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Domestic procedures on serious international crimes: interaction between international and domestic jurisprudence and ways forward for domestic authorities

Introduction

The Hungarian Public Prosecutor's Office rejected an application related to the eventual responsibility of Hungary's ex-minister of interior for persecutions on political ground and other inhuman acts possibly constituting crimes against humanity committed after the 1956 revolution.[2] The rejection by both the Metropolitan and Public Prosecutor's Office was followed by great astonishment among criminal and international lawyers in Hungary[3], mainly because the decision simply omitted to genuinely examine whether the acts could constitute crimes against humanity, resulting in rejection of the complaint due to elapse of time.

This case demonstrates a problem that is not restricted to Hungary only, namely the uneasiness of prosecutorial and judicial institutions to deal with international law. This phenomenon has already appeared in several states; some states already overcame this problem, some didn't. The aim of the present article is to examine why domestic prosecutors and courts are reluctant to apply international law, to study whether there is interaction between international and national jurisprudence and to see what measures could assist in overcoming this problem.

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[2] „The Biszku-case", Municipal Prosecutor's Office, NF 27942/2010/1 (29 October 2010) and Public Prosecutor's Office, NF. 10718/2010/5-I (1 March 2011)

[3] For an analysis of the case, see Gellér Balázs' opinion in the following articles: Kulcsár Anna: Biszku-ügy: mégis nyomozni kellene, Magyar Nemzet, 15 November 2010 (available at: http://mno.hu/migr_1834/biszku-ugy_megis_nyomozni_kellene-203673, downloaded on 29 January 2012);
Kulcsár Anna: Új feljelentés készülhet a Biszku-ügyben, Magyar Nemzet, 20 June 2011 (available at: http://mno.hu/migr_1834/uj_feljelentes_keszulhet_a_biszku-ugyben-191445, downloaded on 29 January 2012); 'Pénzbírság várhat Biszkura egy büntetőjogász szerint', at http://www.origo.hu/itthon/20110127-penzbirsaggal-vegzodhet-a-biszku-elleni-vademeles.html (downloaded on 29 January 2012) and the opinions of Gellér Balázs, Gellért Ádám, Hoffmann Tamás and Lattmann Tamás in: Albert Ákos: ' "Nagy kihívás", de nem lehetetlen Biszku megvádolása', at http://www.origo.hu/itthon/20101125-nem-csak-biszkut-vadoltak-a-nemzetkozi-jog-alapjan.html (downloaded on 29 January 2012)

Why are there only so few domestic procedures on serious international crimes[4]?

A common characteristic of repression of war crimes is the relatively meagre number of national procedures. In fact, there are few other international obligations that are so poorly complied with as the obligations on repression and effective application through judicial enforcement.[5] At the same time, effective prosecution of the perpetrators of the most serious crimes cannot be achieved without the input of domestic courts[6], because "[e]ven with the creation of new international tribunals in this decade, national tribunals remain essential in deterring and remedying violations of the laws of war."[7] As the Office of the Prosecutor of the ICC put it, there is a risk of "an 'impunity gap' unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used"[8].

The relatively small number of national procedures may have several causes. First, such crimes are usually not isolated, therefore with one case there are several accused which leads to loads of cases to be tried. Second, procedures concerning serious international crimes require special knowledge of international law and international jurisprudence, it calls for a special application of national law in conjunction with international law, and the primary and secondary sources may be difficult to access mainly because of language problems. Third, such procedures tend to be expensive and time-consuming: because of the distance in place and time between the place of the procedure and where the crime was committed, evidence is difficult to reach, witnesses live far away and often don't speak the language of the place of the procedure and finally, cooperation with other states' authorities is necessary and thus the proceedings are dependent on the cooperation of the state of *locus delicti*. Due to these reasons it is not difficult to imagine why a prosecutor or a judge would be hesitant to have a case concerning serious international crimes.

