Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees

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Summary of doctoral thesis

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I. The objective and rationale of the research

The ability to enforce rules is one of the weakest points of international law. Although international humanitarian law and international criminal law treaties include a wide range of rules governing the enforcement of their norms, their application depends ultimately on the states, both in national and international proceedings; in the latter case because the states' cooperation is necessary in the area of extradition, the surrender of persons or finding evidence.

Although attempts, both successful and unsuccessful, had been made to establish international tribunals before the middle of the XXth Century, the two levels of enforcement, the international and national levels both only appeared following the Second World War: the 1949 Geneva Conventions included rules governing the obligations of states, and the 1945 Statute of the International Military Tribunal at Nuremberg, through its procedure and the principles applied and developed during its proceedings laid the foundations for future international criminal tribunals. Despite these achievements, an increasing number of processes both on the national and the international level appeared only decades later.

The wide range of scientific literature dealing with the work of international criminal tribunals, their role and future in the enforcement of international law all underlined that the repression of acts regarded as crimes under international law is primarily the task of states, to which international tribunals can only play a complementary role. This complementary role appeared *expressis verbis* in the Rome Statute of the International Criminal Court, which now states as a jurisdictional rule that the Court can only proceed if the state is not proceeding or is unable or unwilling to do so. Although there is extensive literature on the role of international tribunals, especially on the relatively new International Criminal Court, far less scholarly research focuses on the domestic procedures.

The doctoral thesis concentrates on domestic procedures, in order to examine what kind of legal considerations may play a role in the course of such proceedings. The objective of the thesis therefore is to present the legal issues that, especially in light of the principle of legality, may raise problems for the domestic prosecutor and judge during war crimes procedures. This question cannot be answered without analysing the techniques of national implementation and the possible pitfalls that may be encountered when implementing

international treaties. The thesis also examines other considerations that may have an influence on national criminal procedures, such as certain political or practical aspects.

Finally, the thesis attempts to draw attention to the fact that domestic prosecutors and judges cannot be left to deal with the difficulties of the application of international law under domestic law, but rather, the inevitable collision between the joint application of the two sets of rules must be dealt with, in the first place, by domestic legislation. Through different examples the thesis also demonstrates that this requirement does not necessarily mean that prosecutors and judges aren't bound to apply international law directly during their proceedings.

II. Method of research

The initial stages of the research were primarily based on the experience and knowledge gained serving as a legal adviser to the ICRC Regional Delegation for Central Europe which included conducting an overview of the national legislation of the region, providing legal opinions to the amendments to criminal codes, undertaking negotiations and discussions with government experts as well as processing other documents read in the course of such work. Knowledge thus gained provided the main line of thought and arguments for the thesis, although these had to be substantiated, complemented and at times corrected based on the relevant research, literature and cases.

The work undertaken hitherto was thus complemented by research conducted at the library of the ICRC Regional Delegation, the library of the Peace Palace in the Hague, the library of the ICTY (with the kind assistance of Árpád Prandler, *ad litem* judge of the ICTY), and through research undertaken in Hungary at the library of the Central European University, the Library of the Parliament and the excellent and rich collection of the Department of International Public Law of the Pázmány Catholic University, donated by Professor Géza Herczegh.

Especially eye-opening observations were made at the conference organized by the ICRC Delegation in 2007 about the considerations, difficulties and at times hesitance of judges regarding the direct application of international law in domestic courts, the findings of which feature in several parts of the thesis. Similarly, the research undertaken on behalf of

FIDH/REDRESS in 2010 and the presentation of the summary of this research and the discussions that followed at a conference held in Brussels greatly contributed to the ideas, considerations and the overview of national legislation reflected in the sub-chapters on universal jurisdiction.

The thesis is largely based on the cases of domestic and international courts in order to support the arguments made and the conclusions arrived at. A large portion of the domestic cases cited stem from the internet collection of *International Law in Domestic Courts*, the *Yearbook of International Humanitarian Law* and Part II (state practice) of the ICRC's *Customary Law Study*. The online availability of the cases of international courts and tribunals has been a great assistance to my work.

The few but significant monographies related to war crimes-related trials before domestic courts were analyzed. Other sources include articles of relevant law journals, international documents and decisions of related organizations. Hungarian resources and literature were extensively used especially for the discussion on monism-dualism, the relationship of international law and national law as well as the national implementation of the ICC Rome Statute.

