whole international treaties or parts of treaties should obviously be avoided and the international regulations remain the background for the precise definitions.

Eventually, *Lex Biszku* reached its goal, and the office of the General Prosecutor initiated investigations against Béla Biszku, who is currently under house arrest, but interestingly not for the crimes that were indicated in the original request, but for alleged participation in the volley-fires in 1956.[49]

---

45 For a detailed discussion on this problem *see* C. Varga, 'Nehézségek az alkotmányos átmenetben – Belső ellentmondások az elévületlenség és elévülhetetlenség törvényi megerősítésében' (Difficulties in constitutional transition – Contradictions Built in the Statutory Confirmation of that a Crime has not Passed and/or cannot Ever Pass Statutory Limitations), 6 *Iustum, Aequum, Salutare* 4, 2011.

46 Although the new Criminal Code included most of the serious international crimes, as it was stated in the first half of the present article, certain crimes are still missing. Even more, with the rapid development of international criminal law, it may easily happen that new crimes are formulated either in customary law or in treaty law and the legislator may not always be following such developments through amending the Criminal Code. In such cases binding international law has to be obeyed, and the prosecutor and judge will be left with the materia of international law.

47 For a discussion on the Swiss criminal code, *see*: M. Cottier: Die "Umsetzung" des Römer Statuts hinsichtlich der Kriegsverbrechen. *Jusletter* 4, 2005. Available at <www.trial-ch.org/fileadmin/user_upload/documents/jusletter_michael_cottier.pdf> (last accessed on 15 November 2011).

48 *See e.g.*, Art. 153(2)b), which concerns punishment of attacks directed against "cultural property protected by international law", or Art. 153(3) which prohibits the use for military goals of "cultural property protected by international law", or Art. 155(1) prohibiting the "use of weapons prohibited by international law" […], or Art. 157 prohibiting the abuse of "other emblems protected by international law".

49 According to the prosecutor's office, the reason was that not enough evidence could be collected for Biszku's participation in the persecutions after 1956, while there seemed to be enough evidence for the Volley-fire cases. *See* <http://mno.hu/belfold/biszkunak-megsem-all-olyan-rosszul-a-szenaja-1104742> (last accessed on 3 January 2013).

Unfortunately and regrettably, largely verifying the above-mentioned concerns, both the prosecutor's office[50] and the media[51] have proclaimed that the initiation of the investigation against Biszku was made possible by *Lex Biszku* – a statement that is legally clearly wrong. Some, but only few experts noted that proceedings had long been possible based on international law, and although several newspaper articles were written by lawyers on the *Biszku* case,[52] as of today, only one legal opinion was published in a legal periodical about Lex Biszku.[53] A detailed discussion would be highly desirable focusing on the application of international law by prosecutors and judges, in all its aspects, as well as the mechanisms that should be implemented to further this goal.[54]

It is worth adding that this problem is not new: similar problems were raised in Hungarian legislation and practice related to the definition of armed conflicts – namely in the *Korbély* case, where the Supreme Court made incorrect statements as to the applicability of Article 3 and Additional Protocol II, although the decision was later corrected – related to the list of crimes to which universal jurisdiction applies, or the handling and application of unwritten customary law. Although the Basic Law of Hungary, similar to the previous Constitution, states that Hungary recognizes the general principles of international law,[55] certain pieces of legislation still only refer to international treaties.[56]

It is therefore still questionable how prosecutors and judges will handle customary law considering that in many cases they have not shown much willingness to apply written international law either. How will they define what the contents of uncodified customary law is, as of when they apply, and so on? The decision of the prosecution in the *Biszku* case also testifies to the non-observance of international customary law, by not even referring to international law and simply considering the act as an ordinary crime.

---

50 *See* <http://mno.hu/belfold/biszkunak-megsem-all-olyan-rosszul-a-szenaja-1104742> (last accessed 3 January 2013).

51 *See e.g.*, <http://index.hu/belfold/2012/09/10/rendorok_vittek_el_biszku_belat/> (last accessed 3 January 2013).

52 *See* A. Kulcsár, 'Biszku-ügy: mégis nyomozni kellene' (interview with Balázs Gellér), *Magyar Nemzet*, Vol. LXXIII, 25 November 2010; B. Gellér, 'Pénzbírság várhat Biszkura egy büntetőjogász szerint', available at <www.origo.hu/itthon/20110127-penzbirsaggal-vegzodhet-a-biszku-elleni-vademeles.html> (last accessed 4 January 2013), T. Lattmann, 'A múlt árnyai a jelen homályában, Az emberiesség elleni bűncselekmények elévülésének kizárását kimondó törvényjavaslatról', LV *Élet és Irodalom* 47, 2011; T. Hoffmann, 'A jelen árnyai', LVI *Élet és Irodalom* 4; G. Magyar, Gy. Magyar, 'Koncepciók, Biszku Béla büntetőjogi felelősségre vonásáról', LVI *Élet és Irodalom* 49; and articles written by the expert who drafted the law: Á. Gellért, 'Biszku-ügy: lezáratlan igazságtétel', *Magyar Nemzet*, Vol. LXXIV, 4 April 2011; Á. Gellért, 'Emberiesség elleni elévülhetetlen bűncselekmények', *Magyar Nemzet*, Vol. LXXIV 9 May 2011; Á. Gellért, 'A Biszku-ügyhöz', LVI *Élet és Irodalom*Issue 50.

53 *See* T. Varga, 'Alkotmányosság, jogszerűség, nemzetközi és belső jog ütközésének kavalkádja – Két esettanulmány egyetlen törvénykezdeményezés példájában', 7 *Iustum, Aequum, Salutare* 4, 2011, pp. 9-24.