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[4] By serious international crimes, the present article refers to war crimes, crimes against humanity and genocide.
[5] See Ward N. Ferdinandusse (2006), Direct Application of International Criminal Law in National Courts, The Hague, TMC Asser Press, p. 95.
[6] On the importance of domestic procedures, see for instance Joseph Rikhof, 'Fewer places to hide? The impact of domestic war crimes prosecutions on international impunity', Conference Paper, 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland from 11 July - 15 July, 2008, available at: http://www.isrcl.org/Papers/2008/Rikhof.pdf (downloaded on 27 January 2012)
[7] Ruth Wedgewood (2000), National courts and the Prosecution of War Crimes, in: Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts, Volume I, The Hague, Kluwer Law International, p. 393.
[8] See: Paper on Some Policy Issues Before the Office of the Prosecutor, ICC, September 2003, p.3, available at: www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf. (Downloaded on 10 January 2012)

Still, probably the biggest challenge is that although - due to the transformation of international treaties into the national legal order - prosecutors and judges are technically applying national law during the procedure, they are, in the end, in need of specialized knowledge of international law. It is not enough to find one's way around the Geneva Conventions or other relevant international treaty only, the prosecutor/judge also needs to know the corresponding literature, international jurisprudence and other related international norms in order to effectively deal with war crimes or other international crimes cases.[9] Therefore prosecutors/judges require specialized training in international law and international criminal law in order to conduct effective and high standard national criminal proceedings.[10]

Furthermore, trying a case concerning serious international crimes is not necessarily a motivating factor for the prosecutor or judge. It usually does not assist in his/her career, and because of the legal specificities and the length of the procedure, it does not help much the statistics of judged cases. Being an expert in international law or war crimes cases does not bring them further in their career path nor are they compensated in any other way for taking up such a difficult task. Prosecutors therefore may tend to drop charges based on alleged lack of jurisdiction, the denial of the international law character of the crime[11] or simply trying to extradite the person instead of prosecuting him domestically. Judges usually try to get rid of cases through putting restrictive interpretation on jurisdictional issues or trying to apply non-corresponding ordinary crimes instead of the international crime. The question gets even more complicated when it comes to trying own nationals or nationals of a friendly or powerful nation. In such cases political considerations also come in, and the prosecutor may well decide to drop the charges, or the judge may try to find reasons to exclude its jurisdiction or to exclude the criminality of the accused. Even democratic states have these considerations, and, as history has shown, they are not better

[9] For a discussion on the necessary elements to ensure effective domestic application of international criminal law, see Gellér, Balázs József (2009), Nemzetközi Büntetőjog Magyarországon, Adalékok egy vitához, Budapest, Tullius Kiadó, pp. 81-83 and 84-90.

[10] Regarding a need for international law training for judges/prosecutors, see Mettraux, Guénaël: Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes (2006), Journal of International Criminal Justice (4), 362-371, p. 371. See also Varga, Réka, Háborús bűncselekményekkel kapcsolatos eljárások nemzeti bíróságok előtt, in: Kirs, Eszter (ed.) (2009) Egységesedés és széttagolódás a nemzetközi büntetőjogban, Studia Iuris Gentium Miskolcinensia, Tomus IV, Miskolc, Bíbor Press, pp. 91-111.

[11] This is exactly what happenned in the *Biszku*-case (see footnote 2), where the prosecution did not raise charges arguing that the acts in question did not constitute crimes against humanity therefore prosecution is time-barred. Remarkable, that the prosecution did not examine nor did it explain why it had come to this conclusion, it simply stated so. See also Varga, Réka, A nemzetközi jog által büntetni rendelt cselekmények magyarországi alkalmazása (a Biszku-ügy margójára) (2011), Iustum, Aequum, Salutare (2011/4), available at: http://www.jak.ppke.hu/hir/ias/20114sz/02.pdf (downloaded on 30 January 2012)

in prosecution their own people than non-democratic countries.[12] A comparative analysis of behaviour of national judges has shown that judges are reluctant to apply international law if they consider that this would injure national interests.[13] Recognizing the problem of independence of national courts when dealing with international law, the Institute of International Law adopted a Resolution calling on national courts to maintain their independence while interpreting and applying international law, determining the existence and content of international law, both treaty and customary or when deciding about the adjudication of a question related to the exercise of the executive power.[14]

Numerous states acknowledged these difficulties and took measures to overcome them. Many states concentrate procedures relating to serious international crimes to one bench or one specific court, hire experts to advise them on international law matters and systematically collect material and documents for their own consultation. Unfortunately it seems that virtually none of these measures have been taken in Central European countries yet, leaving prosecutors and judges with a difficult task. Nonetheless, when confronted with the issue of lack of preparedness of the judiciary to try serious international crimes, these states tend to deter the problem as being the business of the judges in which the state cannot and should not intervene – referring to the independence of the judiciary. It has to be noted that preparing and training judges to stand the difficult test of trying war crimes and other serious international crimes requires state intervention in many fields and is also a state responsibility. It needs determination, money for training and funds to allocate personnel for these special cases; furthermore, it requires the adoption of internal measures to assign such cases to specifically trained prosecutors and judges and forming an environment that makes it motivating for them to engage in these procedures.