Although certain points of the thesis are of a general nature, parts related to the implementation and application of international law concentrate on the European or Central European region. Where relevant, I attached particular attention to the situation in Hungary and drew up alternatives with due consideration to the Hungarian legal circumstances.

Although comparative law was not applied as a basic method throughout the study, the part of the thesis dealing with legislation of the Central European region was based on comparison, completed by a table demonstrating the approach of Central European states to domestic implementation. The traditional separation of Anglo-Saxon and continental law was not followed, since the problems raised are not typically inherent to this or that legal system, however, wherever it made sense, the different issues and solutions were mentioned.

III. Short summary of the conclusions of the research

In light of the development of international law after the Second World War and the statements of states and international organizations, it seems there is a general commitment by the international community to repress war crimes. Although war crimes and crimes against humanity – although not yet named as such – had already previously been dealt with at the international level, and the Hagenbach-trial proved to be a success and well ahead of its time, and although certain national procedures did take place, attempts at setting up an international tribunal after the First World War failed. Building partially on previous experiences, several mechanisms were established after the Second World War to serve this goal.

The mechanisms to repress war crimes operate on two levels: on the international and national level, developed as such to work as complementary systems. The Nuremberg and Tokyo tribunals, the 1949 Geneva Conventions and their 1977 Additional Protocols, the establishment of the *ad hoc* tribunals and special and mixed courts and tribunals, as well as the establishment of the International Criminal Court have all supported this development.

A part of this progress in international criminal law is the adoption of individual criminal responsibility with the result that criminal accountability can be directly based on international law. In parallel to this development the list of war crimes under international law has evolved, increased and became more precise, and this development is still in progress. Although numerous writings have dealt with the question of collective responsibility especially after the Second World War, the notion of collective responsibility is difficult to apply in the case of war crimes, and, due to the acceptance of individual criminal responsibility, the concept seems pointless.

The enforcement of the rules of armed conflicts has become an even more cardinal question since reference to such rules in modern conflicts seems to serve a new military-political purpose, with the result that states are bound to demonstrate that eventual violations are individual acts, thereby denying an underlying state policy.

The Alien Tort Statute adopted in the United States is somewhat similar to the extra-territorial jurisdiction linked to war crimes in criminal cases. The Statute makes reparation claims for

victims of serious international crimes available before US courts, irrespective of the place of the commission of the act or the nationality of the offender or the victim. Although these are civil law claims, they are often linked to war crimes due to the nature of the acts, and the procedures and arguments of the parties often set an interesting analogy with criminal proceedings related to war crimes.

Even though the concept of universal jurisdiction was adopted in 1949 for grave breaches, its application started only much later. The number of proceedings based on universal jurisdiction is still relatively few, although the number is emerging. Even though the concept is not new, discussions around its exact meaning and contents and ways of application are still ongoing.

The international and national levels of accountability are therefore complementary elements, putting the primary responsibility to prosecute on states, and only in case of its failure or non-availability do the international tribunals step in. This sharing of responsibility is articulated in the system of the Geneva Conventions and Additional Protocols, and the complementarity principle of the International Criminal Court. This does make sense, considering that in most cases domestic courts are in the best position to proceed, taking into account the restricted resources of international tribunals.

Many states undertook to comply with the repression obligation, although they faced many legal and non-legal hurdles in the course of their procedures. Numerous other states have not even started criminal procedures or prepared for it. The Geneva Conventions require states to adopt effective penal sanctions and other measures for grave breaches and other violations of their rules. Therefore the ratification of the treaties and the adoption of ineffective implementation measures are not enough. The consequences of such reckless implementation become apparent during their actual application. Therefore the legislator is bound to remedy in advance the eventual problems that may arise during the application of international law before domestic courts.

The thesis first examines the possible problems, distinguishing between problems inherent to the nature of international law-making, domestic legislation and its different logic from international law or domestic application; it then proceeds to demonstrate possible

alternatives, and solutions already applied in different fields: international jurisprudence, domestic legislation and domestic application.

International law determining the list of criminal acts, their elements and the conditions of their punishability inevitably constrains the – voluntarily renounced – sovereignty of states; however, states are free to decide on the modes of criminalization within the limitations set forth under international law. This is similar to human rights treaties, which now reach beyond the state-citizen relationship and regulate to a certain extent the citizen-citizen relationship as well, when it comes to the violation of basic human rights by another citizen and the obligation of the state to criminalize and punish such violations.