54 Regarding an analysis of relevant mechanisms and how such mechanisms could be incorporated into the Hungarian system, *see* R. Varga, 'Domestic procedures on serious international crimes: interaction between international and domestic jurisprudence and ways forward for domestic authorities', *Miskolc Journal of International Law*, 2012, pp. 54-68.

55 "Hungary recognizes the general principles of international law […]." Basic Law of Hungary Art. Q) (3).

56 *See* the discussion on the new Criminal Code above.

25.3 What Solution Shall Be Chosen? Implementation or Direct Application?

In view of all the considerations mentioned above, it is submitted that basically two solutions could be taken into consideration:
(1) either there is a general tendency towards the direct application of international law by prosecutors and judges, instead of adopting implementation measures. This is, however, only viable, if prosecutors and judges receive adequate training regarding international law and in case they speak foreign languages which is inevitable mainly because of the secondary sources. As regards the structure of training for prosecutors and judges – the fact that their training currently does not cover international law, the lack of specific units dealing with serious international crimes and the fact that many do not speak foreign languages all point to the conclusion that this solution may take decades to be workable.
(2) Or there is a tendency to implement all international obligations, but this would require that really *all* obligations are included in implementing legislation. This, however, is a difficult, if not impossible task, considering the rapidly developing body of international law, and has an effect on a series of already existing legislation, including the constitution.[57] In addition, there remains the question regarding the implementation of customary international law – how can their content be defined, as of when do they apply, and so on. Most Western European states have chosen a middle way. Partly depending on their legal systems, they chose to implement certain treaty regulations – in general, it can be stated that Anglo-Saxon systems require less implementation measures than continental systems – and, in parallel, prosecutors and judges received adequate training. Moreover, small task forces or units had been established within the police authorities, prosecution and courts, and, in certain cases within immigration authorities, to deal with serious international crimes, thereby allowing for the concentration of knowledge and experience in such units.[58] Specific training in international law received sufficient attention in these countries after they experienced that despite exhaustive implementing legislation, prosecutors and judges cannot completely avoid having to directly deal with international law.

57 The Rome Statute for instance expressly closes out immunity of heads of state and others regarding the crimes stipulated therein. Although the Rome Statute does not oblige states to implement its crimes, most states nevertheless do it, which implies subsequent changes in the constitution. This has caused many problems in a series of countries, even caused delays in the ratification of the Rome Statute, or, in the case of Hungary, this is probably the main reason for the non-promulgation in Hungary.

58 *See* FIDH/REDRESS, Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialized war crimes units, December 2010, <www.fidh.org/Strategies-for-the-effective> (last accessed on 14 March 2012)

In Central Europe, we cannot really speak of systematic solutions due to the fact that not many war crimes procedures have taken place,[59] with the exception of Poland, where prosecutors and judges were faced – as a result of the procedures related to alleged war crimes committed by Polish soldiers in Afghanistan[60] – with the actual problems of application of the grave breaches regime.

For Hungary, the present author finds the second option more realistic, with the reservation that, as already mentioned, implementation does not fully prevent prosecutors or judges from having to directly rely on international law as well. Although the new Criminal Code had taken important steps in this regard, references to international treaties, leaving out customary law, may give rise to problems, notwithstanding the Basic Law's clear regulation.

Therefore, in addition to the need to regularly overview domestic legislation and the development of international law in order to ensure as comprehensive an implementation as possible – a daring task! –, efforts should be taken towards ensuring the adequate training of those prosecutors and judges who would likely be assigned to such proceedings. It has to be taken into consideration that such procedures may not only come up with respect to past Nazi or communist crimes, but also, and increasingly with the passing of time, in relation to Hungarian soldiers serving in foreign operations, or due to the eventual application of universal jurisdiction.

It must also be taken into consideration that although the obligation to exercise universal jurisdiction for grave breaches has been prevalent for Hungary since the ratification and entry into force of the Geneva Conventions in 1954, Hungary would probably not be ready to carry out such a procedure effectively, lacking adequate practical measures and background. At the same time, the international trend seems to be that members of the international community expect states to give effect to this form of international justice as well.[61]

---

59 In most states the criminal procedures related to the crimes committed during the communist era were solved based on national law, except in Hungary, where the corresponding Constitutional Court decision made procedures based on ordinary crimes impossible due to elapse of time, leaving reliance on international law the only remaining solution. However, for whatever reasons, only very few procedures were initiated and the failure in solving the issue left it coming up and up even decades after the 1990 changes – the *Biszku* case being one example.

60 The criminal procedure was initiated against seven Polish soldiers serving in Afghanistan for alleged war crimes (attack on civilians). Source: <www.freerepublic.com/focus/f-news/2728722/posts> (last accessed on 14 November 2011), and <www.nytimes.com/2007/11/29/world/europe/29poland.html> (last accessed on 14 November 2011).

61 *See* Report of Fidh/Redress: Extraterritorial Jurisdiction in the European Union, A Study of the Laws and Practice in the 27 Member States of the European Union, December 2010. Available at <www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf> (last accessed on 15 November 2011).

Another argument for the adoption of exhaustive implementation measures is that those applying the law would need a creative approach indeed in case they are proceeding in a case not included in the criminal code, and based purely in international law: what sanctions would they have to apply (now solved by the new Criminal Code), how they should apply the general part of the criminal code for crimes to which different rules apply when it comes to participation, modes of perpetration, and so on. This cannot be expected from prosecutors and judges, considering the approach they had already shown and the requirements of our legal system, especially in light of legality principles, such as *nullum crimen sine lege certa*.

Finally it must be mentioned that as other states' examples show, once this problem had been identified, it does not take unimaginable efforts, money or manpower to improve the situation. Every state, every member of the international community has the obligation to effectively pursue cases involving the most serious international crimes and the rarity of such cases or the faint possibility of their emergence is certainly not an excuse.