States which are more experienced in this field have established exclusive competence for serious international cases. In Germany, it is the office of the federal prosecutor that is competent for

[12] For an analysis of „minimalism and selectivity" of war crimes cases by national judicial authorities, see Ferdinandusse (2006), pp. 89-98.
[13] Benvenisti, Eyal, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts (1993), 4 *EJIL*, p. 159.
[14] Institute of International Law, Resolution adopted at the 66th session in 1993 in Milan: „The Activities of National Judges and the International Relations of their State", available at: http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF (Downloaded: 27 January 2010)

prosecution[15], in Belgium the federal prosecutor[16], in Netherlands a special unit was established for prosecution. Still, it is not enough to assign one specific body but it must also be ensured that trained personnel are ready to accept the assignment. This is what is mostly lacking in Central European states. While in Hungary the Metropolitan Court and the Public Prosecutor have exclusive jurisdiction, there are no special units or specially trained personnel to deal with cases concerning crimes under international law. This negligence in fulfilling international obligations obviously tells us something about the system, not the individual judges or prosecutors[17].

As a consequence, misinterpretation of international law in domestic procedures can most probably be cited from many countries. In Hungary, the Supreme Court opined in the *Korbély* case that the interpretation of common Article 3 of the Geneva Conventions should be drawn from Additional Protocol II.[18] What makes this opinion even more appalling is that this was formulated in connection with events that happened in 1956, before Additional Protocol II was even adopted. Although the Supreme Court fortunately later corrected this reasoning[19], it remains to be an uneasy mishap. In Estonia for instance, there is hardly any case-law, the only ones existing are related to genocide and crime against humanity committed by the Stalinist regime. Here retroactivity questions appeared, because the acts were committed between 1941 and 1949, however, the most important question, whether these acts were considered criminal according to general international law at the time was not analyzed by the national courts at all.[20]

Effective application of international law further requires that courts interpret national law in conformity with international law. This is the so-called principle of *consistent interpretation*, and it has become, according to some authors, a general principle of law.[21] This principle assists in reaching that national law does not put obstacles on the application of international law. The Hungarian Constitutional Court in its decision of 1993 also acknowledged this rule by opining

[15] The Federal prosecutor (Generalbundesanwalt), which has exclusive competence, has a specialized unit. See § 120 Abs. 1 Nr. 8 Gerichtsverfassungsgesetz (GVG): cases based on the Code of International Crimes are under the jurisdiction of the Oberlandsgericht and § 142a Abs 1. GVG: the federal prosecutor has exclusive jurisdiction

[16] Artikel 144*quater* of the Code of Civil Procedure (Gerechtelijk Wetboek), inserted by Article 25 of the Act of 5 August 2003, M.B., 7 August 2003

[17] Ryngaert argues that domestic authorities can be equally equipped as international courts to try serious international crimes if the state arranges for specialized personnel. See Ryngaert, Cedric, Universal Jurisdiction in an ICC Era, A Role to play for EU Member States with the Support of the European Union (2006), European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14/1, 46-80, p. 68

[18] Hungarian Supreme Court, Judgement of 5 November 1998

[19] Hungarian Supreme Court's review bench, Judgement of 28 June 1999

[20] Presentation of Estonian participant at the Conference „The Role of the Judiciary in Implementation of International Humanitarian Law", October 2007, Budapest. Copy on file with the author

[21] See more on the principle of consistent interpretation at Ferdinandusse (2006), pp. 146-153.

that "the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect."[22] On the other hand, in case of procedures related to crimes committed abroad, legal correctness is only one aspect, because „[n]ot only legislators and authors of constitutions need to be culturally open, given that they formulate the human rights and the criminal law subject thereto. Criminal judges must also be culturally open so that they can assess the perpetrators and victims in criminal proceedings arising from typical cultural conflicts equally."[23] Cultural openness requires that persons handling these cases – be it defence lawyers, police investigators, prosecutors or judges – are aware of the historical and cultural environment in which the crimes had been perpetrated, of the traditions of the given society in which the perpetrator/victim/witness live, of the potential security risks for victims and witnesses if they testify and several other factors. These, again, all require a special approach and specific preparation.