State sovereignty is one of the main arguments of those supporting universal jurisdiction only in case of an express authorization under international law. This question is raised mainly in connection with the application of universal jurisdiction for crimes committed in non-international armed conflicts and is a typical example where uncertainty resulting from the formulation of the rule under international law is sought to be corrected by domestic jurisprudence. The application of universal jurisdiction would normally infringe the sovereignty of the state with ordinary jurisdiction, therefore it can be applied only in case of express authorization rendered by a treaty or customary international law – according to the prevailing view in scholarly literature. Although the rule has not entirely crystallized, customary law seems to support this view.

The analysis of the relationship between international law and national law and its domestic application indicates that due to the primary status of international law in case of a collision with national legislation – even where it collides with the constitution – these conflicts must be resolved on the level of legislation, otherwise the state's responsibility for non-compliance with international law shall emerge. This is especially true in cases where we are faced with self-executing international norms or in legal systems which accept direct applicability of international law in domestic law. This argument is substantiated by examples where domestic courts cannot deal with problems which arise in consequence of a lack of such harmonization. Therefore states are bound to consider during the adoption of implementing legislation which rules can really be directly applicable and which cannot.

The adoption of the Rome Statute of the International Criminal Court gave an important impulse to such harmonization. Namely, in the case of the ICC, there is a direct consequence attached to the non-ability of state proceedings, embodied by the eventual jurisdiction of the ICC. Since all states shall obviously try to prevent ICC jurisdiction in a case affecting them, most states, even non-state parties, have started a comprehensive implementation process. This proved to be even more timely in Central European states, where criminal codes adopted during the communist era were in need of revision anyway.

The determination of a state being unable or unwilling to proceed raises the question which considerations the Court will take into account during such examination and whether an international standard exists which could serve as a basis for such analysis. Since it seems such a standard does not exist, the examination of the ICC will most probably be based on considerations spread between the frameworks set forth by the Rome Statute (elements of crimes, conditions of accountability and so on) and the due process requirements formulated under human rights law. However, it is important to note that the intention of the ICC is probably not to serve as an appellate court to domestic institutions, and it will only determine that a procedure represented inability/unwillingness in ostentatious cases. Furthermore, it is important to observe that the examination of states' procedure is a two-step process, whereby the ICC first examines whether the state *de facto* did proceed, and also whether the state is willing or able to proceed. Therefore the demonstration of mere ability or willingness of a state will not be sufficient to bar ICC jurisdiction.

Examining the relationship between the complementarity principle of the Rome Statute and universal jurisdiction, we may observe that the following order of jurisdictions has seemed to appear: (i) war crimes procedures shall be primarily carried out by states having ordinary jurisdiction, as normally it is these states that are most interested in the procedure and possess the most advantageous conditions to follow through with the procedure (presence of the accused, witnesses, documents, etc); (ii) in case states with ordinary jurisdiction do not proceed for some reason, then universal jurisdiction shall be applied; (iii) in case no state proceeds, and other conditions are met, the ICC may take the case. From above, it is clear that although the rules of international law concerning war crimes may have been a source of uncertainty for the domestic legislator and the courts, the Rome Statute seemed to have clarified many questions and appears to have a more direct influence on domestic legislation.

There is a fundamental tension resulting from the implementation of crimes determined by the logic of international law into the domestic legislation underpinned by criminal justice guarantees and this situation raises conceptual questions for the states, such as (i) whether international crimes should be regulated in the criminal code, if so, whether ordinary crimes can be applied or separate crimes should be adopted, and in the latter case, whether it is better to transfer the crimes word for word to national legislation or to re-formulate them; (ii) whether to make a distinction between crimes committed in international and non-international armed conflicts; (iii) how states with continental legal system can apply the conditions of accountability determined on the basis of a mixed, or in most cases, Anglo-Saxon legal tradition; (iv) how they can reconcile the special principles applicable to war crimes with their own legality principles. Most issues mentioned above may be dealt with on the level of national legislation. However, the proof of the pudding is in the eating, and many states amended their legislation after proceeding in one or two relevant cases.

Based on the considerations and questions raised above, the thesis reached the conclusion that although no uniform solution exist– bearing in mind the different legal cultures and traditions of states –, some common elements may be determined. For instance, it did not prove to be a good solution to apply ordinary crimes to war crimes. The reason being that war crimes bear specific elements and determination of violation or non-violation of humanitarian law is founded on so fundamentally different notions that ordinary crimes cannot represent such features.