Effects of jurisprudence of international tribunals on domestic war crimes procedures

Definition of the contents of customary rules and reference to a certain rule as customary are typical fields where domestic courts rely on or refer to judgements and decisions of international tribunals. Especially if we look at the development of jurisprudence on crimes committed in non-international armed conflicts, an eventual obligation to prosecute these crimes or universal jurisdiction applicable to such crimes, we may witness the important influence of international jurisprudence on national case law. The same is true with regard to the elements of crimes. Since the treaties usually do not describe the elements of crimes with the same precision as national law does, state courts are left with definitions formulated in annexes to statutes of international tribunals, as is the case with the International Criminal Court, with the case law of such tribunals or with respective literature. In fact, these are the only sources national courts can reach to, to define elements of serious international crimes.

Making reference to decisions of international tribunals and courts may be problematic, because certain criminal law principles may have different interpretations on the national and the international level: the question is, whether these two interpretations have any effect on each other. The ICTY, for example, pointed out that although *nullum crimen sine lege* is a general

[22] Hungarian Constitutional Court, Decision 53/1993 (13 October 1993)
[23] Höffe, Otfried, Moral Reasons for an Intercultural Criminal Law. A Philosophical Attempt (1998). Ratio Juris, Vol. 11. No. 3 September 1998 (206-27), Oxford, Blackwell Publishers, p. 216.

principle of law, some factors, such as the specific nature of international law, the fact that there is not one authority as legislator in international law and the supposition that the norms of international law will be implemented in national systems leads to the fact that the legality principle is different in international law than in national law when it comes to their application and standards.[24]

The applicability of the *nullum crimen sine lege* principle to the interpretation of crimes before domestic courts came up in front of the European Court of Human Rights as well. In the *Jorgić*-case, the Court found that a stricter interpretation of genocide by the ICTY and ICJ can not be relied on in front of domestic courts, because these judgments were delivered after the offence had been perpetrated. If, however, an interpretation was consistent with the essence of the offence in question and was reasonably foreseeable, such an interpretation was legal.[25] This argument is valid only, however, if the state adopted the international law definition of genocide in its legislation and applied a stricter regime during the proceeding. Nothing prevents a state from adopting a stricter understanding of an international crime in its penal code: in this case one cannot talk about violation of the *nullum crimen sine lege principle*.[26] The effect of *nullum crimen sine lege* on concepts of criminal responsibility and defences is also contested.[27] In the end, it seems that "the *nullum crimen* principle outlaws any deviant practice under jurisdictions as well, at least as far as the general parts of criminal law are concerned."[28] We can therefore conclude that there is no uniform understanding which could lead to a uniform application of international criminal law within the boundaries set by international law.

When it comes to criminal procedural law aspects, we can witness influence exerted by international procedures to domestic procedures and *vica versa*. Due to specificities of trying serious international crimes, certain human rights standards on criminal procedure had been modified. Reasons to such modifications were the followings: the complexity and volume of war crimes prosecutions, security risks in countries concerned, consequences of investigations for

[24] *Prosecutor v Delalic et al.*, Judgement, Case No. IT-96-21-T, Trial Chamber II, 16 November 1998, para 431.
[25] *Jorgić v Germany*, European Court of Human Rights, Judgement of 12 July 2007, Application no. 74613/01 paras 112 and 114.
[26] See Ferdinandusse, Ward, The Prosecution of Grave Breaches in National Courts (2009), Journal of International Criminal Justice 7, 723-741, p. 736
[27] See Fletcher, George P., Basic Concepts of Criminal Law (1998), Oxford/New York, Oxford University Press, p. 107.
[28] van der Wilt, Harmen, Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court (2008), International Criminal Law Review 8, 229-272, p. 260.

national security, high level leaders as accused, the truth-finding and reconciliatory functions of international criminal tribunals and the great dependency of international courts on national jurisdictions and law enforcement officials.[29] Certain rules therefore, although originating from domestic procedural rules, may have been adapted to the specificities of international crimes trials, for instance the rules relating to the protection of witnesses. Although protection of witnesses has been known in domestic procedures as well, it has been widely developed in international cases. Thus, the protection of witnesses "may very well be said to have developed as a point of departure, or international standard, which is capable of influencing domestic war crimes trials. At least, one could say that the rules also have relevance in relation to national prosecutions of war crimes."[30] This is manifested in various domestic cases. For instance, in the *Van Anraat* case[31], the Dutch court considered *proprio motu* the ICTY law in relation to rules on protection of witnesses, although the ICTY statute having no binding effect on the Netherlands.[32] This makes sense, as domestic international crimes procedures are also in need of specific procedural rules, and they gain inspiration from international cases, even if these are not binding on them.[33]

Possible ways forward: war crimes units[34]

Recognizing the difficulties in trying serious international crimes, of which only a few have been mentioned above, a number of states have set up specialized units within their investigative authorities (police and prosecution), immigration services and courts to deal with cases concerning international crimes. Such units allow for the concentration of information, experience, know-how, expertise and good relations with other similar units, with international

[29] Sluiter, Göran: The Law of International Criminal Procedure and Domestic War Crimes Trials (2006), International Criminal Law Review, Issue 6, 605-635, p. 626.
[30] Sluiter (2006), p. 627.
[31] LJN: BA4676, Court of Appeal The Hague, 2200050906 - 2, judgement of 9 May 2007
[32] See Sluiter (2006), p. 629.
[33] "If one acknowledges possible shortcomings of the domestic law of criminal procedure in respect of war crimes investigations and prosecutions this may change views as to the incompatibility between the law of international criminal procedure and domestic law of criminal procedure. Especially, if one adopts the legitimate position that domestic law of criminal procedure has not been developed for and is to a certain degree ill-suited to deal with war crimes investigations and prosecutions there is from a national perspective a vacuum, where international criminal procedure can fulfil a useful gap-filling function, in spite of possible conflicting models of criminal procedure." "International criminal procedure may in spite of all its flaws fulfil an important gap-filling function and serve as important point of reference for participants in domestic war crimes trials with an open eye and mind for procedural solutions and approaches coined in other systems. In this light, the 'legislator' in the field of international criminal procedure should become aware of its relevance and impact beyond the scope of international criminal trials." See Sluiter (2006), pp. 634-635.
[34] In the framework of this article, „war crimes units" also mean units dealing with other serious international crimes, such as crimes against humanity, genocide or torture.

organizations and within the state authorities.[35] Recognizing the boosting effect of war crimes units on effective domestic procedures, the EU Council adopted several decisions supporting the formation of such bodies.[36] These units usually comprise of police officers, prosecutors and immigration officials – either in one single unit or in separate units within the respective authorities, but working in close cooperation; usually separate units exist in courts. As to the size of the units, the word "unit" is often misleading, as these mostly consist of one or two persons only. The personnel of such units participated at specialized trainings organized by international organizations, the Interpol or by experts of their own countries with experience in international tribunals or elsewhere.[37] Exchange of information or study trips among units are also contributing to training and further education of personnel of the units. As for the expenses, although it is true that procedures related to international crimes are usually bearing high expenses, the setting up of units and their training have very low costs. Setting up of the units is merely an administrative measure, with personnel of the units being assigned to other cases as well. Trainings provided by international organizations or NGOs, such as the ICRC, OSCE or FIDH/REDRESS, are usually either free of charge or financial support is available.

The first war crimes units were set up with respect to investigation and prosecution of suspects with respect to Nazi crimes. Such units had been set up in Germany in 1958[38], in the US in 1979[39], in Canada in 1985[40], in Australia in 1987[41], in the UK in 1991[42] and in Poland in 1998[43].

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[35] See REDRESS/FIDH, Strategies for the effective investigation and prosecution of serious international crimes: The practice of specialized war crimes units, December 2010 (hereafter REDRESS/FIDH report), p. 9

[36] Preamble, Council Decision 2002/494/JHA, 13 June 2002: "The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law." Article 4, Council Decision 2003/335/JHA 8 May 2003: "Member States shall consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question."