To give an example, while self-defence must be analysed under domestic law according to certain considerations, the concept bears a very different meaning in the case of war crimes. Similarly, the principle of proportionality in humanitarian law - a notion often decisive for the lawfulness or unlawfulness of the action - is basically untranslatable into ordinary criminal law, still, its consideration may be the decisive element in the assessment of a given action. Proceeding on the basis of ordinary crimes yields further dangers. It is notably difficult to apply the non-applicability of statute of limitations or universal jurisdiction to war crimes while these are understood differently for ordinary crimes.

Examining certain states' legislation and practice we may arrive at the general conclusion that in most cases a direct reference to international law may not provide a full solution. In practice, eventual conflicts or non-compliance with the legality principle caused the biggest

problems. The *nullum crimen sine lege*, especially the *nullum crimen sine lege certa*, and the *nulla poena sine lege* principles are difficult to apply in full in case of a direct reference. This is because international law typically does not attach sanctions to crimes and its elements are not as clear and well defined as domestic law usually requires. Moreover, the elements of crimes of the Rome Statute are enshrined in a document lacking obligatory power, the reference to which may also raise issues of legality.

Reference to customary law may also raise the question of clarity and the well-defined formulation of crimes. Direct application of customary law may prove to be most demanding in states where no national law, not even the constitution declares the applicability of customary law in domestic law.

One of the most contested, sensitive and therefore probably least complied with obligations is universal jurisdiction. The application of universal jurisdiction does not only depend on legal considerations. Political, as well as practical considerations also play a role. Although the obligation is present since 1949, it is probably due to the difficulties inherent in such procedures, as well as their financial and human resources aspects, that relatively few universal jurisdiction cases were tried in general, and none in Central Europe.

Legal questions may include issues of sovereignty of third states as well as the problems of presidential or other immunity. No common solution has been found for the latter question, because although the International Court of Justice argued for upholding immunity even in such procedures, certain domestic courts decided otherwise. Similarly, the question of the applicability of universal jurisdiction for crimes committed in non-international armed conflicts remains an open question. As regards the practical application of universal jurisdiction, it may be observed that states that have applied this rule have introduced more and more constraints to it. This is not surprising, bearing in mind the special circumstances.

Also, special attention shall be paid to issues of legality arising in the course of the application of universal jurisdiction, such as conformity with the principle of *nullum crimen sine lege*. In the case of universal jurisdiction, this entails a two-fold obligation: first, the act must be punishable at the time it was perpetrated – under domestic or international law – and, second, the authorization to exercise universal jurisdiction must also be present at the time of the commission of the act. In cases, however, where the implementing legislation does not make a

reference to universal jurisdiction or does not make a link between the authorization to exercise universal jurisdiction and the crime, its application may face problems.

When examining the influence that international tribunals and the ICC exert on domestic courts, it may be observed that although especially the procedural rules are based on completely different considerations for international bodies, they nevertheless do have an effect on domestic courts. In the case of substantive law, such effects may be detected in the determination of the elements of crimes, the determination of customary rules and the interpretation of the conditions of accountability; in the case of procedural rules, it would be the specific rules of international crimes that have an effect, such as the protection of victims and witnesses. It must also be mentioned that international courts also refer to domestic jurisprudence.

The ICTY and ICTR, through the Rules of the Road program and through 11*bis* procedures have undoubtedly exercised an important effect on the capability of domestic systems to deal with the procedures themselves. The ICTY made efforts in developing the domestic justice systems and in creating an adequate legal background – the result of which is a mostly competent justice system established in the region. As a consequence to concerns raised during 11*bis* procedures in front of the ICTR with respect to the unsatisfactory legislation in Rwanda, the Rwandese authorities adopted a number of new legislation to satisfy the requirements.

Finally, following the analysis of the reluctance of domestic courts to try war crimes cases and the role of domestic judges, the thesis concluded that since war crimes cases are more complicated than ordinary cases – considering the above mentioned issues of the relationship between international law and domestic law, the required knowledge of international law or the arising practical difficulties –, the custom-tailored training of prosecutors and judges and the availability of human and financial resources are inevitable in order to ensure effective war crimes procedures.

Looking at the practice of more experienced states, we may confidently state that training and establishing a group of experts dealing with war crimes (and other international crimes) under the auspices of both investigative and immigration authorities as well as courts may in itself guarantee effective procedures compatible with international obligations.

IV. Relevant publications, scientific research and presentations of the author

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