[37] See REDRESS/FIDH report, pp.10-11

[38] 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/servlet/PB/menu/1193355/index.html?ROOT=1193201 (downloaded on 10 January 2012)

[39] US Department of Justice Human Rights and Special Prosecutions Section, www.justice.gov/criminal/hrsp/about/ (downloaded on 10 January 2012)

[40] Canadian Department of Justice, Crimes Against Humanity and 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. See www.justice.gc.ca/eng/pi/wc-cg/wwp-pgm.html (downloaded on 11 January 2012)

[41] Blumenthal, David A. and McCormack, Timothy L.H. (eds), The Legacy of Nuremberg: Civilising influence or institutionalized Vengeance? (2008), Leiden, Martinus Nijhoff Publishers. See Review by Ben Batros (2009), Journal of International Criminal Justice, 7 (2): 440-442.

[42] See War Crimes Act 1991

However, these units finally ended up prosecuting only a very small number of suspects. In the United Kingdom for instance, out of 376 investigations, only one prosecution took place. The expenses connected to this one conviction reached an absurd sum: the cost of investigation only in the first three years was 5,4 million GBP.[44] Not many states can afford this. Probably this was the main reason why most of these units were finally called off or reorganized.

An impediment of the setting up of specialized units could be that procedures related to war crimes, crimes against humanity and genocide are very rare compared to ordinary cases. Most of the domestic cases were related to crimes committed in one specific state or related to one specific situation which for any reason had a connection with the prosecuting state: either historical links (such as between Rwanda and Belgium and France), geographical proximity, a legislation open to universal jurisdiction cases (like in Belgium) or the fact that many immigrants arrived from the conflict as a result of advantageous immigration policies (e.g. Sweden). At the same time, in Western Europe, nearly all the states already had such cases, therefore it can be generally stated that for this or that reason all or most states will have to face such procedures. In addition, the number of processes related to war crimes perpetrated by own soldiers in the framework of multi-national military missions has also decreased. The challenges to investigating and prosecuting crimes committed by own soldiers may be less demanding due to the easier availability of the suspect and evidences, still, in substance, these bear a significant similarity with cases where the perpetrator was not an own national.

An additional motive for states to set up war crimes units to allow effective procedures was that none of these states wanted to be seen as a safe haven for criminals committing such crimes. The more states establish a set-up allowing for such procedures, the more other states will be considered as safe havens. This is especially true for Central and Eastern European countries, where no such units exist, whereas most of the Western European countries either have such units or are otherwise dealing effectively with serious international crimes. Consequently, the more effective Western European countries become, the more Central and Eastern European countries will be considered as safe havens.

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[43] The Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation (IPN). See www.ipn.gov.pl/portal/en/35/1/Brief_history.html (downloaded on 11 January 2012)
[44] See http://news.bbc.co.uk/2/hi/uk_news/309814.stm (downloaded on 12 January 2012)

In the endeavour to avoid that a state becomes a safe haven, the *immigration authorities* also have an important role to play. The part played by immigration authorities is often underestimated in inexperienced states. At the same time, if we think of it, it is just logical that in cases where the perpetrator is a national of a foreign country, it is the immigration authorities that can stop the influx of such persons into the country without being noticed. Therefore their training and close cooperation with other law enforcement authorities is inevitable.

Correspondingly, war crimes units or small teams had been set up within immigration authorities in various countries to avoid that a person suspected of having committed a serious violation of international law can enter the country unnoticed and eventually seek asylum, refugee or other status.[45] The personnel of such units are often specialized in specific countries or contexts and work closely with law enforcement authorities. In other cases, personnel of war crimes units merely advise immigration officials or carry out specific methods, such as special interviewing techniques, to go through immigration/citizenship/refugee requests in order to sort out possible suspects of serious international crimes[46]. The action specialized units may take varies from refusal to enter the country, revoking citizenship or refugee status, refusal of granting refugee status or eventually handing the person over to the police.

In addition, immigration authorities may also be useful for ongoing cases in that they may be able to track potential victims and witnesses. In Denmark, for example, the Special International Crimes Office has access to the files of the immigration authority through which it can track down potential victims and witnesses[47]. This resulted in subsequent investigation in 22 cases.

It must be noted, however, that numbers of investigations resulting from reports of immigration authorities vary. In the UK, although many possible suspects have been detected and were refused to enter the country, referral to the police and eventual investigations took place only in a relatively small number of cases.[48] The numbers give more way to optimism in the Netherlands,

[45] See REDRESS/FIDH report, pp. 11-12.
[46] Such techniques may include interviewing the applicant about previous jobs during which suspicion may be raised if the asylum seeker was a member of the army or militant group at a time when that army/militant group was known for commission of serious international crimes, or if the person was a member of the government or held important posts in a regime known for grave abuses.
[47] See p. 2 in: http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)
[48] For the UK, see „Exclusive: Britain: A 'safe haven' for war criminals; More than 50 people wanted for murder and torture living here free from prosecution, campaigners say", The Independent, 6 April 2010, available at

where immigration authorities refused to grant asylum due to possible involvement in serious international crimes in approximately 700 cases, and in 2009, 43 cases have been examined by the police and prosecution that had been referred to them by the immigration authorities, out of which 3 were pending before courts, 2 were in the investigation phase and 38 in the preliminary investigation phase[49]. In Denmark, one third of the cases investigated by the Special International Crimes Office have been reported by the Danish Immigration Service[50].

It is important to realize that the number of prosecutions is not the only factor demonstrating the successfulness of war crimes units within immigration authorities. Their tasks are usually twofold: on the one hand, to ensure prosecutions and track down possible victims and witnesses, on the other hand, to be aware if a person suspected of having committed a serious international crime entered or is present in the country. This second factor is important in order to be able to take action: send back to the state of origin or extradite to a state which has an interest in prosecuting the person, or eventually hand over to an international court should such a request be made.

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, the unit comprises of 17 persons (including both investigators and prosecutors) and is a part of the Danish Prosecution Service[51]; in Belgium, one senior prosecutor is supervising a team and five police officers are dealing only with serious international crimes; in the Netherlands, 30 investigators and four prosecutors are dealing exclusively with international crimes[52]; in Germany, two prosecutors are assigned permanently and four prosecutors temporarily, and seven investigators are working on war crimes cases; in Sweden, the police has a

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http://www.independent.co.uk/news/uk/home-news/exclusive-britain-a-safe-haven-for-war-criminals-1936707.html (downloaded on 14 January 2012). The article claims that among the war crimes suspects living in Britain are Saddam Hussein's senior official, a Congolese police chief and a member of the Criminal Investigations Department in Zimbabwe under Robert Mugabe. The article also claims that while during the period 2005-2010, 500 applications have been turned down due to fear that the applicant had been involved in the commission of war crimes, only 51 names have been forwarded to the Metropolitan Police, and no prosecution took place.

[49] See REDRESS/FIDH report, pp. 14-15

[50] See http://www.sico.ankl.dk/page34.aspx (downloaded on 18 January 2012)

[51] SICO (Special International Crimes Office), since its esablishment 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. See http://www.sico.ankl.dk/page34.aspx (downloaded on 18 January 2012). The majority of the cases are related to the Middle East, followed by the former Yugoslavia. See 2009 Annual Report 2009 – Summary in English available at: www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)

[52] 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 favourable immigration policy and its determination to carry out effective war crimes procedures

10-member unit and four prosecutors working on international crimes cases.[53] 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 2009, 22 cases have been decided and this goal was met in 16 cases[54].

Although one can rarely speak of a unit set up within *courts*, in most states a designated court has exclusive competence for international crimes cases and it is the same judge(s) that are carrying out the procedures. Such a system allows that a trained and experienced judge is dealing with such cases and also contributes to consistent judicial practice.

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.[55] The International Federation for Human Rights (FIDH) and REDRESS, in their project to map the work of existing units and assess their usefulness[56] have gone as far as declaring that "it will be difficult, if not impossible, to successfully prosecute a suspect of serious international crimes without special arrangements"[57]. 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 that investigation and prosecution was concluded within three years, and the trial was concluded within 10 months[58]. 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

[53] See REDRESS/FIDH report, pp. 17-18
[54] See http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)
[55] See REDRESS/FIDH report, p. 18
[56] REDRESS/FIDH report
[57] REDRESS/FIDH report, p. 21
[58] See *Prosecutor v Francois Bazaramba* (R 09/404), judgment of June 2011. The case raised huge media attention. It was unique in its kind in Finland. Around 100 witnesses had been heard in the pre-trial phase, most of them abroad; 68 witnesses were heard by the court (out of whom only one 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. 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," See http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue12.html#rw1 (downloaded on 18 January 2012) and Press Release of the District Court of ITÄ-UUSIMAA of 11 June 2010 available at http://www.adh-geneva.ch/RULAC/pdf_state/Finland-decision.pdf (downloaded on 18 January 2012)

question that the setting up of units dealing with serious international crimes requires relatively little effort and results in huge advantages.

Recommendations for Hungary

Although it is clear that Hungary is not and probably will not be facing an influx of serious international crimes suspects on its territory or a mass amount of international crimes cases, it should nevertheless not neglect its international obligations. Besides, cases concerning international crimes occasionally did show up and at these occasions the Hungarian system has mostly demonstrated an instable ability to deal with them. What mostly seems to be lacking in Hungary is the recognition of the problem and the will to make it do. Arguments relating to the absence of finances, small number of cases or the lack of national interest usually outdo any considerations about how the system could be improved without investing much money in it.

Due to the relatively small number of ongoing or possible cases and the meagre financial possibilities it is naturally not viable to set up units composed of several persons in each authority: immigration, police, prosecution and the courts. Still, several measures could be adopted which do not require the allocation of serious funds. These are for instance:

(i) the *setting up of units* in each authority with designating personnel who have gathered knowledge and information to be able to deal with international crimes cases. Such personnel may not have to be assigned to such cases exclusively but would have exclusive competence for war crimes and other serious international cases. Within the immigration authority this could mean that in case of any suspicions about an applicant's involvement in international crimes – which requires that all the personnel is informed to a basic extent about what could be a 'suspicious case' - his/her application could be run through the "war crimes unit", who could, should the need arise, undertake additional interviews with the person. Within the police and prosecution, this would obviously mean that investigation would be carried out by the unit or under the supervision or with the assistance of such unit.

(ii) *training* could be provided by taking advantage of trainings, conferences, workshops organized by international organizations and NGOs,[59] visiting other units to gather experience, seeking cooperation with academic institutions in Hungary and abroad and taking advantage of the experiences of Hungarians who had been working at international tribunals or courts. This

[59] For instance the Interpol, the Institute for International Criminal Investigations or the Joint Rapid Response Team are regularly offering such training possibilities.

also includes the encouragement of relevant personnel for temporary posting to international courts and tribunals. Worth to note, that similar units of several countries are organizing conferences and workshops to enable exchange of experience of their staff[60].

(iii) the adoption of adequate *legislation* to provide an adequate framework for such procedures, including taking into account the specificities of such trials, such as absence of the suspect (mainly in universal jurisdiction cases), the place of commission of the crimes being abroad, protection of victims and witnesses, etc.

(iv) develop *cooperation* lines where nonexistent and increase cooperation where already exists between immigration and investigation (police and prosecution) authorities in order to gain from each other's information on suspects, victims and witnesses. Cooperation is also important among units of different countries[61], especially bearing in mind that investigations and prosecutions are often carried out by several countries related to the same situation, such as crimes committed in Rwanda, Afghanistan, ex-Yugoslavia or Iraq. Sharing of information and cooperation among the units could substantially ease the work of the authorities[62]. It can even happen that two countries are investigating in the same incident which means they could benefit from each other's witness testimonies, documents or other relevant information.

As a conclusion, it would be simplicist to blame the individual prosecutors or judges for failing to adequately engage in questions concerning international law with which they had not met before. This problem requires a complex attitude from the state, and examples of many countries demonstrate that if there is a determination to invest a minimal effort in creating units and training personnel, states may be in a much better position when confronted with cases on international crimes.

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[60] For example, the Nordic countries organized a conference early 2009, followed by two other events in the same year, seeking ways to further cooperate. See p.3 in: http://www.sico.ankl.dk/media/SICO_2009_-_Summary_in_English.pdf (downloaded on 18 January 2012)

[61] The EU Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes (created by decision 2002/494/JHA, of 13 June 2002, of the Justice and Home Affairs Council and reaffirmed with Council Decision 2003/335/JHA**)** brings together experts from ministries of justice, police investigators and prosecutors to share information and expertise on procedures related to these international crimes. Hungary already has a contact point for this network. The network often organizes events and conferences and facilitates the cooperation among states for the sharing of experiences. See http://www.eurojust.europa.eu/gen-network.htm (downloaded on 25 January 2012). In July 2011 the EU network established a permanent secretariat in the Hague.

[62] Taking Rwanda as an example, only in Europe around 10 countries have carried out investigations related to the genocide. See REDRESS/FIDH report, pp. 24-25.